232 N.C. App.—No. 4 Pages 524-691

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 8, 2016

MAILING ADDRESS: The Judicial Department
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OF
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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 3 May 2015.
[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 4 MARCH 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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COLLATERAL ESTOPPEL AND RES JUDICATA

Guarantor liability—statute of limitations—failure to raise in bankruptcy court—Plaintiffs' failure to raise the statute of limitations during a bankruptcy adversary proceeding precluded consideration of whether the statute of limitations prevented defendant D.A.N. Joint Venture Properties of N.C., LLC from recovering from guarantors (a group that included plaintiffs). Claim preclusion applied to the bankruptcy court order because the claimants in the adversarial proceeding asked for an injunction in addition to declaratory relief, and the bankruptcy court was a court of competent jurisdiction that issued a final judgment on the merits. The

there was substantial evidence before the Commission that the merger between Duke Energy Corporation and Progress Energy, Inc. would result in benefits to the public considering the significant guaranteed fuel cost savings and potential non-fuel cost savings, as well as the commitments by the parties to contribute funds to support the community, workforce development, and low income energy assistance. **In re Application of Duke Energy Corp., 573.**

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Merger—public convenience and necessity—The North Carolina Utilities Commission did not err by concluding that the merger between Duke Energy Corporation and Progress Energy, Inc. was justified by public convenience and necessity after considering concerns including whether the merger allowed the applicants to manipulate prices and harm local markets, would result in job losses, and harmed low income families. **In re Application of Duke Energy Corp., 573.**

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.

AMERICAN OIL COMPANY, INC., PLAINTIFF
v.
AAN REAL ESTATE, LLC, DEFENDANT

No. COA13-1099

Filed 4 March 2014

Jurisdiction—standing—unincorporated entity—failure to allege certificate recordation—failure to show privity of contract

The trial court did not err in a breach of a lease agreement case by granting defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiff, an unincorporated entity, failed to allege the location of its certificate recordation in its amended complaint pursuant to N.C.G.S. § 1-69.1(a)(3) and provided no indication of plaintiff's commonly held name. Further, the amended complaint failed to show that plaintiff was in privity of contract with lessee or a beneficiary of any kind to the lease.

Appeal by plaintiff from order entered 20 June 2013 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 2014.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James E. Scarbrough, for plaintiff.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., for defendant.

ELMORE, Judge.

Plaintiff appeals from an order entered 20 June 2013 granting defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful consideration, we affirm the trial court's order.

I. Facts

AAN Real Estate, LLC (defendant) entered into a lease agreement (the lease) with American Oil Group (lessee) on 28 June 2012, whereby lessee agreed to lease the premises at 5320 and 5324 E. Independence Boulevard in Charlotte from defendant for use as a car wash and vehicle

maintenance business. On 22 January 2013, American Oil Company, Inc. (plaintiff) filed a complaint alleging that defendant breached the lease terms by failing to "install the vehicle lifts until on or about December 1, 2012" in violation of the lease's "Lessor's Work" provision. Shortly thereafter, plaintiff filed an amended complaint on 14 February 2013 alleging more lease breaches. In addition to attaching a copy of the lease as "Exhibit A" in the amended complaint, plaintiff alleged that: 1.) its party name was "American Oil Company Inc.[;]" 2.) it was "a corporation organized and existing under the laws of the State of North Carolina with a place of business in Mecklenburg County, North Carolina[;]" and 3.) defendant was "a limited liability company organized and existing under the laws of the State of North Carolina with a place of business in Mecklenburg County, North Carolina." The amended complaint never referenced plaintiff's relationship to lessee. In response to the amended complaint, defendant filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. After a hearing in Mecklenburg County Superior Court, Judge Eric L. Levinson granted defendant's motion to dismiss in an order entered 20 June 2013. Plaintiff filed a timely notice of appeal on 18 July 2013 to this Court from Judge Levinson's order.

II. Analysis

Plaintiff argues that the trial court erred in granting defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Specifically, plaintiff avers that its differing party name in the amended complaint and the lease was insufficient to dismiss the amended complaint. We disagree.

"The motion to dismiss under N.C.R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). A dismissal pursuant to Rule 12(b)(6) is appropriate when an "insurmountable bar to recovery" exists on the face of the complaint. *Meadows v. Iredell County*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (citation and quotation omitted). A party that lacks standing to bring a claim constitutes an insurmountable bar to recovery, and a

motion under Rule 12(b)(6) is the proper legal mechanism to seek dismissal of a complaint on such grounds. *Id.* Standing refers to "a party's right to have a court decide the merits of a dispute." *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (2009) (citation and quotation omitted). Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims. *Id.*

N.C. Gen. Stat. § 1-69.1(a)(1) states that

> [a]ll unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

N.C. Gen. Stat. § 1-69.1(a)(1) (2013). N.C. Gen. Stat. § 66–68 "requires that a business operating under an assumed name file a certificate, stating the name of the business and name and address of the owner(s), in the office of the register of deeds of the county in which business is conducted." *Highlands Twp. Taxpayers Ass'n v. Highlands Twp. Taxpayers Ass'n, Inc.*, 62 N.C. App. 537, 538-39, 303 S.E.2d 234, 235 (1983). Aside from some narrow exceptions inapplicable to this case, an unincorporated entity that seeks to bring suit must "allege the specific location of the [certificate's] recordation" in its complaint. N.C. Gen. Stat. § 1-69.1(a)(3) (2013); *see Highlands Twp. Taxpayers Ass'n*, 62 N.C. App. at 539, 303 S.E.2d at 236 ("The statutory language of G.S. 1-69.1 is very clear and specific, i.e., any unincorporated association desiring to commence litigation in its commonly held name *must* allege the location of the recordation required by G.S. 66-68."). The failure of an unincorporated entity to meet this statutory requirement will defeat its complaint. *Daniel v. Wray*, 158 N.C. App. 161, 166, 580 S.E.2d 711, 715 (2003).

In addition to the statutory requirements an unincorporated entity must meet in order to bring a lawsuit, the entity must be "[a] real party in interest[.]" *Woolard v. Davenport*, 166 N.C. App. 129, 135, 601 S.E.2d 319, 323 (2004) (citation and quotation omitted). "[O]ur Supreme Court has stated that for purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, a real party in interest is a party who is benefited or injured by the judgment in the case." *Id.* (citation and quotation omitted). In order for a breach of contract claim to withstand a 12(b)(6) motion based on a lack of standing, the

plaintiff's allegations must "either show it was in privity of contract, or it is a direct beneficiary of the contract." *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750 (2001). Privity is "a [d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest." *Id.* at 8-9, 545 S.E.2d at 750 (citation and quotation omitted). The law implies privity "[i]f a plaintiff is an intended beneficiary to a contract[.]" *Id.* at 9, 545 S.E. 2d at 750 (citation omitted).

We first note that upon defendant's motion in the case at bar, we take judicial notice that "American Oil Company, Inc." is neither a corporation existing within this state currently nor at the time the amended complaint was filed. Thus, as an unincorporated entity, plaintiff was required to allege the location of its certificate recordation in its amended complaint pursuant to N.C. Gen. Stat. § 1-69.1(a)(3). The amended complaint did not comply with this statutory requirement and provided no indication of plaintiff's commonly held name.

Notwithstanding the mandates of N.C. Gen. Stat. § 1-69.1(a)(3), the amended complaint also fails because plaintiff did not show that it was in privity of contract with lessee or a beneficiary of any kind to the lease. The name of the lessee, American Oil Group, is different than the name of plaintiff, American Oil Company, Inc., and no alleged facts in the amended complaint link the two parties. Accordingly, the amended complaint did not sufficiently show that plaintiff suffered an injury as a result of the alleged lease breach by defendant. Since plaintiff's amended complaint failed to show that it 1.) met the requirements of N.C. Gen. Stat. § 1-69.1 and 2.) was in privity of contract or a beneficiary of the lease, plaintiff lacked standing to bring suit, and the trial court's dismissal of the amended complaint was without error.

III. Conclusion

The trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) because plaintiff lacked standing to bring suit. Thus, we affirm the trial court's order.

Affirmed.

Chief Judge MARTIN and Judge HUNTER, Robert N., concur.

LARRY BARROW, LOIS BARROW, AND DORIS MURPHREY, PLAINTIFFS
v.
D.A.N. JOINT VENTURE PROPERTIES OF NORTH CAROLINA, LLC, CONNIE MURPHREY AND DONALD STOCKS, DEFENDANTS

No. COA13-975

Filed 4 March 2014

Collateral Estoppel and Res Judicata—guarantor liability—statute of limitations—failure to raise in bankruptcy court

Plaintiffs' failure to raise the statute of limitations during a bankruptcy adversary proceeding precluded consideration of whether the statute of limitations prevented defendant D.A.N. Joint Venture Properties of N.C., LLC from recovering from guarantors (a group that included plaintiffs). Claim preclusion applied to the bankruptcy court order because the claimants in the adversarial proceeding asked for an injunction in addition to declaratory relief, and the bankruptcy court was a court of competent jurisdiction that issued a final judgment on the merits. The superior court order granting summary judgment for plaintiffs was reversed and remanded for determination of the amount of the guarantors' liability.

Appeal by D.A.N. Joint Venture Properties of North Carolina, LLC from orders entered 10 May 2013 and 15 May 2013 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 6 January 2014.

White & Allen, P.A., by John P. Marshall and Ashley C. Fillippeli, for plaintiffs-appellees.

Driscoll Sheedy, P.A., by Susan E. Driscoll, for defendant-appellant D.A.N. Joint Venture Properties of North Carolina, LLC.

Miller & Audino, LLP, by Jeffrey L. Miller, for defendant-appellee Donald Stocks.

MARTIN, Chief Judge.

D.A.N. Joint Venture Properties of North Carolina, LLC appeals from two superior court orders denying D.A.N. Joint Venture's motion for summary judgment and granting Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's motions for summary judgment.

The facts relevant to appeal are that Larry Barrow, Lois Barrow, Doris Murphrey, Connie Murphrey, and Donald Stocks (guarantors) are all parties to a guaranty agreement guaranteeing notes issued by Wachovia Bank, N.A. to L.L. Murphrey Company. In 2000, L.L. Murphrey filed a Chapter 11 petition with the United States Bankruptcy Court for the Eastern District of North Carolina. At the time the petition was filed, L.L. Murphrey was in default on several Wachovia notes that were guaranteed by the guarantors. On 4 May 2001, L.L. Murphrey filed its Fourth Amended Plan of Reorganization with the bankruptcy court, which was later confirmed by the bankruptcy court in part because the "guarantors contributed $550,000 to [L.L. Murphrey] to make confirmation of its plan feasible."

The Plan of Reorganization divided L.L. Murphrey's Wachovia debts into two notes: Note A and Note B. Wachovia sold Note A and Note B to Cadlerock Joint Venture, L.P., which later sold the notes to D.A.N. Joint Venture. In addition to creating two notes, the Plan of Reorganization provided that the "guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of Recapitalized Debt, defined herein."

Because L.L. Murphrey and D.A.N. Joint Venture could not agree on the amount of the recapitalized debt, L.L. Murphrey filed a motion with the bankruptcy court to reopen the Chapter 11 case on 1 April 2011. L.L. Murphrey, Larry Barrow, Lois Barrow, and Doris Murphrey then filed an adversary proceeding,[1] before the bankruptcy court, against D.A.N. Joint Venture. In the adversary proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration that the guarantors were contingently liable for only the amount of the recapitalized debt. They also requested an injunction requiring D.A.N. Joint Venture to stop demanding payment from L.L. Murphrey and the guarantors in excess of the amount of the recapitalized debt.

In an order entered on 16 December 2011, the bankruptcy court found that the amount of the recapitalized debt was $6,186,362. D.A.N. Joint Venture filed a motion with the bankruptcy court seeking reconsideration of the 16 December 2011 order, which was not a final order because it did not resolve all of the claims between the parties. The bankruptcy court granted D.A.N. Joint Venture's motion. On 10 May 2012, the bankruptcy court issued a second order denying the claim for

1. An adversary proceeding is a "lawsuit that is brought within a bankruptcy proceeding, governed by special procedural rules, and based on conflicting claims." *Black's Law Dictionary* 58 (8th ed. 2004).

injunctive relief, because there was no showing of irreparable harm, and declaring that the liability of guarantors was capped at the amount of the recapitalized debt.

The present action was filed by Larry Barrow, Lois Barrow, and Doris Murphrey against D.A.N. Joint Venture, Connie Murphrey, and Donald Stocks in superior court after the 10 May 2012 bankruptcy court order was entered. Larry Barrow, Lois Barrow, and Doris Murphrey assert that they are entitled to a declaration that the expiration of the statute of limitations prevents D.A.N. Joint Venture from asserting any claims against the guarantors based on the guaranties. D.A.N. Joint Venture counterclaimed and crossclaimed that the guarantors were in breach of the guaranty agreements as modified by the Plan of Reorganization. The parties then filed cross-motions for summary judgment. D.A.N. Joint Venture appeals from the superior court's grant of Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's motions for summary judgment.

On appeal, D.A.N. Joint Venture argues that the 10 May 2012 bankruptcy court order, which addressed the guarantors' liability under the Plan of Reorganization, precluded the trial court from granting summary judgment on the grounds that the statute of limitations bars all claims asserted by D.A.N. Joint Venture against the guarantors based on the guaranties. We agree.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). We apply a de novo standard of review when evaluating a trial court's grant of summary judgment. *Id.* Under de novo review, we "consider[] the matter anew and freely substitute [our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

[1] To resolve this interjurisdictional preclusion issue, which involves the preclusive effect of a bankruptcy court order in superior court, we must first determine whether state or federal law applies. In *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–09, 149 L. Ed. 2d 32, 41–43 (2001), the Supreme Court of the United States considered whether federal or state law controls the claim-preclusive effect of a federal-court judgment based on diversity jurisdiction in a later state-court proceeding. From the outset, the Court noted that "[n]either

the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, nor the full faith and credit statute, 28 U.S.C. § 1738, address the question. By their terms they govern the effects to be given only to state-court judgments." *Id.* at 506–07, 149 L. Ed. 2d at 41–42. Furthermore, there is "no other federal textual provision, neither of the Constitution nor of any statute, [that] addresses the claim-preclusive effect of a judgment in a federal diversity action," or "the claim-preclusive effect of a federal-court judgment in a federal-question case." *Id.* at 507, 149 L. Ed. 2d at 42. Federal-question cases, however, have a preclusive effect on later proceedings because the Court "has the last word on the claim-preclusive effect of *all* federal judgments," and requires that federal-question cases be given preclusive effect. *Id.* Federal common law, therefore, governs the claim-preclusive effect of federal-court judgments. *See id.* at 508, 149 L. Ed. 2d at 42.

In this case, defendant argues that the bankruptcy court order must be given preclusive effect. Therefore, we look to federal common law to determine the preclusive effect of the bankruptcy court order.[2]

Because the terminology used to describe the preclusive effect of prior adjudications can be inconsistent, we begin by defining the terms. "[*R*]*es judicata* generally refers to the law of former adjudications," *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 n.5 (4th Cir. 1996), and "encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel." *Id.* at 1315. Both claim preclusion and issue preclusion apply to bankruptcy court orders. *See id.* ("The doctrine of *res judicata* applies in the bankruptcy context.").

Claim preclusion occurs when a suit—which arises from the *same* cause of action as a second suit—precludes relitigation in a second suit of matters actually decided and every claim that might have been raised in the first suit. *Id.* (citing *Nevada v. United States*, 463 U.S. 110, 129–30, 77 L. Ed. 2d 509, 524 (1983)). Issue preclusion on the other hand, applies when the first suit and the second suit involve *different* causes of action, but involve some of the same factual or legal issues. *Id.* In this situation, issue preclusion prevents relitigation, in the second suit, of the legal and factual issues actually and necessarily decided in the first suit. *See id.* Thus, the key difference between claim and issue preclusion is whether the first suit and the second suit involve the same cause of action.

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2. To assist in our determination of federal common law, we find the common law of the Fourth Circuit Court of Appeals persuasive because it is the circuit in which the United States Bankruptcy Court for the Eastern District of North Carolina is located.

We believe that the adversary proceeding and the superior court proceeding involve the same cause of action and therefore consider whether claim preclusion applies to this case. Before addressing the requirements of claim preclusion, however, we must address whether claim preclusion applies to a declaratory judgment.

Generally, the preclusive effect of declaratory judgments is limited to matters "actually litigated by the parties and determined by a declaratory judgment." 18A Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4446 (2d ed. 2002). Thus, issue preclusion clearly applies to declaratory judgments. Federal courts, however, have consistently held that the general rule limiting the preclusive effect of declaratory judgments to issue preclusion "applies only if the prior action solely sought declaratory relief." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008). As a result, if a claimant seeks coercive relief, like an injunction, in addition to declaratory relief, then the claimant forfeits the ability to limit the preclusive effect of a declaratory judgment to issue preclusion. *Id.* (quoting *Stericycle, Inc. v. City of Delavan*, 929 F. Supp. 1162, 1164 (E.D. Wis. 1996) (citing *Cimasi v. City of Fenton*, 838 F.2d 298, 299 (8th Cir. 1988) and *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983))). Accordingly, claim preclusion also applies to the bankruptcy court order in this instance because Larry Barrow's, Lois Barrow's, and Doris Murphrey's complaint in the adversary proceeding sought injunctive relief in addition to declaratory relief.

Claim preclusion applies to an adjudication when (1) a court of competent jurisdiction enters a final judgment on the merits; (2) there is a second suit involving the claimants or parties in privity with the claimants; and (3) the claims in the second suit are based on the same cause of action as the first suit or could have been asserted in the first suit. *Varat*, 81 F.3d at 1315; *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993). In this case, all three criteria are satisfied.

To analyze the first criterion for claim preclusion, we divide it into three subparts. Subpart one requires a court of competent jurisdiction. Subpart two requires a final judgment. Subpart three mandates that the final judgment be on the merits.

First, Larry Barrow, Lois Barrow, and Doris Murphrey assert that the bankruptcy court was not a court of competent jurisdiction. They argue that the bankruptcy court lacked subject-matter jurisdiction over the claims asserted in the adversary proceeding because they were not core bankruptcy proceedings. While federal courts are courts of limited jurisdiction, federal courts have the power to decide whether they have

jurisdiction; their determination of jurisdiction may be appealed, but it may not be collaterally attacked. *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998).

In the adversary proceeding, the 10 May 2012 bankruptcy court order stated:

> [T]his adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). . . . Matters related to interpreting or implementing a plan post-conformation are still considered "core" even in light of the Supreme Court's ruling in *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011).

Furthermore, the bankruptcy court stated: "The provisions of this plan modifying guaranties are completely consistent with applicable law at the time of confirmation, particularly since 7 contributed $550,000 to the debtor to make confirmation of its plan feasible." Therefore, the bankruptcy court was a court of competent jurisdiction because it was conducting a core bankruptcy proceeding.

Next, Larry Barrow, Lois Barrow, and Doris Murphrey assert that the bankruptcy court could not issue a final order because the adversary proceeding involved a noncore proceeding that required the consent of the parties before the bankruptcy court could issue a final order. As discussed above, the bankruptcy court had subject-matter jurisdiction over the adversary proceeding because it was a core proceeding. The bankruptcy court, therefore, could issue a final judgment. *See Stern v. Marshall*, __ U.S. __, __, 180 L. Ed. 2d 475, 488 ("Bankruptcy judges may hear and enter final judgments in all core proceedings arising under title 11, or arising in a case under title 11." (internal quotation marks omitted)), *reh'g denied*, __ U.S. __, 180 L. Ed. 2d 924 (2011).

Not only did the bankruptcy court have the power to issue a final judgment but it entered a final judgment. "[A] judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court." Restatement (Second) of Judgments § 13 cmnt.b (1982). The 10 May 2012 bankruptcy court order completed all steps in the adjudication of the adversary proceeding. This is clear from the order for two reasons. First, it disposed of all of the claims between the parties. Second, one of the reasons the bankruptcy court granted the motion for reconsideration was for the purpose of entering an "indisputably final [order] for purposes of appeal." Therefore, the 10 May 2012 order is a final judgment.

Finally, "judgment on the merits" is a term of art that means a judgment was " 'based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form.' " *In re Gilson*, 250 B.R. 226, 236 (Bankr. E.D. Va. 2000) (quoting *Fairmont Aluminum Co. v. Comm'r of Internal Revenue*, 222 F.2d 622, 625 (4th Cir. 1955)). There is no dispute that the bankruptcy court order was rendered on the merits. All parties to the adversary proceeding were able to appear before the bankruptcy court at a hearing on 21 November 2011, where they could raise issues and make legal arguments. Thus, the final judgment was on the merits because it was based on the parties' legal rights.

Next, we address whether the superior court suit involves the same claimants or those in privity with the claimants in the adversary proceeding. *See Varat*, 81 F.3d at 1315. In the adversary proceeding, L.L. Murphrey, Larry Barrow, Lois Barrow, and Doris Murphrey sued D.A.N. Joint Venture. In the superior court proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sued D.A.N. Joint Venture and joined Connie Murphrey and Donald Stocks as defendants. However, for purposes of this appeal, Donald Stocks is treated the same as Larry Barrow, Lois Barrow, and Doris Murphrey for determining whether claim preclusion applies to the statute of limitations argument.

Larry Barrow, Lois Barrow, and Doris Murphrey asserted claims against D.A.N. Joint Venture in both proceedings, and claim preclusion should apply to them. Thus, the only issue is whether Donald Stocks is in privity with Larry Barrow, Lois Barrow, and Doris Murphrey.

Privity exists when a non-party to a former adjudication is "so identified in interest with a party to former litigation that [the non-party has] . . . precisely the same legal right in respect to the subject matter involved." *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 651 (4th Cir. 2005) (internal quotation marks omitted). That is, "the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." *Id.* (internal quotation marks omitted). As discussed earlier, Donald Stocks, Larry Barrow, Lois Barrow, and Doris Murphrey are all parties to a guaranty agreement and both lawsuits address the liability of guarantors. Therefore, Donald Stocks is in privity with Larry Barrow, Lois Barrow, and Doris Murphrey because they share the same legal rights with respect to the guaranty agreements.

Finally, we must address whether the adversary proceeding and the superior court proceeding involve the same cause of action. *See Varat*, 81 F.3d at 1315. The Fourth Circuit, for the purpose of claim preclusion,

has defined a cause of action as all claims that arise "out of the same transaction or series of transactions." *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) (internal quotation marks omitted). "Transaction" in this context "connotes a natural grouping or common nucleus of operative facts." *Id.* (internal quotation marks omitted).

We examine the adversary proceeding and the superior court proceeding to determine if the claims asserted or which could have been asserted in each case arise from a common nucleus of operative facts. In the adversary proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration from the bankruptcy court that guarantors were contingently liable for only the amount of the recapitalized debt. Nothing precluded guarantors from asserting that they were absolved from liability on statute of limitations grounds. The claim actually asserted in the adversary proceeding focused on how the Plan of Reorganization impacted the legal relationship between guarantors and D.A.N. Joint Venture. In fact, the bankruptcy court considered the language of the Plan of Reorganization in reaching its holding that guarantors were entitled to a declaration that "the liability of pre-petition guarantors is capped at the amount of the Recapitalized Debt."

In the superior court proceeding, Larry Barrow, Lois Barrow, and Doris Murphrey sought a declaration, and Donald Stocks relied on the affirmative defense, that the statute of limitations bars any claims that D.A.N. Joint venture might assert against guarantors based on the guaranty agreements. The logic of this argument is that the Plan of Reorganization required Wachovia to prepare new loan documents, which Wachovia apparently never prepared. As a result, they argue, that the only guaranty agreements are those executed before the Chapter 11 bankruptcy, and the statute of limitations bars enforcement of the guaranty agreements because Wachovia notified guarantors that they were in default under the guaranty agreements sometime prior to the filing of the Chapter 11 bankruptcy petition.

However, it is clear that the Plan of Reorganization has some impact on the guaranty agreements because it states: "guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of the Recapitalized Debt, defined herein." Thus, the central focus of Larry Barrow's, Lois Barrow's, Doris Murphrey's, and Donald Stocks's superior court arguments is how the Plan of Reorganization affected the legal relationship between guarantors and D.A.N. Joint Venture. This statute of limitations claim could have been asserted in the adversary proceeding. Consequently, the adversary proceeding and the superior court proceeding arise from the same cause of action because

they both focus on how the Plan of Reorganization affects the legal relationship between guarantors and D.A.N. Joint Venture and the claims that were available to guarantors.

To summarize, claim preclusion applies to the 10 May 2012 bankruptcy court order because the claimants in the adversary proceeding asked for an injunction in addition to declaratory relief. Next, the bankruptcy court was a court of competent jurisdiction that issued a final judgment on the merits because there was a hearing concerning the substance of the legal issues in dispute between the parties on a core proceeding as well as an order disposing of all claims between claimants. Also, the adversary proceeding and the superior court proceeding involved the guarantors asserting rights against D.A.N. Joint Venture, thus both cases involved the same claimants. Finally, both cases arose from the same cause of action because both cases focused on how the Plan of Reorganization impacts the relationship of guarantors and D.A.N. Joint Venture and nothing prevented guarantors from asserting their statute of limitations claim in the adversary proceeding. Therefore, Larry Barrow's, Lois Barrow's, and Doris Murphrey's failure to raise the statute of limitations issue during the adversary proceeding precludes us from now considering whether the statute of limitations prevents defendant from recovering from the guarantors.

Accordingly, we reverse the superior court's order and remand the case to the superior court for a determination of the amount of the guarantors' liability.

Reversed and remanded.

Judges ERVIN and McCULLOUGH concur.

BOTTS v. TIBBENS

[232 N.C. App. 537 (2014)]

ELIZABETH R. BOTTS, PLAINTIFF
v.
MARK DAVID TIBBENS AND ALICIA TIBBENS, DEFENDANTS

No. COA13-827

Filed 4 March 2014

1. Contracts—breach—summary judgment—defenses of impossibility and illegality—installation agreement

The trial court did not err in a breach of contract case by granting plaintiff's motion for summary judgment on the defenses of impossibility and illegality. The contract did not require performance by someone precluded by statute from performing. Thus, the installation agreement was neither illegal nor impossible to perform.

2. Damages and Remedies—breach of contract—cost of engineering services—installation

The trial court did not err in a breach of contract case by calculating plaintiff's damages to include the cost of engineering services which were allegedly not part of defendant's obligations under the contract. The trial court considered the engineering services to be part of the "installation" portion of the contract.

Appeal by defendant Mark Tibbens from Judgment entered 7 February 2013 by Judge Michael Rivers Morgan in Superior Court, Durham County, and from Order entered 9 March 2012 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 9 January 2014.

Berman & Associates, by Gary K. Berman, for plaintiff-appellee.

Cheshire & Parker, by D. Michael Parker, for defendant-appellant.

STROUD, Judge.

Mark Tibbens ("defendant") appeals from a judgment entered on 7 February 2013 awarding Elizabeth Botts ("plaintiff") $32,331.72 for breach of contract and from an order granting plaintiff's motion for summary judgment on several affirmative defenses raised by defendant. We affirm both the summary judgment order and the judgment.

I. Background

In 2000, defendant purchased a 61.7 acre tract of land in Orange County. He later decided to subdivide the tract and, in 2007, signed an "Offer to Purchase and Contract" along with his wife, Alicia Tibbens, and plaintiff, wherein plaintiff offered to purchase 15 acres of land for $75,000. Plaintiff intended to build a home for herself on the land, but first needed a septic system installed. On 16 January 2008, the parties closed on their land purchase agreement and entered into a "Septic System Installation Agreement." Defendant's wife did not sign the installation agreement. In the installation agreement, defendant agreed to "install the septic system" for plaintiff's property and he agreed to "be responsible for all labor and job supervision associated with the installation." Plaintiff agreed to supply all necessary materials, rental equipment, and fuel for the project up to $10,000. Defendant agreed to be responsible for costs in excess of $10,000.

Defendant began the process of installing the septic system by consulting with others in the business and arranging for plaintiff's system to be designed and engineered by Summit Consulting, PLLC. Summit began its portion of the work in March 2008 and finished around February 2010. In February 2010, defendant's attorney sent plaintiff a letter informing her that defendant was not a licensed contractor and that, as a result, he could not lawfully construct her septic system. It further asserted that the installation agreement was unenforceable and void. In response, plaintiff hired a septic company to install her system. The new company charged her $33,500 for its services.

On or about 9 March 2010, plaintiff filed a complaint against defendant and his wife alleging breach of contract and seeking damages for breach of the installation agreement. Plaintiff filed an amended complaint on 11 January 2011 adding a claim of unjust enrichment against Alicia Tibbens. Defendant answered, raising affirmative defenses of impossibility, illegality, and laches. After discovery, plaintiff moved for partial summary judgment on the affirmative defenses raised by defendant. The trial court granted plaintiff's motion by order entered 9 March 2012, finding no genuine issue of material fact and concluding that plaintiff was entitled to judgment as a matter of law on the affirmative defenses.

The case was tried on 17 and 18 December 2012 by the superior court judge sitting without a jury. The trial court entered its judgment, which contained findings of fact and conclusions of law, on 7 February 2013. It found that defendant had breached the installation agreement and that he owed plaintiff $32,331.72 in damages for the total cost of her

septic system installation, $42,331.72, less the $10,000 she had agreed to spend on it. The trial court found that plaintiff had failed to prove that Alicia Tibbens was a party to the agreement and that she should also be liable for the breach. Defendant filed written notice of appeal to this Court on 5 March 2013.

II. Impossibility and Illegality

[1] Defendant first contends that the trial court erred in granting plaintiff's motion for summary judgment on the defenses of impossibility and illegality. We conclude that the trial court correctly granted summary judgment to plaintiff on these defenses because the installation agreement was neither illegal nor impossible to perform.

A. Standard of Review

> We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Cox v. Roach, ___ N.C. App. ___, ___, 723 S.E.2d 340, 347 (2012) (citation omitted), *disc. rev. denied*, 366 N.C. 423, 736 S.E.2d 497 (2013).

B. Analysis

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment on the defenses of illegality and impossibility because the contract was illegal and his performance impossible under N.C. Gen. Stat. § 90A-72, which requires that a person installing a septic system be a properly certified contractor.

> The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties.

Williams v. Habul, ___ N.C. App. ___, ___, 724 S.E.2d 104, 111 (2012) (citations and quotation marks omitted). Defendant does not contend

that the contract is ambiguous or that there were genuine issues of material fact. He simply disagrees with the trial court's interpretation of the contract and its conclusion that the statute does not prevent defendant from performing.

"[A]n agreement which violates a constitutional statute or municipal ordinance is illegal and void." *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 128, 217 S.E.2d 551, 555 (1975); *Carolina Water Service, Inc. of North Carolina v. Town of Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560 (2001) ("An agreement which cannot be performed without violation of a statute is illegal and void."), *disc. rev. denied*, 354 N.C. 360, 556 S.E.2d 298 (2001). Additionally, nonperformance may be excused for impossibility if the performing party's

> performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing whether impossible or not. Moreover, in most cases it must be shown that the event was not reasonably foreseeable. Government actions . . . may be a basis for a finding of legal impossibility.

UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 397, 432 S.E.2d 699, 702 (1993), *cert. denied*, 335 N.C. 242, 439 S.E.2d 163 (1993).

Here, the only basis of illegality and impossibility asserted by defendant is statutory—that he was not allowed to construct a septic system for plaintiff because he was not a certified on-site wastewater contractor. We agree that N.C. Gen. Stat. § 90A-72(a) requires that construction and installation of "an on-site wastewater system" be performed by or under the supervision of a properly certified contractor. *See* N.C. Gen. Stat. § 90A-72(a) (2009); N.C. Gen. Stat. § 90A-81(d)(1) (2009) (establishing that construction of an on-site wastewater system without the proper certificate is a Class 2 misdemeanor). But the parties' contract did not require defendant to install the septic system personally.

The contract provided, in relevant part:

> 1. Tibbens will install the septic system for a residence on the property described in Exhibit A attached hereto. Tibbens will be responsible for all labor and job supervision associated with the installation.
>
> 2. Botts will provide all materials and rental and fuel for any equipment necessary for the installation of the septic

> system in an amount not to exceed TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).
>
> 3. In the event that the expense of materials and rental and fuel for any equipment exceeds TEN THOUSAND AND 00/100 DOLLARS ($10,000.00), then and in said event, Tibbens shall be responsible for all materials and rental of and fuel for any equipment necessary for the installation of the septic system in excess of TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).

Nothing in the plain language of this contract requires that defendant install the septic system *personally* or precludes him from employing others to effect the installation. Instead, the contract simply makes defendant responsible for the installation. Indeed, the language making Tibbens "responsible for all labor *and job supervision* associated with the installation" (emphasis added) strongly suggests that hiring others to assist in the performance of his contractual duties was permitted. Defendant could have sub-contracted to a properly licensed contractor to perform his contractual obligations. Moreover, nothing prevented him from seeking an appropriate contractor's license in the two years between the signing of the contract and the letter indicating his refusal to perform. That defendant miscalculated the costs of performing his contractual obligations does not make his performance impossible. *See* Restatement (Second) of Contracts, § 261, cmt. d (1981) ("A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover. Furthermore, a party is expected to use reasonable efforts to surmount obstacles to performance (see § 205), and a performance is impracticable only if it is so in spite of such efforts.")

We conclude that the contract does not require performance by someone precluded by statute from performing. Therefore, we hold the contract was not illegal and defendant's performance was not impossible. As a result, we affirm the trial court's order granting plaintiff's motion for summary judgment on these issues.

III. Damages

[2] Defendant next argues that the trial court erred in calculating plaintiff's damages by including the cost of engineering services which were not part of defendant's obligations under the contract.

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

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation and quotation marks omitted).

> Damages are allowed for breach of contract as may reasonably be supposed to have been in the contemplation of the parties when the contract was made or which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed. The party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.

J.T. Russell and Sons, Inc. v. Silver Birch Pond L.L.C., ___ N.C. App. ___, ___, 721 S.E.2d 699, 704 (2011) (citations, quotation marks, and brackets omitted).

"While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586 (1987). Where a contract has been breached,

> [t]he injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached. Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach.

Troitino v. Goodman, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945) (citations and quotation marks omitted).

Defendant does not challenge any of the trial court's findings of fact as unsupported by the evidence. He simply contends that the trial court erred in interpreting the contract to include engineering services and including those costs in its damages calculation, but does not

argue that the standard used by the trial court to award damages was otherwise erroneous.

The trial court found that the agreement made defendant "responsible for the installation of the septic system." It further found that engineering services would be a necessary part of the installation process and that defendant was aware of that fact when he signed the contract. Indeed, defendant helped arrange for Summit Consulting to provide the necessary engineering services. Finally, the trial court found that, under the agreement, defendant was "responsible for all costs exceeding $10,000." Defendant does not specifically challenge any of these findings as unsupported by competent evidence. It is clear from these findings that the trial court considered the engineering services to be part of the "installation" portion of the contract.

The trial court found that the total cost of completing the project was $42,331.72, but reduced the damages award by $10,000, because plaintiff had agreed to be responsible for costs up to that amount. It therefore awarded plaintiff $32,331.72. This amount, based on the uncontested findings by the trial court, was clearly aimed at putting plaintiff in the same position as she would have been had defendant performed the contract—she would spend up to $10,000 and a septic system would be installed on her property appropriate for the house she was constructing. We therefore affirm the trial court's judgment and damages award.

IV. Conclusion

We affirm the trial court's order granting plaintiff's motion for summary judgment because the contract was not illegal and it was not impossible for defendant to perform his contractual obligations. Further, we affirm the trial court's judgment awarding plaintiff $32,331.72 in damages.

AFFIRMED.

Judges HUNTER, JR., Robert N. and DILLON concur.

FIRST BANK, PLAINTIFF
v.
S&R GRANDVIEW, L.L.C.; DONALD J. RHINE; JOEL R. RHINE; GORDON P. FRIEZE, JR.; MAXINE GANER; SHARON R. SILVERMAN, EXECUTRIX OF THE ESTATE OF STEVEN S. SILVERMAN; AND MARTIN J. SILVERMAN, DEFENDANTS

No. COA13-838

Filed 4 March 2014

Assignments—limited liability company—charging order does not effectuate debtor's assignment of membership interest

The trial court erred by concluding that a charging order effectuated an assignment of defendant's membership interest in a limited liability company (LLC) to plaintiff and by enjoining defendant from exercising his management rights in the LLC and ruling that these rights "lie fallow" until the judgment was satisfied. Under the plain language of N.C.G.S. § 57C-5-03, a charging order does not effectuate an assignment of a debtor's membership interest in an LLC and does not cause a debtor to cease being a member in an LLC.

Appeal by defendant Donald J. Rhine from order entered 26 February 2013 by Judge Vance Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 10 December 2013.

Nexsen Pruet, PLLC, by M. Jay DeVaney and Brian T. Pearce, for plaintiff-appellee.

Wilson & Ratledge, PLLC, by Michael A. Ostrander, and Saffo Law Firm, P.C., by Anthony A. Saffo, for defendant-appellant.

HUNTER, Robert C., Judge.

Donald J. Rhine ("defendant") appeals from a charging order entered in favor of First Bank ("plaintiff") charging defendant's membership interest in an LLC to satisfy payment of a judgment. On appeal, defendant argues that the trial court erred by: (1) concluding that the charging order "effectuated an assignment" of defendant's membership interest in the LLC; and (2) enjoining defendant from exercising his rights as a member of the LLC and ordering that his membership rights "lie fallow" until the judgment is satisfied.

After careful review, we reverse the trial court's order and remand for entry of a new charging order consistent with this opinion.

Background

On 7 September 2012, the trial court entered monetary judgment for plaintiff against defendant in excess of $3.5 million based on defendant's default on various loans and guaranty agreements. In an effort to collect on this judgment, plaintiff filed a motion seeking a charging order against defendant's membership interest in S&R Grandview, LLC ("the LLC"), a limited liability company of which defendant was a member and manager. After a hearing on 18 February 2013, the trial court granted plaintiff's motion, and after concluding that the charging order "effectuate[d] an assignment," ordered the following:

> 1. Defendant D. Rhine's membership interest in S&R Grandview, L.L.C. is hereby charged with payment of the unsatisfied amount of First Bank's Judgment, including interest that has accrued after the date of the Judgment.
>
> 2. First Bank shall hereafter have the rights of an assignee of Defendant D. Rhine's membership interest in S&R Grandview, L.L.C., and all members and managers of S&R Grandview, L.L.C. shall treat First Bank as such an assignee.
>
> 3. Until such time as the full amount of the Judgment has been paid to First Bank, Defendant D. Rhine shall be enjoined from exercising any of the rights of a member of S&R Grandview, L.L.C.
>
> 4. First Bank shall receive any and all distributions and allocations from S&R Grandview, L.L.C. to which Defendant D. Rhine is entitled, until the full amount of the Judgment has been paid to First Bank.
>
> 5. The members and managers of S&R Grandview, L.L.C., shall not allow any distribution or allocation to Defendant D. Rhine unless and until First Bank's Judgment has been fully satisfied.
>
> 6. S&R Grandview, L.L.C. shall not allow Defendant D. Rhine to circumvent the terms or purpose of this Charging Order.
>
> 7. This order does not allow First Bank to exercise any rights of a member of S and R [sic] Grandview, LLC except as set out in paragraph 4 above. Defendant D. Rhine's

> membership right shall lie fallow until the judgement [sic] is satisfied except as set out in paragraph 4 above.

Defendant filed timely notice of appeal from this order.

Discussion

I. Effect of Charging Order on LLC Membership Interest

Defendant brings two related arguments on appeal: (1) the trial court erred by concluding that the charging order effectuated an assignment of his membership interest in the LLC to plaintiff, and (2) the trial court erred by enjoining him from exercising his management rights in the LLC and ruling that these rights "lie fallow." We agree as to both arguments and reverse the trial court's order.

Both issues on appeal involve interpretation of N.C. Gen. Stat. §§ 57C-5-02, -03 (2011). Questions of statutory interpretation are questions of law, which are reviewed *de novo* by this Court. *Dare Cnty. Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997); *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). The primary objective of statutory interpretation is to give effect to the intent of the legislature. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). The plain language of a statute is the primary indicator of legislative intent. *Begley v. Emp't Sec. Comm'n*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). However, where the plain language is unclear, this Court may also glean the General Assembly's intent from legislative history. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). Likewise, "[l]ater statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute." *Wells v. Consol. Judicial Ret. Sys.*, 354 N.C. 313, 318, 553 S.E.2d 877, 880 (2001). Finally, statutory provisions must be read in context: "Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Williams v. Williams*, 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980) (internal citations omitted).

Section 57C-5-03 allows a judgment creditor to seek a charging order against a debtor-member's interest in an LLC to satisfy the judgment. It provides:

> On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. *To the extent so charged, the judgment creditor has only*

> *the rights of an assignee of the membership interest.* This Chapter does not deprive any member of the benefit of any exemption laws applicable to his membership interest.

N.C. Gen. Stat. § 57C-5-03 (emphasis added). Because section 57C-5-03 states that the judgment creditor "has only the rights of an assignee of the membership interest," it is proper to read section 57C-5-03 together with section 57C-5-02, which sets out the rights of an assignee of an LLC membership interest. *See Williams*, 299 N.C. at 180-81, 261 S.E.2d at 854. Section 57C-5-02 provides:

> Except as provided in the articles of organization or a written operating agreement, a membership interest is assignable in whole or in part. An assignment of a membership interest does not dissolve the limited liability company or entitle the assignee to become or exercise any rights of a member. *An assignment entitles the assignee to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment.* Except as provided in the articles of organization or a written operating agreement, *a member ceases to be a member upon assignment of all of his membership interest.* Except as provided in the articles of organization or a written operating agreement, the pledge of, or granting of a security interest, lien, or other encumbrance in or against, all or any part of the membership interest of a member shall not cause the member to cease to be a member or the secured party to have the power to exercise any rights or powers of a member.

N.C. Gen. Stat. § 57C-5-02 (emphasis added). Membership interests are defined by N.C. Gen. Stat. § 57C-1-03(15) (2011) as "[a]ll of a member's rights in the limited liability company, including without limitation the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company assets, any right to vote, and any right to participate in management."

Plaintiff argues that "[t]he only reasonable way to read N.C. Gen. Stat. § 57C-5-02 and N.C. Gen. Stat. § 57C-5-03 together and to give import to each of the clauses included in each statute is to conclude that the entry of a charging order amounts to an assignment of the debtor's membership interest" and after entry of a charging order "a debtor ceases to be a member in the limited liability company to which the charging order applies." To reach this conclusion, plaintiff argues that:

(1) a charging order assigns a debtor's economic interest in an LLC to a judgment creditor; (2) the only LLC membership rights that are freely transferable are economic rights, and thus, assignment of economic rights "effectuates a full and complete assignment of a limited liability company interest"; and (3) because "a member ceases to be a member upon assignment of all of his membership interest," N.C. Gen. Stat. § 57C-5-02, a charging order terminates the debtor-member's membership in the LLC.

We disagree with plaintiff's interpretation of these statutes. First, we do not read sections 57C-5-02 and 57C-5-03 as effectuating an assignment of the debtor's membership rights, either in whole or in part. Section 57C-5-03 clearly states that "the judgment creditor has *only the rights* of an assignee of the membership interest." An assignee has the right "to receive, to the extent assigned, only the distributions and allocations to which the assignor would be entitled but for the assignment." N.C. Gen. Stat. § 57C-5-02. Thus, under the plain language of these statutes, a charging order gives a judgment creditor the right to receive distributions and allocations to which the debtor-member would have been entitled until the judgment is satisfied. Nowhere in these provisions does the General Assembly mandate an assignment of membership interests from a debtor to a judgment creditor through a charging order. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). Section 57C-5-03 does exactly what it says; it "charge[s] the membership interest of the member with payment of the unsatisfied amount of the judgment with interest." Had the General Assembly intended a charging order to assign all membership interests and terminate a debtor's membership in an LLC, as plaintiff contends, it could have easily included language to that effect. Absent such language, we are bound by the words used by the General Assembly, and we hold that a charging order does not effectuate an assignment of a debtor-member's total interest in an LLC.

Recent amendments to the North Carolina Limited Liability Company Act support our conclusion that a charging order does not effectuate an assignment. Effective 1 January 2014, the General Assembly repealed Chapter 57C and enacted a new North Carolina Limited Liability Company Act in Chapter 57D. *See* 2013 Sess. Laws 157, §§ 1,2. N.C. Gen. Stat. § 57D-5-03 clarifies the rights of a judgment creditor seeking a charging order as follows:

> (a) On application to a court of competent jurisdiction by any judgment creditor of an interest owner, the court may charge the economic interest of an interest owner with the payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest.
>
> (b) *A charging order is a lien on the judgment debtor's economic interest* to the extent provided in this section from the time that such charging order is served upon the LLC in accordance with Rule 4(j)(8) of the Rules of Civil Procedure. . . .
>
> (c) *This Chapter does not deprive any interest owner of a right*, including any benefit of any exemption law applicable to the interest owner's ownership interest.
>
> (d) The entry of a charging order is the exclusive remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest.

N.C. Gen. Stat. § 57D-5-03 (2013) (emphasis added). Although the newly revised North Carolina Limited Liability Company Act does not apply to this case, see N.C. Gen. Stat. § 57D-11-03, the clarified portions of section 57D-5-03 support our conclusion that the General Assembly did not intend for section 57C-5-03 to effectuate an assignment, enjoin a debtor-member from exercising managerial rights, or cause the debtor-member to cease to be a member in the LLC.

Although plaintiff contends that this conclusion leads to irreconcilable results, again we disagree.

First, plaintiff argues that to conclude that a charging order does not effectuate a total assignment, this Court would have to reconcile "why the interest received by a party receiving a charging order is identical to the interest received by a party who is otherwise assigned a membership interest in a limited liability company." We disagree with plaintiff's contention that these interests are identical. Section 57C-5-03 provides that a trial court "may charge the membership interest of the member with payment of the *unsatisfied* amount of the judgment with interest." N.C. Gen. Stat. § 57C-5-03 (emphasis added). Inherent in the concept of a charging order is that once the judgment is paid, the debtor-member's

interest in the LLC is no longer charged. An assignee of a member's LLC membership interest has no such limitation. Thus, contrary to plaintiff's argument, although a judgment creditor has the economic rights of an assignee until the judgment is satisfied, the interests that the two parties have are not identical.

Second, plaintiff argues that because the term "charging order" is not included in the last sentence of section 57C-5-02, which prescribes situations where a member loses some economic rights but retains membership in the LLC, the General Assembly could not have intended this provision to apply to charging orders. Although the term "charging order" is not specifically mentioned by name, we find that it fits within the "other encumbrance[s] in or against, all or any part of the membership interest" for which the provision applies. *See* N.C. Gen. Stat. § 57C-5-02 ("[T]he pledge of, or granting of a security interest, lien, or *other encumbrance* in or against, all or any part of the membership interest of a member shall not cause the member to cease to be a member or the secured party to have the power to exercise any rights or powers of a member.") (emphasis added). Plaintiff argues that because encumbrances do not include actual transfer of rights until they are enforced, and charging orders permit the judgment creditor to actually receive distributions and allocations, charging orders cannot be encumbrances. The flaw in this logic is the assumption that charging orders are never "enforced." The plain language of sections 57C-5-02 and 57C-5-03, specifically that the debtor's membership interest is "charge[d]" and the judgment creditor has the right to "receive . . . the distributions and allocations to which the assignor would be entitled," demonstrates a legislative intent for charging orders to act as encumbrances that are "enforced" whenever the debtor-member would have received distributions or allocations from the LLC. Furthermore, the General Assembly has clarified that charging orders are encumbrances, not assignments, and that the imposition of a charging order does not affect a member's managerial rights. Specifically, section 57D-5-03(b) states that "A charging order is a lien on the judgment debtor's economic interest[.]" The subsequent amendment of the charging order statute is strong evidence that the General Assembly intended charging orders under 57C-5-03 to be encumbrances that do not affect a debtor's managerial interest, contrary to plaintiff's contention and the trial court's order. *See Wells*, 354 N.C. at 318, 553 S.E.2d at 880.

Third, plaintiff argues that because section 57C-5-03 is included in the Article of the North Carolina Limited Liability Company Act entitled "Assignment of Membership Interests; Withdrawal," charging orders

must be interpreted to effectuate assignments. Although we agree that the title of an Article in which a statute is placed can be relevant when interpreting the statute, the placement of a statute within an Act is less probative of legislative intent than the plain language of the statute itself. "[I]n interpreting a statute, we *first* look to understand the legislative intent behind the statute by examining the plain language of the statute." *State v. Moore*, 167 N.C. App. 495, 503, 606 S.E.2d 127, 132 (2004) (emphasis added) (citing *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). "[W]hen confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Hamilton*, __ N.C. App. __, __, 725 S.E.2d 393, 396 (2012). Here, the plain language of section 57C-5-03 unambiguously states that a charging order gives the judgment creditor the *rights* of an assignee. N.C. Gen. Stat. § 57C-5-03. It does not provide for actual assignment of membership rights from debtor to judgment creditor. The fact that section 57C-5-03 was placed by the General Assembly in an Article entitled "Assignment of Membership Interests; Withdrawal" does not change this outcome.

Conclusion

After careful review, we hold that under the plain language of section 57C-5-03, a charging order does not effectuate an assignment of a debtor's membership interest in an LLC and does not cause a debtor to cease being a member in an LLC. Thus, we reverse the trial court's charging order enjoining defendant from exercising his membership rights in the LLC and ordering that his membership rights "lie fallow" and remand for entry of a charging order consistent with this opinion.

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.

MILLIE E. HERSHNER, PETITIONER
v.
N.C. DEPARTMENT OF ADMINISTRATION AND N.C. HUMAN RELATIONS COMMISSION, RESPONDENT

No. COA13-790

Filed 4 March 2014

1. Administrative Law—termination of state employment—adoption of findings and conclusions

In an action arising from the termination of a state employee, the trial court did not err in adopting the findings and conclusions of the administrative law judge and State Personnel Commission where unchallenged findings of fact supported the decisions.

2. Public Officers and Employees—termination of employment—no just cause

The trial court did not err by affirming the decisions of the administrative law judge and the State Personnel Commission that respondent state agency lacked just cause to terminate petitioner's employment. Respondent did not prove that allegedly confidential information disclosed by petitioner was confidential, did not prove that a rule allegedly violated by petitioner was in effect, or that petitioner in fact disobeyed an instruction as contended.

3. Administrative Law—initial quorum—recusals

The State Personnel Commission (SPC) had a quorum where seven members were present when business was commenced, exceeding the six required for a quorum. That quorum was not nullified by the subsequent recusal of two members.

Appeal by respondent from order entered 11 January 2013 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 December 2013.

John Walter Bryant and Amber J. Ivie for petitioner-appellee.

Roy Cooper, Attorney General, by Ann Stone, Assistant Attorney General, for respondent-appellant.

STEELMAN, Judge.

Where unchallenged findings of fact support the decisions of the administrative law judge and state personnel commission, the trial court did not err in adopting their findings of fact and conclusions of law. Where respondent failed at trial to present evidence to support the alleged bases for petitioner's termination, the trial court did not err in affirming the decisions of the administrative law judge and state personnel commission that petitioner's termination was wrongful. Where the state personnel commission had a quorum at the time it commenced business, it was authorized to issue a decision.

I. Factual and Procedural Background

Millie Hershner (petitioner) was employed by the North Carolina Department of Administration (DOA), Human Relations Committee (HRC) (collectively, respondent) as a staff attorney. Citizens who believe their rights under the Fair Housing Act have been violated can file complaints with the HRC. As part of her employment duties, petitioner assisted investigators in these cases and helped to determine whether HRC should hear them.

In 2005, petitioner was hired as an Attorney I for respondent. She was selected for this position over another applicant, Richard Boulden. In 2006, Boulden was selected for an Attorney II position, making him petitioner's supervisor. Prior to 2006, petitioner had only one disagreement with Boulden. At the time, Boulden, a case investigator, had determined that a case had cause, while petitioner determined that it did not. Subsequent to his promotion, Boulden did not train petitioner, or meet with her to establish any kind of work plan or standards, as required by respondent's "Performance Management System." However, on Boulden's first review of petitioner's work, he gave her a negative performance rating. Petitioner subsequently advised Boulden that he could not rate her performance negatively without stating the basis for the rating; Boulden then amended the performance ratings, so that they were positive, but in the lower range.

Following the low rating, petitioner contacted the complainants in cases on which she had previously worked. One such complainant, Virginia Radcliffe (Radcliffe), had threatened to sue HRC. On 3 January 2008, Boulden contacted Radcliffe, informed her that HRC was no longer working on her case, and told her that he would be the sole point of contact between Radcliffe and respondent. Boulden claimed at the hearing that he had overheard petitioner speaking with Radcliffe on the telephone later that day, although he did not raise the issue with petitioner at the time.

On 9 June 2008, Boulden informed petitioner of a disciplinary meeting concerning her conversation with Radcliffe on 3 January 2008. On 11 June 2008, petitioner received a Final Written Warning for unacceptable personal conduct, specifically insubordination, with regard to her continued contact with Radcliffe. This letter outlined five numbered rules that petitioner had been expected to follow. There was no evidence presented that petitioner had violated any of these rules, or that petitioner had any subsequent contact with Radcliffe.

On 24 August 2009, petitioner was dismissed for unacceptable personal conduct, including conduct unbecoming a State employee that was detrimental to State service, violation of a known work rule, and insubordination. Specifically, three acts were alleged as the basis for this dismissal: (1) petitioner sent two letters to Radcliffe, containing allegedly confidential information; (2) petitioner contacted Stephanie Williams (Williams), another complainant, and informed her that she believed Williams' case had "cause," before a final determination had been made by HRC; and (3) petitioner had been instructed to work on a single assignment, to the exclusion of others, and yet continued to work on other assignments. John Campbell, Executive Director of HRC (Campbell) admitted that petitioner was not fired due to a failure to meet expectations, a failure to do her job, or unsuccessful job performance due to lack of skill or effort. Further, an HRC Supervising Investigator, Maggie Faulcon, observed that she had "never heard of anyone ever even being disciplined for discussing the likelihood of the determination with a party, and for certain, never heard of anyone losing their job over such a thing."

On 4 December 2009, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH). On 3 February 2012, Administrative Law Judge Donald W. Overby (ALJ) issued his decision, and held that respondent's dismissal of petitioner was unwarranted and should be reversed. Respondent appealed the ALJs decision to the State Personnel Commission. On 23 May 2012, the SPC issued its decision and order, adopting the findings of fact and conclusions of law of the ALJ, and affirming the decision in favor of petitioner. Respondent appealed to the Superior Court of Wake County. On 11 January 2013, the trial court affirmed the decision of the SPC, and ordered that petitioner be reinstated with back pay and benefits.

Respondent appeals.

II. Standard of Review

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006).

"[W]e consider *de novo* whether the Commission erred in reaching its conclusion that 'just cause' existed for petitioner's termination." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 678, 443 S.E.2d 114, 120 (1994).

III. Adoption of Findings and Conclusions by Trial Court

[1] In its first argument, respondent contends that the trial court erred in adopting the findings of fact and conclusions of law of the ALJ and SPC. We disagree.

The ALJ made one hundred and twenty five findings of fact, which were adopted by the SPC, and ultimately adopted by the trial court. Respondent challenges the evidentiary support for only ten of these findings. Those findings which respondent does not challenge are binding upon this court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Even assuming *arguendo* that respondent is correct, and that these ten findings were not supported by evidence in the record, there were one hundred and fifteen unchallenged findings. We hold that these remaining findings of fact support the ALJ's conclusions of law. These conclusions of law support the decisions of the SPC and trial court to affirm the ALJ's decision.

This argument is without merit.

IV. Affirming the ALJ and SPC

[2] In its second argument, respondent contends that the trial court erred in affirming the decisions of the ALJ and SPC. We disagree.

Respondent contends that petitioner was dismissed due to violations of guidelines, particularly those in the Final Written Warning dated 11 June 2008, relating to the disclosure of confidential information and contacting a complainant. Respondent contends that petitioner's violation of these guidelines constituted just cause for petitioner's dismissal.

At trial, respondent supported its claim that petitioner's conduct was unbecoming a State employee with two letters, written by petitioner to Radcliffe, which respondent contends contained confidential

information about cases and derogatory remarks about petitioner's supervisor and HRC. However, respondent failed to offer any evidence that the information in these letters was confidential. Respondent also failed to present evidence that these letters were detrimental to State service simply because they may have contained negative remarks concerning petitioner's supervisor. The ALJ concluded that "[t]he Respondent failed to meet its burden to establish that any information released by the Petitioner . . . was confidential to anyone other than the Petitioner, who is free to waive that confidentiality as she chooses." The ALJ also concluded that "[t]he Respondent failed to meet its burden to establish that the release of information by Ms. Hershner was detrimental to state service simply because it may have been negative regarding one Supervisor[.]" These conclusions were affirmed by the SPC and trial court.

Respondent also contended that petitioner was dismissed, in part, for the willful violation of a known work rule, specifically for her alleged disclosure to Williams of the status of her case. However, respondent presented no evidence that this rule applied to HRC attorneys such as petitioner. Evidence in the record instead supported a finding that this rule applied to the non-attorney investigators, and that investigators regularly disregarded this rule. Petitioner's supervisor testified that he had never told petitioner that this policy was grounds for dismissal. One investigator testified that such a policy did not apply to attorneys, and that she had not heard of investigators being disciplined for discussing preliminary determinations with complainants. The ALJ concluded, based upon this evidence, that the State had not met its burden of establishing that this policy existed, or that such a policy was enforced prior to being used as a basis to discipline petitioner.

Finally, respondent alleged as its third basis for petitioner's dismissal that petitioner was insubordinate, in that she willfully refused to carry out a reasonable order from her supervisor. Respondent contends that this directive was to work on nothing but an appellate brief for one specific case. However, the directive was for petitioner to make the brief her "top priority," not to cease all other work. The ALJ found that the case in question was ultimately dismissed as a result of her supervisor's conduct, not as a result of petitioner's work. The ALJ further concluded that:

> The Respondent failed to establish its burden that the Petitioner was insubordinate in her handling of the writing of the Appellate Brief, when she had been commended by the Executive Director of the Agency for postponing her vacation to finish a brief, putting her work ahead of

> her personal life, she had never missed a filing deadline in her work at the HRC, the Petitioner still had fifteen days remaining within which to finish the brief before its due date when she was placed on administrative leave by the Agency Counsel, the HRC Agency Counsel eventually decided to abandon the appeal without ever filing the brief, and the very day the Petitioner was placed on Administrative leave she was told by the Agency Counsel that the brief was only a "top priority" not her only priority.

We have previously held that, "according to the Commission's regulations, 'just cause' for dismissal has been divided into two basic categories—unsatisfactory job performance and personal conduct (misconduct) detrimental to State service." *Amanini*, 114 N.C. App. at 679, 443 S.E.2d at 120. In *Amanini*, we held that there was a distinction between the two categories:

> The JOB PERFORMANCE category is intended to be used in addressing performance-related inadequacies for which a reasonable person would expect to be notified of and allowed an opportunity to improve. PERSONAL CONDUCT discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings.

Id. at 679, 443 S.E.2d at 120-21. In the instant case, the conduct at issue involved job performance, the first category. Alleged infractions under this category require prior notice and opportunity to improve. As the ALJ found, however, petitioner had never received such warning.

We hold that petitioner's termination, based upon disclosure of information which respondent failed to prove was confidential, violation of a rule which respondent failed to prove was in effect, and disobedience of an instruction which was not, in fact, disobeyed, was not supported by just cause. The trial court did not err in affirming the decisions of the ALJ and SPC that respondent lacked just cause to terminate petitioner's employment.

This argument is without merit.

C. Whether a Quorum Existed

[3] In its third argument, respondent contends that the SPC lacked the authority to make its decision because a quorum of its members was not present. We disagree.

Of the nine members of the SPC, seven were present when petitioner's case was heard. Once the session of the SPC had opened, those with conflicts were asked to recuse themselves; two did so, leaving five remaining SPC members. Respondent contends that five members did not constitute a quorum, and that the SPC lacked authority to rule on petitioner's case.

At the time of petitioner's case, the SPC required a quorum of six in order to hear cases. N.C. Gen. Stat. § 126-2(f) (2011).[1] The term "quorum" is not defined in Chapter 126 of the North Carolina General Statutes. Black's Law Dictionary defines a quorum as "[t]he minimum number of members . . . who must be present for a deliberative assembly to legally transact business[,]" but does not state at what time during the proceedings a quorum should be determined. *Black's Law Dictionary*, 1370 (9th ed. 2009). However, several other North Carolina statutes note that once a person is deemed present for quorum purposes, he is deemed present for the remainder of that meeting. *See* N.C. Gen. Stat. §§ 55-7-25(b), 55A-7-22(a) (2013). We hold that a quorum of the SPC is to be determined at the beginning of a meeting; once the meeting is opened, the SPC may conduct business regardless of subsequent recusals that may reduce the number of members voting on a particular issue below the number required for a quorum.

In the instant case, when the SPC commenced business, seven members were present, exceeding the six required for a quorum. At that time, a quorum was established. Respondent cites no authority to support the contention that this quorum was subsequently nullified by the recusal of two of its members. We hold that the SPC had a quorum, and therefore had the authority to hear petitioner's case.

This argument is without merit.

NO ERROR.

Judges GEER and ERVIN concur.

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1. In August of 2013, N.C. Gen. Stat. § 126-2(f) was amended to read "Five members of the Commission shall constitute a quorum." N.C. Gen. Stat. § 126-2(f) (2013). However, at the time of petitioner's hearing before the SPC, the statute required six members to constitute a quorum.

HORNER INT'L CO. v. McKOY

[232 N.C. App. 559 (2014)]

HORNER INTERNATIONAL COMPANY, Plaintiff
v.
BILL M. MCKOY, Defendant

No. COA13-964

Filed 4 March 2014

1. Appeal and Error—interlocutory orders and appeals—preliminary injunctions—trade secrets—substantial right

The merits of both plaintiff's appeal and defendant's cross-appeal from preliminary injunction rulings were addressed where the case involved trade secret agreements between an employer and employee.

2. Employer and Employee—non-compete agreement—too broad—unenforceable

The trial court did not err in a case involving the food processing and flavor industry by denying plaintiff's motion for a preliminary injunction as to a non-compete agreement where the agreement was overbroad and unenforceable. The agreement contained no geographical limitation, purported to bar defendant from doing wholly unrelated work for any firm that sold flavor materials, even if that firm's products did not compete with those of plaintiff, and purported to bar defendant from having even an indirect financial interest in such a business.

3. Trade Secrets—likelihood of success on the merits—specific trade secrets—threat of misappropriation

The trial court did not err by concluding that a plaintiff seeking a preliminary injunction showed a likelihood of success on the merits of its claim for violations of the Trade Secrets Protection Act where plaintiff pled the trade secrets at risk with sufficient particularity. Furthermore, defendant's knowledge of the trade secrets and the opportunity to use those in his work for his new employer created a sufficient threat of misappropriation rather than merely the opportunity for misappropriation.

4. Trade Secrets—injunction—not too nebulous

The trial court's injunction in a trade secrets action was not too broad and nebulous where the trade secrets were described with sufficient specificity that defendant would not be prevented from working with any standard processes with his new employer.

Judge STEELMAN concurring in a separate opinion.

Appeal by Plaintiff and cross-appeal by Defendant from preliminary injunction entered 14 June 2013 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 8 January 2014.

Wallace & Nordan, L.L.P., by John R. Wallace and Joseph A. Newsome, for Plaintiff.

Robinson Bradshaw & Hinson, P.A., by J. Dickson Phillips and Brian L. Church, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

This case concerns the grant in part and denial in part of a motion for a preliminary injunction in a dispute between a company and its former employee. Plaintiff Horner International Company manufactures flavor materials for use in tobacco and food products. Defendant Bill M. McKoy was employed by Plaintiff from May 2006 until October 2012. In 2006, Defendant, who had worked in the food processing and flavor industry since the early 1980s, assisted Plaintiff with setting up a new manufacturing plant in Durham and served as plant manager thereafter. In May 2006, Defendant signed a Non-Competition Agreement ("NCA") and Agreement Not to Disclose Trade Secrets ("ANDTS") as conditions of his employment with Plaintiff. Defendant resigned from Plaintiff on 8 October 2012 and, thereafter, began employment with Teawolf, LLC, a Delaware Limited Liability Company with its principal place of business in New Jersey. Defendant's work for Teawolf involves installing, maintaining, and optimizing equipment used in the production of new flavor products. Both Plaintiff and Teawolf sell flavor materials derived from cocoa, chocolate, coffee, tea, fenugreek, ginseng, and chamomile.

On 20 May 2013, Plaintiff filed (1) a complaint; (2) a motion for temporary restraining order ("TRO"), preliminary injunction, and permanent injunction; and (3) a motion for an order allowing expedited discovery of Defendant. The motions for TRO and expedited discovery were allowed on 22 May 2013, and Defendant was restrained from violating the NCA and ANDTS. Following a hearing on the motion for preliminary injunction in early June 2013, the trial court entered an order on 14 June 2013, *nunc pro tunc*, to 4 June 2013, which enjoined Defendant from disclosing Plaintiff's confidential information and trade secrets, but denied the motion as to

the NCA. On 27 June 2013, Plaintiff filed notice of appeal from the trial court's denial of the preliminary injunction as to the NCA. On 8 July 2013, Defendant filed notice of cross-appeal from the grant of the preliminary injunction as to Plaintiff's confidential information and trade secrets.

Grounds for Appellate Review

[1] Preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives the appellant of a substantial right which he would lose absent review prior to final determination." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004) (citations and internal quotation marks omitted).

> The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and internal quotation marks omitted). Our Supreme Court went on to hold that

> where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, [where a] case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, [appellate courts should] address the issues.

Id. at 401, 302 S.E.2d at 759. We believe the same reasoning applies to agreements between an employer and employee regarding protection of

the employer's alleged trade secrets. Accordingly, we address the merits of both Plaintiff's appeal and Defendant's cross-appeal.

Discussion

In its appeal, Plaintiff argues that the trial court erred in denying its motion for a preliminary injunction as to the NCA, contending that (1) a non-compete agreement can be properly enforced by means of a preliminary injunction and (2) the NCA is valid and enforceable. In his cross-appeal, Defendant argues that the court erred in enjoining him from disclosure of Plaintiff's confidential information and trade secrets, contending that (1) Plaintiff failed to sufficiently identify the trade secrets allegedly at risk of disclosure, (2) Defendant's mere "opportunity to misappropriate" cannot support the court's determination of Plaintiff's likelihood of success on the merits of its claims, and (3) the preliminary injunction entered was too "broad and nebulous." As discussed herein, we affirm.

I. Standard of Review

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the *status quo* of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Id. at 401, 302 S.E.2d at 759-60 (citations, internal quotation marks, and emphasis omitted).

"The standard of review from a preliminary injunction is essentially *de novo*." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted). Thus, "on appeal from an order of a superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760 (citation omitted). "Nevertheless[,] a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362 (citation and internal quotation marks omitted).

II. Plaintiff's Appeal

[2] Plaintiff argues that the trial court erred in denying its motion for a preliminary injunction as to the NCA, contending that (1) non-compete agreements *may* be properly enforced by means of a preliminary injunction and (2) the NCA is valid and enforceable. While Plaintiff's first contention is correct, we disagree with the second.

Plaintiff asserts that this Court should reverse the denial of its motion and remand for entry of a preliminary injunction as to the NCA, citing the following discussion from *A.E.P. Indus., Inc.*:

> [T]here are two important aspects of this case which distinguish it substantively and procedurally from the more usual case in which a preliminary injunction is sought. The first is that the ultimate relief [the] plaintiff seeks is *enforcement* of a covenant not to compete. The promised performance by the employee is forbearance to act and the remedy is one for specific performance of the contract in the nature of an injunction prohibiting any further violation of it.
>
> The second distinguishing feature of this case is that the decision made at the preliminary injunction stage of the proceedings becomes, in effect, a determination on the merits. This is so because the validity of the covenant depends, among other things, on the duration of the time limitation which, in order to be reasonable, must be brief. The case is clothed with immediacy. Frequently the time limitation will have expired prior to final determination. Moreover, because the primary relief sought by the plaintiff is a permanent injunction, many of the considerations involved in the decision to grant or deny the preliminary injunction parallel those involved in a final determination on the merits. Specifically, the court must decide whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law.

A.E.P. Indus., Inc., 308 N.C. at 405-06, 302 S.E.2d at 762 (citations omitted; emphasis in original). Thus, our Supreme Court held:

> Because of the need for immediacy of appropriate relief in cases dealing with covenants not to compete, as for example in the present case where [the] defendant contracted

> not to engage in a competitive business for only eighteen months, the law as stated above is particularly applicable. We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to [the] plaintiff; where no "legal" (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, [the] plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

Id. at 410, 302 S.E.2d at 764. Thus, valid non-compete agreements *can be* enforced by a preliminary injunction, and Defendant freely concedes this point. What is not discussed in *A.E.P. Indus.*, *Inc.*, but forms the central question in this appeal, is the second prong of Plaintiff's appellate argument: whether the NCA is valid.

> Covenants not to compete between an employer and employee are not viewed favorably in modern law. To be valid, the restrictions on the employee's future employability by others must be no wider in scope than is necessary to protect the business of the employer. If a non-compete covenant is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it.

VisionAIR, *Inc.*, 167 N.C. App. at 508, 606 S.E.2d at 362 (citations and internal quotation marks omitted). In that case, this Court observed that the non-compete clause in question provided that the defendant

> may not "*own*, *manage*, *be employed by or otherwise participate in*, *directly or indirectly*, *any business similar to Employer's . . . within the Southeast*" for two years after the termination of his employ with VisionAIR. Under this covenant [the defendant] would not merely be prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; [the defendant] would be prevented from doing even wholly unrelated work at any firm similar to VisionAIR. Further, by preventing [the defendant] from even "indirectly" owning any similar firm, [the defendant] may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to

> VisionAIR. Such vast restrictions on [the defendant] cannot be enforced.

Id. at 508-09, 606 S.E.2d at 362-63 (footnote omitted; emphasis added).

The NCA here is quite similar to the non-compete covenant in *VisionAIR, Inc.* The NCA purports to bar Defendant from "directly or indirectly" being employed by or acting "as an advisor, consultant, or salesperson for, or *becom*[*ing*] *financially interested*, *directly or indirectly*, in any person, proprietorship, partnership, firm, or corporation engaged in, or about to become engaged in, the business of selling flavor materials" for a period of 18 months after his employment with Plaintiff ended. (Emphasis added).

We perceive no meaningful distinction between the NCA here and the non-compete covenant held to be overbroad in *VisionAIR, Inc.* The duration of time is slightly shorter (18 months here versus two years in *VisionAIR, Inc.*). However, the NCA contains no geographical limitation, unlike the restriction of the *VisionAIR, Inc.* covenant to similar businesses in "the Southeast." More importantly, just as, "[u]nder th[e] covenant [the defendant in VisionAIR] would not [have] merely be[en] prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; [the defendant] would [have] be[en] prevented from doing even wholly unrelated work at any firm similar to VisionAIR[,]" the NCA purports to bar Defendant from doing wholly unrelated work for any firm that sells "flavor materials[,]" even if that firm's products do not compete with those of Plaintiff. Finally, the NCA purports to bar Defendant from having even an indirect financial interest in such a business, a condition specifically rejected by the Court in *VisionAIR, Inc. See id.* at 509, 606 S.E.2d at 362-63 ("Further, by preventing [the defendant] from even 'indirectly' owning any similar firm, [the defendant] may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAIR. Such vast restrictions on [the defendant] cannot be enforced.").

Plaintiff further cites *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 568 S.E.2d 267 (2002) and *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 638 S.E.2d 617 (2007) in support of its position. These cases are distinguishable.

In *Okuma Am. Corp.*, this Court observed:

> *When considering the time and geographic limits outlined in a covenant not to compete*, we look to six overlapping factors:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Id. at 89, 638 S.E.2d at 620 (citation and internal quotation marks omitted; emphasis added). In *Precision Walls*, this Court considered only "the reasonableness of time and territory restrictions" and a bar on employment with competitors. *Precision Walls, Inc.*, 152 N.C. App. at 637, 639, 568 S.E.2d at 272, 273. As noted *supra*, it is the broad sweep of the activities covered by the NCA which renders the agreement overbroad and thus unenforceable. Accordingly, these cases are largely inapposite. However, we do find it instructive that the Court in *Okuma Am. Corp.* noted that "a covenant not to compete is overly broad [when], rather than attempting to prevent [the former employee] from competing for []business, it requires [the former employee] to have no association whatsoever with any business that provides [similar] services . . . ." 181 N.C. App. at 91, 638 S.E.2d at 621 (citations and internal quotation marks omitted). We believe this is the situation presented by the NCA here.

In sum, because the NCA is overbroad and thus unenforceable, Plaintiff cannot demonstrate likely success on the merits. *See VisionAIR, Inc.*, 167 N.C. App. at 508, 606 S.E.2d at 362. We conclude that the trial court did not err in denying Plaintiff's motion for a preliminary injunction as to the NCA, and, accordingly, that portion of the order is affirmed.

III. Defendant's Cross-Appeal

In his cross-appeal, Defendant advances two bases for his argument that the trial court erred in granting the preliminary injunction as to confidential information and trade secrets obtained by Defendant during his employment with Plaintiff: that Plaintiff failed to show a likelihood of success on the merits of its claim for violations of the North Carolina Trade Secrets Protection Act ("TSPA") and that the trial court's injunction was too broad and nebulous. We disagree.

A. Specificity of allegations

[3] Defendant first contends that the trial court erred in concluding that Plaintiff showed a likelihood of success on the merits of its claim for violations of the TSPA because Plaintiff failed to plead the trade secrets at risk of disclosure with sufficient particularity and alleged only the

opportunity to misappropriate the trade secrets. We disagree with both contentions.

The TSPA

> provides that the owner of a trade secret shall have remedy by civil action for misappropriation of the secret.
>
> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret. The TSPA also provides that actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . .

Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (citations and internal quotation marks omitted), *disc. review denied*, 363 N.C. 139, 674 S.E.2d 422 (2009).

> To determine what information should be treated as a trade secret, a court should consider the following factors:
>
> (1) the extent to which information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
>
> (3) the extent of measures taken to guard secrecy of the information;

> (4) the value of information to the business and its competitors;
>
> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (citations and internal quotation marks omitted). "[A] complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is insufficient to state a claim for misappropriation of trade secrets." *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 585-86 (citation and internal quotation marks omitted). Rather, to successfully plead misappropriation of trade secrets, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *VisionAIR, Inc.*, 167 N.C. App. at 510-11, 606 S.E.2d at 364 (citation and internal quotation marks omitted). Regarding specificity of those trade secrets allegedly at risk, for example, allegations that an employee "acquired knowledge of [the employer's] business methods; clients, their specific requirements and needs; and other confidential information pertaining to [the employer's] business" are too "broad and vague" to allege a TSPA claim. *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586.

Here, in contrast, the verified amendment to Plaintiff's complaint alleges with great detail and specificity the information Defendant has allegedly provided to his new employer, describing, *inter alia*, various raw materials and raw material treatments; extraction, filtration, separation, and distillation techniques; and methods for compounding of flavors, packaging, and plant utility. Further, the amendment alleged that these processes and methods were used in the production of flavor materials derived from seven specifically identified substances, such as cocoa, ginseng, and chamomile. Accordingly, we reject Defendant's assertions that Plaintiff failed to properly plead its claims under the TSPA.

Regarding allegations supporting the threat of misappropriation, Defendant contends that the trial court erred in granting the preliminary injunction because Plaintiff could only show "opportunity" for misappropriation. As noted *supra*, the TSPA provides that "*actual or threatened misappropriation of a trade secret may be preliminarily*

enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ." N.C. Gen. Stat. § 66-154(a) (2013) (emphasis added). Further,

> [m]isappropriation of a trade secret is *prima facie* established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.
>
> This *prima facie* evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law.

N.C. Gen. Stat. § 66-155 (2013) (italics added). Courts have upheld grants of a preliminary injunction where plaintiffs have presented some evidence that former employees have or necessarily will use trade secrets. *Compare Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 597-98, 424 S.E.2d 226, 230-31 (1993) (finding a *prima facie* case for misappropriation existed which supported a preliminary injunction where the defendant helped develop software while working for the plaintiff and then began producing identical software after leaving the plaintiff's employment); *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 467, 579 S.E.2d 449, 453 (2003) (upholding denial of preliminary injunction where product design differences between the defendant's former and new employers "render[ed] the alleged trade secrets largely non-transferable").

Here, unlike in *Analog Devices, Inc.*, there are no product design differences which would render "non-transferable" the trade secrets of Plaintiff which Defendant possesses. Defendant's strenuous assertions on appeal that Plaintiff produced no direct or circumstantial evidence of his "acquisition, use, or disclosure of [Plaintiff's] information" is misplaced. The TSPA permits preliminary injunctions where a *prima*

facie case for "actual or *threatened* misappropriation of a trade secret" is established. N.C. Gen. Stat. § 66-154(a) (emphasis added). In turn, that *prima facie* case is established by showing that a defendant "(1) [k]nows or should have known of the trade secret; and (2) [*h*]*as had a specific opportunity to acquire it for disclosure or use* or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C. Gen. Stat. § 66-155 (emphasis added). Defendant's knowledge of trade secrets and opportunity to use those in his work for his new employer create a threat of misappropriation, and thus the trial court's grant of a preliminary injunction during the pendency of the action was proper.[1]

B. Specificity of the preliminary injunction

[4] Defendant also argues that the court's injunction was too broad and nebulous, citing *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 228 S.E.2d 478 (1976).

In *Travenol Labs., Inc.*, the plaintiff-employer

> sought and the trial court . . . granted an injunction to prevent [the employee] from revealing "all information regarded as confidential . . . including but not limited to information concerning the mechanical modification of the Westphalia centrifuge . . ." and to prevent [the new employer] from receiving the same. Again [the Court] weigh[ed] the factors relevant to the likelihood of disclosure in determining the appropriateness of injunctive relief. Ordinarily, mere employment by a competitor alone will not create a likelihood of disclosure sufficient to support an injunction. An employee may take from his employment general knowledge and skills. [The plaintiff-employer] has clearly shown that it is probable that at trial it will establish that the mechanical modification of the Westphalia centrifuge is a trade secret. This modification has been the subject of research and development and would be of current use to [the new employer] in its production process. [The employee] has worked in the production field for 22 years. Since this is precisely the field in which [the employee] will be employed by [the new employer], not merely as a

1. Defendant also identifies two e-mails, the contents of which Defendant asserts were improperly proved by testimony. However, the court did not rely on the e-mails to support its conclusions of law. Accordingly, we need not consider the admissibility of this evidence.

> worker but at a high level supervisory position, the possibility of disclosure is high even absent any underhanded dealing in the circumstances of his termination of employment with [the plaintiff-employer].
>
> [The plaintiff-employer] has also presented evidence showing that several competitors have tried without success to make a similar modification. The disclosure of this modification would cost [the plaintiff-employer] a competitive advantage worth many thousands of dollars. We f[ou]nd, therefore, that with respect to the modification of the Westphalia centrifuge, the trial court was correct in issuing a preliminary injunction in [the plaintiff-employer's] favor.
>
> We [did] not agree, however, that [the plaintiff-employer] made an adequate showing to support that part of the injunction broadly prohibiting disclosure of "all information regarded as confidential." This provision presents problems of scope and nebulosity.
>
> The showing made with respect to the centrifuge modification rested upon its use in production, [the employee's] high level position in production, and the failure of competitors to make a similar modification. These factors have no bearing to the more broadly phrased part of the injunction . . . . *Sub judice*, [the plaintiff-employer] apparently considers its entire production process as secret and confidential. Yet it appears that [the plaintiff-employer, the new employer,] and other competing enterprises use the standard . . . process in their plasma fractionation operations. Though there may be some variation in the production process among the competing enterprises, [the plaintiff-employer] has failed to show unique processing, other than the modified Westphalia centrifuge, the disclosure of which would result in irreparable damage.

Id. at 694-95, 228 S.E.2d at 485 (citations omitted). This Court went on to "emphasize that the facts and circumstances of each case dictate the propriety of injunctive relief[.]" *Id.* at 695, 228 S.E.2d at 485.

Here, looking at the individual facts and circumstances of the matter, the enjoining of Defendant from "[u]sing, disclosing, or transmitting for any purpose any confidential information obtained by [Defendant]

from [Plaintiff]" plainly applies to the methods, processes, and techniques described as trade secrets in the preliminary injunction's findings of fact and conclusions of law. As discussed *supra*, those trade secrets are described with sufficient specificity that Defendant will not be prevented from working with any "standard processes" with his new employer. Accordingly, we overrule this argument.

The trial court's order is

AFFIRMED.

Judge DAVIS concurs.

STEELMAN, Judge, concurring.

I fully concur with the legal reasoning and result set forth in the opinion, but write separately to again express concern over the state of our law of restrictive employment covenants in the context of our increasingly integrated global economy.

At the time that our law in the area of restrictive employment covenants was developed, much of our commerce was local, and restrictive covenants were imposed only to protect specific local interests. Any covenants that attempted to protect broader commercial interests were held to be invalid as an improper restraint of trade. Today's economy is global in nature. In the instant case, plaintiff conducts a very specialized niche type of business, but its scope is worldwide, rather than being focused upon a few counties in North Carolina. Our Supreme Court should re-evaluate the law of restrictive covenants in the context of changed economic conditions to allow restrictions upon competing business activities for a specific period of time, limited to a specific, narrow type of business, but with fewer geographic limitations.

IN RE APPLICATION OF DUKE ENERGY CORP.

[232 N.C. App. 573 (2014)]

IN THE MATTER OF APPLICATION OF DUKE ENERGY CORPORATION AND PROGRESS ENERGY, INC., TO ENGAGE IN A BUSINESS COMBINATION TRANSACTION AND TO ADDRESS REGULATORY CONDITIONS AND CODES OF CONDUCT

No. COA13-566

Filed 4 March 2014

1. Utilities—merger—costs—benefits and protections of retail ratepayers

The North Carolina Utilities Commission did not err by concluding that there was sufficient evidence of costs to allow the Commission to determine that the merger between Duke Energy Corporation and Progress Energy, Inc. met the statutory standard for approval considering the benefits and protections afforded to retail ratepayers.

2. Utilities—merger—benefits to public—fuel cost savings—funds contributed to community

The North Carolina Utilities Commission did not err by concluding that there was substantial evidence before the Commission that the merger between Duke Energy Corporation and Progress Energy, Inc. would result in benefits to the public considering the significant guaranteed fuel cost savings and potential non-fuel cost savings, as well as the commitments by the parties to contribute funds to support the community, workforce development, and low income energy assistance.

3. Utilities—merger—public convenience and necessity

The North Carolina Utilities Commission did not err by concluding that the merger between Duke Energy Corporation and Progress Energy, Inc. was justified by public convenience and necessity after considering concerns including whether the merger allowed the applicants to manipulate prices and harm local markets, would result in job losses, and harmed low income families.

4. Jurisdiction—standing—aggrieved party

Although Orangeburg contended the North Carolina Utilities Commission erred by concluding that the pertinent regulatory conditions did not restrict the sale of low cost wholesale power to certain Commission-favored wholesale customers in violation of the Commerce Clause and Supremacy Clause of the U.S. Constitution, Orangeburg lacked standing to appeal the merger order

since it was not an aggrieved party. Therefore, Orangeburg's appeal was dismissed.

Appeal by City of Orangeburg, South Carolina and N.C. Waste Awareness and Reduction Network from order entered 29 June 2012 by the N.C. Utilities Commission. Heard in the Court of Appeals 6 November 2013.

Allen Law Offices, PLLC, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen; Duke Energy Corporation Deputy General Counsel Lawrence B. Somers; and Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney, III, for Appellee Duke Energy Corporation.

Spiegel & McDiarmid, LLP, by James N. Horwood and Peter J. Hopkins, pro hac vice; and Schiller & Schiller, PLLC, by David G. Schiller, for Intervenor-Appellant City of Orangeburg, South Carolina.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle, for Intervenor-Appellant N.C. Waste Awareness Reduction Network.

Public Staff Chief Counsel Antoinette R. Wike and Staff Attorney Gisele L. Rankin, for Appellee Public Staff-North Carolina Utilities Commission.

McCULLOUGH, Judge.

Intervenors City of Orangeburg, South Carolina ("Orangeburg") and N.C. Waste Awareness and Reduction Network ("NC WARN") appeal from order of the N.C. Utilities Commission (the "Commission") entered 29 June 2012. For the following reasons, we affirm the Commission's order and dismiss Orangeburg's appeal.

I. Background

In accordance with N.C. Gen. Stat. § 62-111(a), on 4 April 2011, Duke Energy Corporation ("Duke") and Progress Energy, Inc. ("Progress") (collectively the "applicants") submitted an application to the Commission for authorization to: "engage in a business combination transaction; revise and apply Duke Energy Carolinas, LLC's ("DEC") Regulatory Conditions and Code of Conduct to Progress and Progress Energy Carolinas, Inc. ("PEC"); and nullify PEC's Regulatory Conditions and

Code of Conduct." DEC and PEC, wholly-owned subsidiaries of Duke and Progress, respectively, are electric utilities organized, existing, and operating under the laws of the State of North Carolina. Pursuant to the terms of the Agreement and Plan of Merger (the "merger agreement") entered into by the applicants and attached to the application as Exhibit 1, the business combination transaction (the "merger") would occur at the holding company level with Diamond Acquisition Corporation, a wholly-owned subsidiary of Duke, merging with and into Progress with the result that Progress survives the merger as a wholly-owned subsidiary of Duke.[1] Progress and PEC would remain separate legal entities following the merger, with the plan that PEC and DEC would merge into a single legal entity in the future.

On 27 April 2011, the Commission entered an Order Scheduling Hearing, Establishing Procedural Deadlines, and Requiring Public Notice. By the terms of the order, a Commission hearing on the application was scheduled to begin on 20 September 2011.

In the interim, the Commission allowed the intervention of thirty-seven (37) different parties, including the Commission's public staff and appellants NC WARN and Orangeburg. Regarding appellants, NC WARN filed a petition to intervene on 27 May 2011 that the Commission granted by order entered 7 June 2011; Orangeburg filed a petition to intervene on 5 August 2011 that the Commission granted by order entered 12 August 2011. Also in the interim, on 2 September 2011, the applicants and the public staff entered into an agreement and stipulation of settlement (the "Stipulation") for consideration by the Commission pursuant to N.C. Gen. Stat. § 62-69.

By Commission order entered following a pre-hearing conference on 19 September 2011, the application, certain exhibits, the revised Joint Dispatch Agreement, the Stipulation, and the corrected Regulatory Conditions and Code of Conduct were admitted into evidence as if introduced at the hearing on the application set to begin the following day.

The Commission hearings on the application then began as scheduled on 20 September 2011. The hearings lasted three days, concluding on 22 September 2011. A supplemental hearing was later held on 25 June 2012.

On 27 June 2012, NC WARN filed an offer of proof alleging that many facts relevant to the merger had changed significantly since the

1. Duke would acquire all issued and outstanding common stock of Progress in exchange for Duke common stock.

September 2011 hearings and, therefore, the Commission should reopen the hearing process. The Commission, however, determined the offer of proof was defective and on 29 June 2012 entered an Order Approving Merger Subject to Regulatory Conditions and Code of Conduct (the "merger order"). In the merger order, which includes 41 findings of fact and over 80 pages of analysis discussing the evidence and reasoning supporting the findings, the Commission stated its conclusions as follows:

> The Commission concludes that the Stipulation, Regulatory Conditions, Code of Conduct, Supplemental Stipulation, as amended, guaranteed fuel and fuel-related savings, Applicants' contributions to various work force development, low-income assistance, environmental and charitable programs, and the potential for future merger cost savings for ratepayers are sufficient to ensure that: (1) the merger will have no adverse impact on the rates and service of DEC's and PEC's North Carolina retail ratepayers; (2) DEC's and PEC's North Carolina retail ratepayers are protected as much as reasonably possible from potential costs and risks resulting from the merger; and (3) there are sufficient benefits from the merger to offset the potential costs and risks. Therefore, the Commission further concludes that the proposed business combination between Duke and Progress is justified by the public convenience and necessity.

In accordance with the terms of the merger order, the applicants filed a statement notifying the Commission they accepted and agreed with all terms, conditions, and provisions of the merger order on 2 July 2010, the same day the merger was finalized.

On 26 July 2012, NC WARN filed a motion for reconsideration of the merger order. The Commission denied NC WARN's motion by order entered 10 December 2012.

Orangeburg and NC WARN appealed from the merger order to this Court.[2]

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2. NC WARN also appealed from the Commission's denial of its motion for reconsideration. The issues related to the denial of NC WARN's motion for reconsideration, however, were dismissed by the Commission on 29 April 2013 following Duke's 7 March 2013 motion to dismiss.

II. Discussion

NC WARN and Orangeburg raise distinct issues on appeal. On the one hand, NC WARN challenges the merger as a whole, claiming there is not substantial evidence to support the Commission's decision to approve the merger. On the other hand, Orangeburg challenges the constitutionality of certain regulatory conditions imposed in connection with the Commission's approval of the merger. We address these issues separately.

A. Standard of Review

The scope of this Court's review of a Commission decision is governed by statute. As our Supreme Court has recognized, " '[t]he decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C. Gen. Stat. §] 62–94(b).' " *State ex rel. Utilities Com'n v. Cooper*, 366 N.C. 484, 490, 739 S.E.2d 541, 545 (2013) (quoting *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n* (*CUCA I*), 348 N.C. 452, 459, 500 S.E.2d 693, 699 (1998)). N.C. Gen. Stat. § 62-94(b) provides:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2013). As explained by our Supreme Court,

> "[t]his Court's role under section 62–94(b) is not to determine whether there is evidence to support a position the Commission did not adopt. Instead, the test upon appeal is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. Substantial evidence [is] defined as more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's knowledge, however expert, cannot be considered by this Court unless the facts and findings thereof embraced within that knowledge are in the record. Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62–94(b)(4) because it frustrates appellate review."

Cooper, 366 N.C. at 490-91, 739 S.E.2d at 545 (quoting *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699–700 (alteration in original) (citations and internal quotation marks omitted)); s*ee also State ex rel. Utilities Com'n v. Village of Pinehurst*, 99 N.C. App. 224, 226, 393 S.E.2d 111, 113 (1990) ("[T]he essential test to be applied is whether the Commission's order is affected by errors of law or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted."). Yet, "[u]pon any appeal, . . . any . . . finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e).

B. NC WARN's Appeal

NC WARN is a not-for-profit corporation with members across North Carolina that, according to its motion to intervene, seek "to reduce hazards to public health and the environment from nuclear power and other polluting electricity production through energy efficiency and renewable energy resources." In this case, NC WARN was allowed to intervene to advocate that the Commission investigate the public convenience and necessity of the merger and to address its members' concerns regarding the merger's potential impacts on the cost of electricity, renewable energy projects, and energy efficiency programs.

Now on appeal, NC WARN contends the Commission erred in approving the merger because there was insufficient evidence to support approval. Specifically, NC WARN argues: (1) the applicants failed to submit evidence of the risks posed by the merger; (2) there is no evidence

the merger will result in benefits to the public; and (3) the merger is not justified by the public convenience and necessity.

As provided in the Public Utilities Act, "[n]o . . . merger or combination affecting any public utility [shall] be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." N.C. Gen. Stat. § 62-111(a) (2013). Since 2000, the Commission has required that applicants submit market-power and cost-benefit analyses as part of an application for an electric utility merger. *See Order Requiring Filing of Analyses*, Docket No. M-100, Sub 129, at 7 (2 November 2000) (the "Sub 129 Order").

1. Merger Risks

[1] NC WARN first argues that neither the application nor applicants addressed the risks posed by the merger, as required by the Sub 129 Order. We disagree. Although there was no specific document titled cost-benefit analysis, we find there was sufficient consideration of the risks of the merger.

In approving the merger, the Commission explicitly found "[t]he Applicants . . . are in compliance with the filing requirements established in the Sub 129 Order with respect to the market power and cost-benefit analyses submitted with the application." This finding reiterated a prior 27 April 2011 Commission order concluding the application satisfied the filing requirements of the Sub 129 order.

Upon review of the record, we hold there was substantial evidence to support the Commission's approval where, in addition to the application, the applicants submitted investment analyses from three different financial institutions, an analysis of the economic efficiencies under joint dispatch, a fuel synergies review, and a market power study, among other exhibits.

Despite recognition of the analyses submitted by the applicants, NC WARN argues the analyses only examined the potential benefits of the merger and did not constitute a comprehensive cost-benefit analysis. We hold that the Commission adequately addressed this argument in discussing its finding that the applicants met the filing requirements of the Sub 129 Order. In the merger order, the Commission noted, "[t]he purpose of such analyses is to assist the Commission in determining whether or not a merger meets the statutory standard for approval." The Commission then explained,

> [t]he Applicants stated in the application that the actual integration of Duke and Progress and their service companies is expected to produce cost savings in addition to those identified in the Compass Lexecon Study and the Fuel Synergies Review and that there will be upfront costs associated with achieving these savings. The fact that the application did not include a quantification of the costs and benefits associated with these non-fuel savings, along with the exhibits quantifying direct and immediate fuel savings, does not constitute a filing deficiency insofar as the Sub 129 Order is concerned. Moreover, as discussed . . . , the record contains ample evidence regarding the Applicants' estimates of both fuel and non-fuel savings to support a decision as to whether the merger meets the statutory standard for approval.

We find it evident from a review of the merger order that the Commission had sufficient evidence to determine whether the merger was justified by the public convenience and necessity.

Throughout the merger order, the Commission weighed and balanced the benefits of the merger with the known and potential costs and risks of the merger. Specifically, in Finding of Fact 22, the Commission documented the potential costs and risks to retail ratepayers that it considered.

> Known and potential costs and risks of the merger to North Carolina retail ratepayers include direct merger costs and other merger-related cost increases that could impact North Carolina retail rates; the potential for preemption of the Commission's regulatory authority under the FPA, particularly as it relates to the JDA and the Joint OATT, and under the Public Utility Holding Company Act of 2005 (PUHCA 2005); potential adverse effects on DEC and PEC of transactions within the holding company family and the resulting need for increased regulatory oversight of such transactions, including the treatment of joint dispatch costs and savings; the potential for DEC and PEC to unreasonably favor their unregulated affiliates over nonaffiliated suppliers of goods and services; potential adverse impacts on DEC's and PEC's cost of capital; the exposure of DEC, PEC, and their respective retail ratepayers to costs and risks associated with Duke, Progress, and their subsidiaries; and the potential for DEC's and PEC's

> quality of service to deteriorate because of increased management focus on cost savings and earnings growth.

In identifying these costs and risks, the Commission noted that "[t]he known and potential costs and risks to North Carolina retail ratepayers from a merger affecting one or more regulated electric utilities have been well documented in prior merger proceedings." The Commission further found, however, that despite these costs and risks, the retail ratepayers were adequately protected by the Regulatory Conditions and Stipulation approved by the Commission with the merger.

Although no single document entitled cost-benefit analysis was presented by the applicants quantifying the known and potential costs and risks of the merger, we hold there was sufficient evidence of the costs, considering the benefits and protections afforded to retail ratepayers, to allow the Commission to determine that the merger met the statutory standard for approval.

2. Public Benefit

[2] NC WARN also argues that there is no evidence that the merger will result in benefits to the public. NC WARN instead maintains that the benefits resulting from the merger accrue solely to the benefit of the emerging entity. We disagree.

Based on claims in the application and supporting evidence in the analysis of economic efficiencies under joint dispatch and fuel synergies review, the Commission found,

> [t]he primary quantifiable benefits of the merger to North Carolina retail ratepayers consist of an estimated $364.2 million in total system fuel and fuel-related cost savings over the five-year period 2012 through 2016 through joint dispatch of DEC's and PEC's generation assets and an additional estimated $330.7 million in total system fuel and fuel-related system cost savings through sharing and implementing best practices for fuel procurement and use over the same five-year period.

These savings in turn benefit the ratepayers. As further found by the Commission,

> [t]he Stipulation [agreed upon by the applicants and the public staff] guarantees that North Carolina retail ratepayers will receive their allocable share of $650 million of these cost savings, as well as a small amount of non-fuel

> operations and maintenance (O&M) cost savings, over five years through DEC's and PEC's annual fuel clause proceedings. . . . Further, if the fuel and fuel-related savings achieved by DEC and PEC exceed the guaranteed $650 million during the first five years after the merger, then North Carolina ratepayers will receive their allocable share of the additional savings.

NC WARN does not dispute the fuel cost savings on appeal, but contends the savings are temporary, are not a product of the merger, and are diminished by settlements to allocate fuel savings to wholesale customers. We are unpersuaded by NC WARN's contentions.

First, the fact that the savings are only guaranteed over the first five years does not diminish the benefit of the guaranteed savings to retail ratepayers. Second, the fuel savings are a product of the merger. As the Commission explained, the fuel cost savings "are the result of using the lower cost resources of each company to displace the higher cost resources of the other depending on the marginal cost of production of each utility's available resources in a given hour." Without the merger, these savings from joint dispatch would not be possible. Similarly, without the merger, it is unlikely the savings from the implementation of best practices for fuel procurement and use would be realized because companies do not usually share their proprietary skills and practices with unaffiliated entities. Third, we are unconvinced that the savings to retail ratepayers will be diminished by settlements with wholesale customers. As the Commission noted, there was testimony that "the settlement agreements between the Applicants and parties other than the Public Staff were considered by the Public Staff in its negotiations of its settlement with the Applicants." Furthermore, the Commission ultimately sets retail rates and the Commission is not bound by the terms of those settlement agreements.

In addition to the quantifiable fuel cost savings, the Commission also found that "substantial non-fuel O&M cost savings are expected to result from the integration of Duke and Progress over the long term." As explained by the Commission, this finding is supported by an internal study on merger integration savings and witness testimony that a major source of the O&M savings is lower payroll costs resulting from the elimination of duplicate positions.

Lastly, in addition to the fuel and non-fuel cost savings, the Stipulation provides that DEC and PEC will make annual community support and charitable contributions of at least $9.2 million and $7.28 million,

respectively, in their service areas over four years and contribute $15 million for workforce development and low income energy assistance during the first year following the merger. Additionally, the merger order requires DEC and PEC to contribute $2 million to NC GreenPower.

Considering the significant guaranteed fuel cost savings and potential non-fuel cost savings, as well as the commitments by DEC and PEC to contribute funds to support the community, workforce development, and low income energy assistance, we hold there was substantial evidence before the Commission that the merger will result in benefits to the public.

3. Public Convenience and Necessity

[3] In NC WARN's third argument, NC WARN contends the merger is not justified by public convenience and necessity for three reasons: (1) the merger allows the applicants to manipulate prices and harm local markets; (2) the merger will result in job losses; and (3) the merger harms low income families. It is evident from the merger order that the Commission considered each of these concerns; nevertheless, the Commission found the merger justified by public convenience and necessity. Upon review, we affirm the Commission.

Monopsony

NC WARN first argues the merger contradicts the public convenience and necessity because it is likely to create a monopsony, "a market situation in which one buyer controls the market." Black's Law Dictionary 1023 (7th ed. 1999). NC WARN contends this control could allow the buyer to manipulate prices, harming local markets, such as the market for renewable energy. NC WARN further contends that based on uncontroverted witness testimony concerning the potential for a monopsony following the merger, the Commission should have concluded "the merger will harm [local markets] within North Carolina – such as renewable energy markets – and therefore the merger cannot be in the public convenience and necessity."

While we acknowledge the potential of a monopsony was raised in testimony provided during the Commission hearing, we find the Commission adequately addressed the issue in the merger order. In explaining the potential costs and risks of the merger enumerated in Finding of Fact 22, the Commission specifically addressed the testimony of Richard S. Hahn, noting "Hahn testified that a result of the merger would be market dominance by the merged entities with regard to the procurement of renewable energy, leading to unaffiliated renewable

energy developers foregoing North Carolina development activities." Yet, after considering the rebuttal testimony of B. Mitchell Williams, the Commission was not persuaded that the merger would negatively impact the market for renewable energy. The Commission reasoned,

> PEC and DEC are required to meet their [Renewable Energy and Energy Efficiency Standards ("REPS")] renewable energy obligations in the least cost manner. In doing so, they minimize the rate impact to their customers of complying with this statutory mandate. In addition, to the extent the merger allows PEC and DEC to lower their REPS compliance costs through more efficient resource procurement procedures, this will be a direct benefit to their North Carolina customers.

The Commission further explained,

> following the close of the merger DEC and PEC will each continue to have the same obligations they had before the merger to refrain from favoring or subsidizing their affiliates, to pursue the most reliable, prudent and cost-effective resources and projects, and to demonstrate that they have done so in appropriate proceedings before the Commission[.]

Upon review, we hold the Commission's analysis is supported by Williams' testimony and the governing statutes, N.C. Gen. Stat. §§ 62-133.8(b) and 62-133.9(b).

Job Losses

NC WARN also argues the merger contradicts the public convenience and necessity because it results in job losses. NC WARN specifically points to the testimony of James Rogers, William D. Johnson, and Paula Sims to emphasize the applicants' plan to terminate 2,000 or more jobs (approximately 6.7% of the applicants' workforce) as a consequence of the merger. NC WARN argues that "[t]hese job losses, in a time of economic crisis, weigh strongly against the merger of Duke and Progress."

We agree the job losses weigh against the public convenience and necessity; yet, the number of jobs lost must not be considered in isolation.

Although 2,000 or more jobs were expected to be lost as a result of the merger, the evidence before the Commission tended to show that a majority of these job reductions would occur through retirement, normal

attrition, and voluntary severance. Furthermore, witness testimony reassured the Commission that these reductions would not affect the quality, safety, and reliability of DEC and PEC service because the majority of the reductions would occur in corporate functions, rather than operational functions. Testimony also provided that retained employees would benefit from the merger as a result of a larger, more diverse company with better career opportunities, compensation, and benefits.

It is evident from the merger order that the Commission considered the number of jobs lost, the manner in which the workforce was reduced, the benefits to the retained employees, and the potential benefits to retail ratepayers as a result of savings expected to be realized from lower payroll costs in its determination that the merger was justified by the public convenience and necessity. It is not this Court's role to second guess the determination of the Commission where its findings and conclusions are supported by the evidence.

Low-Income Families

In NC WARN's final argument, NC WARN argues the merger contradicts the public convenience and necessity because it harms low-income families. Specifically, NC WARN relies on the testimony of Roger D. Colton and contends the merger will eliminate the individualized customer service on which low-income families rely to manage the costs of electricity.

It is evident from the merger order that the Commission considered Colton's testimony but was unpersuaded. The Commission explained,

> [t]he Commission determines that the needs of low-income customers to manage their energy usage and be financially able to pay their bills are undeniably real and substantial, and the agencies and individuals who are committed to addressing those needs, particularly in times of economic hardship and high unemployment, have a considerable undertaking to manage. However, the Commission does not agree with witness Colton that the merger will adversely affect those customers or that conditions of the merger approval should be a major vehicle for addressing their energy needs.

The Commission was persuaded, however, "that the Applicants' commitments in the proposed Regulatory Conditions, along with the Commission's Rules and Regulations and monitoring by the Commission and the Public Staff, are sufficient to ensure that there is no diminution

of resources to assist low-income customers and other customers of DEC and PEC."

Upon review of Williams' rebuttal testimony, we hold the Commission's analysis is supported by the evidence. In rebuttal, Williams testified that Colton's concerns were speculative and "that this merger will do absolutely nothing to impair or modify [the] Commission's jurisdiction, consumer protection authority or regulatory control over the combined company." Specifically, Williams identified numerous Commission Rules and Regulatory Conditions that ensure quality customer service. Williams further testified the merger would not affect the discretion of customer service representatives and would not constrain the range of options available to customer service representatives assisting low income families manage payments.

NC WARN further contends that the payment of $15 million dollars by DEC and PEC within the first year following the merger is inadequate to remedy the harm to low income families resulting from the merger. NC WARN instead asserts that the Commission should have required the applicants to pay $270 million, $27 million per year for 10 years, as recommended by Colton. We disagree.

As stated above, the Commission was clear that it did not agree with Colton's analysis. Although there is no direct evidence to link the $15 million payment to the harm to low-income families, we hold the Commission did not err in approving the payment. As the Commission noted, the merger approval should not be the vehicle to address the energy needs of low income families. The statutory requirement for merger approval is that the merger is justified by the public convenience and necessity. Here, the $15 million dollar payment agreed to in the Stipulation is just a portion of the economic benefits to low income families, who also benefit from the $650 million in guaranteed savings to retail ratepayers.

Where it is evident that the Commission considered the potential costs and risks of the merger and weighed them against the anticipated benefits, and where there is substantial evidence supporting the Commission's findings and conclusions, we will not second guess the Commission's determination that the merger is justified by the public convenience and necessity. Thus, we affirm the Commission's approval of the merger in the merger order.

C. Orangeburg's Appeal

[4] Orangeburg, through its Department of Public Utilities, provides electric services to approximately 25,000 residential, industrial, and

commercial customers in the City of Orangeburg and Orangeburg County. With a generation capacity of only 23.5 megawatts and a growing total peak load of over 180 megawatts, Orangeburg is reliant on wholesale purchases of power to meet the needs of its customers.

When the Commission entered the merger order, the Commission approved the application "subject to the provisions of [the merger order] and the Regulatory Conditions and Code of Conduct[.]" Just as Orangeburg argued before the Commission, Orangeburg, as "a potential wholesale power customer of Duke or Progress and a competitor for industrial load with utilities in the Southeastern United States[,]" challenges Regulatory Conditions 3.6, 3.7, and 3.9 on appeal.

In short, these Regulatory Conditions provide the following: (1) DEC and PEC "shall continue to serve [their] Retail Native Load Customers with the lowest-cost power it can reasonably generate or obtain . . . before making power available for sales to customers that are not entitled to the same level of priority[;]" (2) DEC and PEC shall give written notice to the Commission prior to "execut[ing] any contract that grants Native Load Priority to a wholesale customer" other than the historically served wholesale customers recognized by the Commission; and (3) "[t]he Commission retains the right to assign, allocate, impute, and make pro-forma adjustments with respect to the revenues and costs associated with both DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes."

Orangeburg argues these Regulatory Conditions effectively restrict the sale of low cost wholesale power to certain Commission-favored wholesale customers in violation of the Commerce Clause and Supremacy Clause of the U.S. Constitution. As a result, Orangeburg, which is not one of the Commission-favored wholesale customers, contends it is competitively disadvantaged and will not receive competitive offers to purchase wholesale power in the future.

Below, the Commission considered these same arguments; nevertheless, the Commission approved the merger subject to the Regulatory Conditions finding,

> [t]he Commission-approved Regulatory Conditions effectively protect as much as reasonably possible the Commission's jurisdiction as a result of the merger, including risks related to agreements and transactions between and among DEC, PEC, and their affiliates, including the JDA; financing transactions involving Duke, DEC, or PEC, and any other affiliate; the ownership, use and

> disposition of assets by DEC or PEC; participation in the wholesale market by DEC or PEC; and filings with federal regulatory agencies. In addition they insulate DEC's and PEC's retail ratepayers as much as reasonably possible from any adverse consequences potentially resulting from the merger.

In fact, in discussing the evidence and conclusions supporting the above finding, the Commission specifically addressed Orangeburg's challenges to Regulatory Conditions 3.6, 3.7, and 3.9, noting that "[t]he Commission, the North Carolina appellate courts[,] and FERC have been confronted by Orangeburg's arguments or by similar arguments by others on previous occasions." Following a discussion of these prior occasions, the Commission then explicitly rejected Orangeburg's challenges. "The Commission [further] determine[d] that Orangeburg lacks standing at this time and in these dockets to raise these issues and alternatively that Orangeburg's arguments as they contemplate potential future harm are not ripe for consideration."

Upon review, we agree with the Commission's analysis; yet, we do not reach the merits of Orangeburg's challenges to the Regulatory Conditions on appeal because we hold Orangeburg lacks standing to appeal the merger order. Therefore, we dismiss Orangeburg's appeal.

N.C. Gen. Stat. § 62-90 provides that a "party aggrieved" by a final Commission order or decision has standing to appeal. N.C. Gen. Stat. § 62-90(a) (2013). "Generally, 'a "party aggrieved" is one whose rights have been directly and injuriously affected by the judgment entered[.]' " *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc.* (*CUCA II*), 163 N.C. App. 1, 10, 592 S.E.2d 277, 282 (2004) (quoting *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999) (citations omitted)). In this case, we hold Orangeburg is not a party aggrieved at this time.

In January 2011, Orangeburg entered into a wholesale power supply agreement with S.C. Electric & Gas Co. ("SCE&G") to purchase its power requirements from SCE&G from 1 January 2012 through at least 31 December 2022.[3] As a result of this agreement, Orangeburg is not currently in the market to purchase wholesale power from DEC or PEC and will not be until it reenters the market in search of a new agreement several years before the current agreement expires. Thus, Orangeburg is

3. The wholesale power supply agreement between Orangeburg and SCE&G provided SCE&G an option to extend the agreement through 31 December 2023.

not aggrieved by the Regulatory Conditions it challenges. Furthermore, we find our holding is bolstered by Orangeburg's own declaration that it is merely "a potential wholesale power customer of Duke and Progress." As the Commission recognized, there are many variables subject to change prior to the time Orangeburg is back in the wholesale market.

Despite its contract to purchase wholesale power from SCE&G through at least 31 December 2022, Orangeburg argues it has standing to challenge the regulatory conditions because the Commission, by allowing it to intervene, necessarily determined that it had an interest in the merger and a right to be heard. We are unpersuaded by Orangeburg's argument.

The standards for intervention and standing are discrete and distinguishable. Intervention in a Commission proceeding is governed by Commission Rule 1-19, which provides that "[a]ny person having an interest in the subject matter of any hearing . . . before the Commission may become a party thereto . . . by filing a verified petition with the Commission" that includes, among other requirements, "[a] clear, concise statement of the nature of the petitioner's interest in the subject matter of the proceeding, and the way and manner in which such interest is affected by the issues involved in the proceeding." N.C. Admin. Code. tit. 4, c. 11, r. 1-19(a) (June 2012). Rule 1-19 further provides:

> [L]eave to intervene filed within the time herein provided, in compliance with this rule and showing a real interest in the subject matter of the proceeding, will be granted as a matter of course, *but granting such leave does not constitute a finding by the Commission that such party will or may be affected by any order or rule made in the proceeding.*

N.C. Admin. Code. tit. 4, c. 11, r. 1-19(d) (emphasis added). On the other hand, and as discussed above, standing is statutory and requires the party to be aggrieved. *See* N.C. Gen. Stat. § 62-90(a). As this Court has recognized, "[t]his Court's interpretation of 'party aggrieved' as it relates to an appeal of an order by the Commission . . . suggests that more than a generalized interest in the subject matter is required." *CUCA II*, 163 N.C. App. at 10, 592 S.E.2d at 282-83 (citing *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n*, 104 N.C. App. 216, 408 S.E.2d 876 (1991) (holding CUCA was not an aggrieved party and dismissing its appeal of an order by the Commission for lack of standing because CUCA had failed to show that its interest in person, property, or employment has been substantially adversely affected, directly or indirectly);

State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, 142 N.C. App. 127, 136, 542 S.E.2d 247, 253 (2001) (holding that CUCA was not a "party aggrieved" and thus, lacked standing to appeal "because the Commission's order did not impact rates and because any rate increases [would] be effectuated at subsequent rates cases")).

Although Orangeburg may have had an interest in the proceedings before the Commission, Orangeburg is not currently in the market to purchase wholesale power and, therefore, not directly and injuriously affected by the Regulatory Conditions approved by the Commission at this time. Thus, we hold Orangeburg is not an aggrieved party and dismiss its appeal for lack of standing. Additionally, although we dismiss Orangeburg's appeal for lack of standing, we take this opportunity to note, as did the Commission, that regulatory conditions similar to those challenged by Orangeburg have been upheld by the Commission, this Court, and FERC in prior cases. *See State ex. re. Utilities Com'n v. Carolina Power & Light Co.*, 359 N.C. 516, 614 S.E.2d 281 (2005).

III. Conclusion

For the reasons discussed above, we hold the Commission did not err in determining the merger was justified by the public convenience and necessity and, therefore, affirm the Commission's approval of the merger. Furthermore, having determined Orangeburg lacks standing to raise a challenge to the regulatory conditions on appeal, we dismiss Orangeburg's appeal.

Affirmed in part and appeal dismissed in part.

Judges ELMORE and STEPHENS concur.

JOYCE FARMS, LLC v. VAN VOOREN HOLDINGS, INC.

[232 N.C. App. 591 (2014)]

JOYCE FARMS, LLC F/K/A HICKORY MOUNTAIN FARMS, LLC, PLAINTIFF
v.
VAN VOOREN HOLDINGS, INC., STANNY H. VAN VOOREN, AND WARRY VAN VOOREN AND VAN VOOREN GAME RANCH, INC. AN ONTARIO, CANADA CORPORATION, DEFENDANTS

No. COA13-773

Filed 4 March 2014

1. Corporations—dissolution—effect on defendants' contract claims—general successor liability rule

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA)was dissolved and sold at auction even though defendants contended that there was a genuine issue of fact regarding the effect of the dissolution on defendants' contract claims. The trial court, consistent with the general successor liability rule, ordered a sale of VVGR USA's assets and did not order the transfer of VVGR USA's liabilities, including any contract claims defendants may have had against it.

2. Corporations—dissolution—ambiguity of order approving sale—impermissible collateral attack of receivership sale

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC (VVGR USA)was dissolved and sold at auction even though defendants contend there was ambiguity in the order approving the sale. Defendants' argument amounted to an impermissible collateral attack on the receivership sale of VVGR USA's assets.

3. Corporations—dissolution—exceptions to general successor liability rule

The trial court did not err by granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims in a civil action arising after Van Vooren Game Ranch USA, LLC was dissolved and sold at auction even though defendant contended there was a genuine issue of material fact regarding application of the exceptions to the general successor liability rule. The exceptions to the general successor liability rule put in place to prevent fraudulent transfers in private sales of company assets were inapplicable.

Appeal by defendants from order entered 18 April 2013 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 December 2013.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, for plaintiff-appellee.

Craige Brawley Liipfert & Walker, LLP, by William W. Walker, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants appeal from an order entered 18 April 2013 in Forsyth County Superior Court by Judge William Z. Wood, Jr. granting plaintiff's motion for partial summary judgment and dismissing defendants' counterclaims. Defendants contend on appeal that the trial court erred by granting plaintiff's motion for partial summary judgment because defendants' counterclaims were not barred, and there was ambiguity in the receivership sale documents as to whether liabilities were transferred, thus creating a genuine issue of material fact. Alternatively, defendants argue that summary judgment was improper because they fall under an exception to the general successor liability rule as set out in *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988).

After careful review, we affirm the trial court's order.

I. Background

This action arises from the second of two related proceedings between the parties. The first proceeding involved a civil action and arbitration leading to the judicial dissolution of Van Vooren Game Ranch USA, LLC ("VVGR USA"). The second proceeding, which gives rise to this appeal, involved a civil action after VVGR USA was dissolved and sold at auction.

Stan Van Vooren ("Stan") formed Van Vooren Game Ranch, Inc. ("VVGR Canada") in Ontario, Canada in 1987 to grow and sell pheasants for commercial consumption. VVGR Canada created a breed of white pheasants especially suited for meat production and developed a market in North America and overseas. Ron Joyce ("Joyce") joined the family poultry distribution business, Joyce Foods, Inc. ("JFI") in Forsyth County, North Carolina in 1971, became sole shareholder and manager in 1981, and formed Hickory Mountain Farms, LLC ("HMF") in 2003 to manage JFI's farming operation.

In 2006, VVGR Canada sought a processor for its pheasants. After negotiation, HMF and Joyce entered into an agreement with Stan and Van Vooren Holdings Ltd. ("VVH") to form VVGR USA. VVGR USA was owned equally; HMF and Joyce owned 50% and Stan and VVH owned 50%. Joyce and Stan served as co-managers of the new company. VVGR USA was to purchase the assets of VVGR Canada for $2,200,000.00. In late 2006 VVGR Canada moved its assets to North Carolina. JFI provided office space and other services for VVGR USA, and JFI's chief financial officer administered VVGR USA's books and bank accounts.

In March 2007, VVGR USA established a $300,000.00 line of credit with SunTrust Bank ("the SunTrust loan") which was converted to a promissory note in 2008. The note gave SunTrust a security interest in all of VVGR USA's assets and was personally guaranteed by Joyce and Stan. The SunTrust loan went into default in 2009. VVGR USA negotiated a forbearance agreement with SunTrust to keep SunTrust from seizing VVGR USA's assets while VVGR USA looked for other sources of income as it paid interest on the note. Out of the three parties liable on the note – Joyce, Stan, and VVGR USA – Joyce was the only party with sufficient assets to pay the debt.

Joyce and Stan were unable to work together as co-owners/managers of VVGR USA due to myriad disputes related to VVGR USA's relationship with JFI. In July 2011, JFI sent VVGR USA a demand letter for $100,548.62 owed for product sold and delivered. VVGR USA contended that, because of improper charges, JFI actually owed VVGR USA funds in excess of the amount demanded by JFI. Joyce, JFI, Stan, and VVGR USA agreed in August 2011 to submit their disputes to arbitration.

A. Arbitration and Judicial Dissolution

In the arbitration, Stan and VVGR USA filed, among other claims, a request for judicial dissolution of VVGR USA pursuant to N.C. Gen. Stat. § 57-6-02. Because judicial dissolution of VVGR USA would trigger default of the SunTrust note and Joyce's guaranty would be called upon, Joyce began a plan to protect his personal obligation in the note. Joyce determined that he would be paying off the note "one way or the other" and decided he would rather have control of the VVGR USA assets than lose them in a bank auction, which he believed would not realize the assets' value. 2011 Asset Acquisition, LLC ("2011 AA") was formed by Todd Tucker, a JFI shareholder and officer, to purchase the SunTrust note from the bank. Art Pope, another JFI shareholder and creditor, loaned the funds to 2011 AA to buy the SunTrust note for $299,589.42. Joyce agreed, through HMF, to underwrite and fund

2011 AA's costs of purchasing the SunTrust note and take control of the VVGR USA collateral.

On 3 October 2011, Joyce and HMF commenced the dissolution action in Forsyth County Superior Court seeking (1) judicial dissolution of VVGR USA; (2) an order allowing the other VVGR USA owners to buy Stan and VVGR Canada's interest in VVGR USA; (3) a declaratory judgment determining the scope of the arbitration agreement; and (4) an order staying the arbitration proceeding. HMF specifically alleged management deadlock, that HMF was not a party to the arbitration agreement, and that VVGR USA should be "dissolved, its assets liquidated and creditors paid." On 5 October 2011, the attorney for Joyce and JFI informed Stan and VVGR USA that 2011 AA had purchased the SunTrust note. 2011 AA demanded immediate payment of the $299,589.42 balance on the SunTrust note and took possession of all of VVGR USA's assets pursuant to the original security agreement.

On 10 October 2011, Stan and VVGR USA filed a counterclaim, a third-party complaint, and a motion for injunctive relief in the dissolution action. They argued that there was no factual or legal difference between Joyce, JFI, HMF, Tucker, and 2011 AA and that the acts of any one of them was the act of the others, meaning that all were subject to the arbitration agreement entered into by Joyce and JFI as part of their dispute with Stan and VVGR USA. Alternatively, they asked the court to enjoin Joyce, JFI, HMF, Tucker, and 2011 AA from pursuing claims outside the arbitration proceeding, and for the court to appoint a receiver to manage VVGR USA.

On 4 November 2011, the trial court: (1) denied the preliminary injunction motion; (2) found that HMF and 2011 AA were not parties to the arbitration agreement; (3) found that VVGR USA was deadlocked; and (4) ordered that a receiver be appointed to dissolve VVGR USA. The receiver operated VVGR USA until he made a motion to sell VVGR USA's assets, which was granted on 15 December 2011. Neither the order appointing the receiver nor the order approving the receiver's sale specifically mention any contract-based claims that Stan, his father Warry Van Vooren ("Warry"), VVH or VVGR Canada held against VVGR USA. The bill of sale and motion to sell were silent with regard to the transfer of liabilities; however, an attached asset protection agreement explicitly stated that the sale would not transfer liabilities.

The receiver conducted an auction of VVGR USA's assets, where HMF submitted the highest bid of $510,000.00. The court approved the sale in an order dated 16 December 2011, with the details of the sale attached.

The order approving sale provided that "[t]he Purchased Assets shall be sold free and clear of all liens, interests and encumbrances whatsoever[.]" With the sale complete, the receiver asked Tucker to specify all amounts VVGR USA owed to 2011 AA on the SunTrust note and security agreement purchased by 2011 AA. Tucker claimed 2011 AA was due $485,630.00 from VVGR USA, and the receiver paid the requested amount to 2011 AA. Tucker subsequently transferred his sole ownership of 2011 AA to Joyce for no consideration. Joyce therefore controlled all of VVGR USA's assets through the auction sale to HMF, and had the SunTrust note paid off to 2011 AA, which Joyce now solely owned. The arbitrator later conducted a hearing in March 2013 and entered a ruling on 2 April 2013 denying Stan's and VVH's claims against Joyce for money owed from unpaid capital contributions at VVGR USA's creation.

B. The Present Action

HMF commenced this action against Stan, Warry, VVH, and VVGR Canada (collectively "defendants") claiming they were liable to HMF as assignee for legal claims previously held by VVGR USA related to unapproved distributions and unpaid invoices, among other things. Defendants counterclaimed that HMF, as the owner of VVGR USA's contracts and goodwill, was liable to defendants for, inter alia, money owed from VVGR USA's initial purchase of assets from VVGR Canada in 2006 and subsequent loans defendants made to VVGR USA throughout the course of the business. After discovery, HMF filed a partial summary judgment motion claiming that the liabilities of VVGR USA were not transferred in the dissolution sale, and therefore all of defendants' counterclaims should be dismissed.

The trial court denied HMF's motion for summary judgment as to its own claims but granted the motion as to defendants' counterclaims, concluding that the receivership sale did not transfer VVGR USA's liabilities to the buyer, HMF. The parties settled all remaining claims shortly after jury selection. The settlement specified that it was a "final determination of the rights of the parties" and that "[d]efendants' right to appeal the dismissal of [d]efendants' counterclaims [was] not waived or abridged by [the] settlement."

Defendants filed timely notice of appeal from the trial court's order.

II. Discussion

Defendants contend that summary judgment was improper for three reasons: (1) their counterclaims were not barred by the dissolution because a genuine issue of material fact existed as to whether the trial

court ordered a sale free and clear of defendants' contract claims against VVGR USA; (2) the order approving the sale of VVGR USA's assets to HMF was ambiguous, and thus its effect could not be determined as a matter of law; and (3) the evidence raises genuine issues of material fact as to whether any exceptions to the general successor liability rule apply. After careful review, we affirm the trial court's order dismissing defendants' counterclaims.

"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)). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 182 S.E.2d 897, 901 (1972). On summary judgment, facts must be viewed in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

A. Effect of Dissolution on Defendants' Contract Claims

[1] Defendants first argue that a genuine issue of material fact exists as to whether the trial court actually ordered that VVGR USA's assets were to be sold free and clear of defendants' contract claims against VVGR USA. We disagree.

Under the general successor liability rule, "a corporation which purchases all or substantially all of the assets of another corporation is not liable" for the transferor's liabilities. *Budd Tire*, 90 N.C. App. at 687, 370 S.E.2d at 269. Defendants' counterclaims all stem from alleged breach of contractual agreements defendants held with VVGR USA. Contract claims are liabilities that generally do not transfer to successor corporations. *See Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 791, 561 S.E.2d 905, 909 (2002). Thus, under the general rule, when plaintiff purchased all of VVGR USA's assets at the receivership sale, it did not acquire VVGR USA's liabilities, which included defendants' contract claims against it.

Despite the general successor liability rule, defendants argue that there is a genuine issue of material fact as to whether the judicial dissolution court specifically ordered VVGR USA's assets to be sold free and clear of defendants' contract claims. Because neither the order appointing the receiver nor the order approving the receiver's sale specifically

mention defendants' contract claims against VVGR USA, defendants argue that there is a genuine issue of material fact as to whether these liabilities were transferred. We disagree. Though the trial court's orders do not expressly indicate that defendants' contract claims against VVGR USA were excluded in the receiver's sale of VVGR USA's assets, they do indicate that VVGR USA's assets were to be sold "free and clear of all liens, claims and encumbrances[.]" Furthermore, as is discussed in more detail below, all relevant documents related to the receivership sale indicate that it was intended to be a sale of assets only, with no liabilities included.

Absent any indication to the contrary, we hold that the trial court, consistent with the general successor liability rule, ordered a sale of VVGR USA's assets and did not order the transfer of VVGR USA's liabilities, including any contract claims defendants may have had against it.

B. Ambiguity of Order Approving Sale

[2] Defendants next argue that the order approving the sale of VVGR USA's assets was ambiguous and therefore could not be determined as a matter of law. We disagree.

At the outset, we note that defendants' argument as to this issue amounts to an impermissible collateral attack on the receivership sale of VVGR USA's assets. "Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law." *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 451, 315 S.E.2d 514, 517 (1984). The method of attacking a public sale of assets must be direct, either by motion in the cause or appeal, not through a separate action. *See Brown v. Miller*, 63 N.C. App. 694, 697, 306 S.E.2d 502, 504 (1983). "[T]he court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of coordinate authority[.]" *Hall v. Shippers Exp.*, 234 N.C. 38, 40, 65 S.E.2d 333, 335 (1951).

Here, defendants attempted to challenge the order approving the receivership sale in a new action brought in a trial court of coordinate authority as that which conducted the dissolution. The trial court in the dissolution action concluded, and defendants do not contest, that it had proper subject matter jurisdiction to oversee the receivership sale. Defendants failed to file any claims, motions, objections, or appeals in the dissolution action or otherwise challenge the receivership proceedings or the order authorizing the sale in any way. Therefore, because the trial court in the judicial dissolution case had proper subject matter

jurisdiction over the parties with regard to the receivership sale, and defendants now contest the receivership sale before a new judge with co-ordinate authority, we hold that this argument is an impermissible collateral attack.

However, even if this were not an impermissible collateral attack, we would hold that defendants' argument fails. Whether ambiguity exists in a court order is a question of law. *Emory v. Pendergraph*, 154 N.C. App. 181, 186, 571 S.E.2d 845, 848 (2002). "[W]here a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case." *Kniep v. Templeton*, 185 N.C. App. 622, 631, 649 S.E.2d 425, 431-32 (2007) (citations and quotation marks omitted).

Defendants' contention that the order approving the sale was ambiguous arises from the order's provision that VVGR USA's "contracts" would be sold with its assets but that "[t]he [p]urchased [a]ssets shall be sold free and clear of all liens, interests and encumbrances whatsoever." Defendants argue that because their contract claims against VVGR USA were not "liens, interests or encumbrances," and that VVGR USA's "contracts" were transferred to plaintiff, ambiguity existed as to whether liability on defendants' contract claims were sold to plaintiff and this issue should have been decided by a trier of fact. We disagree.

The receiver's report and motion to sell assets both indicate that the receiver intended to conduct an asset sale exclusive of liabilities. An "Asset Purchase Agreement" form, which the receiver attached to the motion as a template for the sale, specifically excluded transfer of VVGR USA's liabilities to the buyer:

> NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE PURCHASER SHALL NOT ASSUME ANY LIABILITIES OR OBLIGATIONS (FIXED OR CONTINGENT, KNOWN OR UNKNOWN, MATURED OR UNMATURED), INCLUDING ANY AND ALL ENVIRONMENTAL LIABILITIES, OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS WHETHER OR NOT ARISING OUT OF OR RELATING TO THE PURCHASED ASSETS OR THE BUSINESS OR ANY OTHER BUSINESS OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS, ALL OF WHICH LIABILITIES AND OBLIGATIONS SHALL, AT AND AFTER THE CLOSING, REMAIN THE EXCLUSIVE RESPONSIBILITY OF THE COMPANY OR ITS MEMBERS OR SHAREHOLDERS (AS APPLICABLE).

Furthermore, the bill of sale refers only to the sale of assets and is silent with regard to liabilities. The receiver filed an affidavit in which he stated that the auction sale was for assets only, not liabilities. Finally, the order itself states that "[t]he Purchased Assets shall be sold free and clear of all liens, interests and encumbrances whatsoever." In short, all of the evidence related to the receivership sale clearly indicates that it was a sale of assets, not liabilities. Defendants produced no evidence indicating that the parties, the receiver, or the trial court intended to contravene the long-standing general successor liability rule by selling defendants' unspecified contract claims together with VVGR USA's assets.

Based on these facts, we agree with plaintiff that the order unambiguously transferred VVGR USA's assets and excluded all liabilities, including defendants' contract claims, in the receivership sale. Therefore, defendants' argument is overruled.

C. Exceptions to the General Successor Liability Rule

[3] Defendants' final argument is that a genuine issue of material fact existed as to whether any exceptions to the general successor liability rule apply. We disagree.

Defendants rely on the four exceptions enunciated in *Budd Tire* to support their argument. In *Budd Tire*, the Court dealt with a private sale of company assets for inadequate consideration where the purchaser would be protected by the general successor liability rule. *Budd Tire*, 90 N.C. App. at 684, 370 S.E.2d at 267. The Court was forced to carve out exceptions to the general successor liability rule to provide an equitable remedy to a creditor in the face of a fraudulent transaction. *Id.* at 689, 370 S.E.2d at 270. Thus, the Court held that the general successor liability rule does not apply where:

> (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors, or; (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.

Id. at 687, 370 S.E.2d at 269.

However, the structured court-ordered sale of assets in the present case is distinguishable from the type of fraudulent private transaction in *Budd Tire* that involved inadequate consideration and shielding

the insolvent company from creditors without the creditors having legal remedies prior to the sale. *See id.* Defendants cite to no caselaw, and we find none, supporting the contention that these exceptions are applicable to a court-ordered and supervised public sale. In this context, statutory safeguards are already in place to ensure that the trial court and the receiver conduct dissolution fairly and without fraud. *See* N.C. Gen. Stat. § 1-505 (2013) ("Sales of property [by receivers] shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership."). Furthermore, unlike the private sale in *Budd Tire*, defendants here could have protected their interests by bidding on VVGR USA's assets. The *Budd Tire* exceptions were put in place to prevent fraudulent transfers in private sales. *Id.* at 689, 370 S.E.2d at 270. The need to protect creditors from fraud through application of these exceptions is minimized where, as here, statutory safeguards were already in place to ensure dissolution without fraud and the creditors could have protected their own interests by participating in the public sale.

For these reasons, we decline to extend the exceptions to the general successor liability rule to the new context of court-ordered and supervised public sales of company assets. Defendants' contention that there existed a genuine issue of material fact as to whether the exceptions apply is overruled.

III. Conclusion

Because the trial court unambiguously ordered VVGR USA's assets to be sold at the receivership sale free of all liabilities, and the general successor liability rule applies, there is no genuine issue of material fact and defendants' counterclaims against plaintiff based on alleged contracts with VVGR USA are barred as a matter of law. Furthermore, we hold that the *Budd Tire* exceptions to the general successor liability rule put in place to prevent fraudulent transfers in private sales of company assets are inapplicable here. As such, we affirm the trial court's order.

AFFIRMED.

Judges McGEE and ELMORE concur.

PREMIER, INC. v. PETERSON

[232 N.C. App. 601 (2014)]

PREMIER, INC., PLAINTIFF
v.
DAN PETERSON; OPTUM COMPUTING SOLUTIONS, INC.; HITSCHLER-CERA, LLC; DONALD BAUMAN; MICHAEL HELD; THE HELD FAMILY LIMITED PARTNERSHIP; ROBERT WAGNER; ALEK BEYNENSON; I-GRANT INVESTMENTS, LLC; JAMES MUNTER; GAIL SHENK; STEVEN E. DAVIS; CHARLES W. LEONARD, III AND JOHN DOES 1-10, DEFENDANTS

No. COA13-344

Filed 4 March 2014

Contracts—breach of contract—declaratory judgment—summary judgment—plain terms of the contract—further factual development

The trial court erred by granting summary judgment in favor of plaintiff on its claim for a declaratory judgment that it did not breach its contract with defendants. Although the trial court correctly concluded that the contract at issue required some affirmative act by a facility to subscribe to or license the SafetySurveillor product in order for Product Implementation to have occurred, further factual development was necessary to explore what affirmative acts—if any—were taken by the facilities identified by defendants to obtain the SafetySurveillor product.

Appeal by defendants from order entered 11 December 2012 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 2013.

Moore & Van Allen, PLLC, by J. Mark Wilson, Kathryn G. Cole, and Benjamin R. Huber, for plaintiff-appellee.

Williams Mullen, by Christopher G. Browning, Jr. and Garrick A. Sevilla, for defendants-appellants.

DAVIS, Judge.

Dr. Dan Peterson ("Dr. Peterson"); Optum Computing Solutions, Inc.; Hitschler-Cera, LLC; Donald Bauman; Michael Held; the Held Family Limited Partnership; Robert Wagner; Alek Beynenson; I-Grant Investments, LLC; James Munter; Gail Shenk; Steven E. Davis; Charles W. Leonard, III; and John Does 1-10 (collectively "Defendants") appeal from the trial court's 11 December 2012 order granting summary judgment in favor of Plaintiff Premier, Inc. ("Premier") on (1) its claim for a declaratory judgment that

it did not breach its contract with Defendants; and (2) Defendants' counterclaims for breach of contract, attorneys' fees, and recovery of audit expenses. After careful review, we vacate the trial court's order granting summary judgment and remand for further proceedings.

Factual Background

On 29 September 2006, Premier acquired Cereplex, Inc. ("Cereplex") by entering into a Stock Purchase Agreement (the "Agreement") with Defendants, the former shareholders and stakeholders of Cereplex. Cereplex developed and designed web-based surveillance and analytic services to healthcare providers through its software products, Setnet and PharmWatch. Setnet was designed to assist healthcare providers in detecting, responding to, and preventing healthcare-associated infections ("HAIs"). HAIs are infections that patients acquire during their course of treatment in a healthcare facility or setting. The Setnet program provided various alerts, reports, and other monitoring and surveillance functions regarding the possible presence of HAIs in healthcare providers' patient population.

PharmWatch was a program designed to optimize treatment, curb resistance to antibiotics, and prevent unnecessary use or overuse of antibiotics. The PharmWatch product provided automated surveillance and monitoring by generating alerts to notify a healthcare provider of a potential problem in the provision and dosage of antibiotics to a particular patient.

After acquiring Cereplex, Premier developed SafetySurveillor, a successor product that combined the functionalities of Setnet and PharmWatch into one software program. SafetySurveillor, like its predecessors, generates automated alerts to notify the user of potential problems that require attention. SafetySurveillor's key features relate to its ability to (1) facilitate infection prevention by firing alerts to infection control professionals regarding the potential existence of clusters or outbreaks of HAIs; and (2) provide configurable pharmacological-related alerts based on set variables, including high-cost medication, drug combinations, length of therapy, lab results, and other factors.

Pursuant to the Agreement, Defendants were entitled to receive an annual earnout payment (the "Earnout Amount") from Premier for five years following the date of the Agreement. The Earnout Amount provision of the Agreement states, in pertinent part, as follows:

> (iii) Earnout. On each of the dates that are the first five (5) anniversaries of the Closing Date, the Earnout Amount

> earned during the preceding twelve (12) months shall be determined by the Buyer in good faith (the "Yearly Earnout"). . . . "Earnout Amount" shall mean an amount equal to $12,500 for each Hospital Site where a Product Implementation occurs during the applicable 12-month period; excluding the first fifty (50) Hospital Sites where a Product Implementation occurs . . . . For the avoidance of doubt the first fifty (50) Hospital Site threshold is a one-time threshold, not an annual threshold. "Hospital Site" shall mean an individual hospital, nursing home, care center or similar facility (and for the avoidance of doubt a single health care company or hospital group may consist of multiple Hospital Sites). "Product Implementation" means a Hospital Site that has (A) subscribed to or licensed the Company's Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product), whether such product is provided, sold or licensed (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company, and (B) completed any applicable implementation, configuration and testing of the product so that the product is ready for production use by the Hospital Site. Together with the delivery of each Yearly Earnout, the Buyer shall provide the Sellers' Representative with a written report listing the names and addresses of the Hospital Sites covered by the applicable Yearly Earnout payment.

The Agreement provided that Defendants were authorized to conduct an annual audit to verify that Premier was paying out the correct Earnout Amount to Defendants. Defendants were responsible for paying the expenses associated with the audit unless the audit revealed that Premier had underpaid the Earnout Amount by more than 5%. If the applicable Earnout Amount was in dispute, Premier would not have any obligation to pay the costs and expenses of the audit "unless a final, non-appealable order of a court or an arbitrator that is binding on [Premier] finds that the Audit findings are correct."

From May 2010 to September 2010, Dr. Peterson, the co-founder and former Chief Executive Officer of Cereplex, conducted a pilot audit on

Defendants' behalf regarding Premier's compliance with the Agreement. Dr. Peterson testified by affidavit that in determining the appropriate Earnout Amount that Defendants were due, his audit "reported on the occurrence of single-event alerts as a simple and sure way to identify Product Implementations of SafetySurveillor[1] for the Audit." A single-event alert refers to the notification the SafetySurveillor program dispatches to infection control professionals or other designated medical personnel to identify either (1) the potential presence of an HAI in a patient who was discharged from a hospital and later sought medical attention from another healthcare facility; or (2) a possible problem with the antibiotic therapy prescribed to a patient.

Dr. Peterson examined Premier's databases and discovered over 1,000 healthcare facilities from which an alert had been fired. His affidavit states that "[e]ach alert relates to an individual patient and is specific to the facility at which that patient was seen, and each alert was sent to at least one clinician who had chosen to be alerted about the event." He also explained that in order for an alert to be fired from a facility, the SafetySurveillor program must have acquired access to the facility's patient data.

The conclusion reached by Dr. Peterson from his audit was that Premier had provided SafetySurveillor to over 1,000 facilities yet had only recognized 263 Hospital Sites for purposes of the Product Implementation provision of the Agreement. Based on Dr. Peterson's audit, Defendants informed Premier that they intended to initiate litigation against Premier for miscalculating the Earnout Amount and violating the terms of the Agreement.

On 19 January 2011, Premier filed an action in Mecklenburg County Superior Court seeking a declaratory judgment that it had not breached the Agreement. On 27 April 2011, Defendants filed an answer and counterclaims. Defendants alleged that Premier had, in fact, breached its contract with Defendants and sought damages as well as the recovery of audit expenses and attorneys' fees. The matter was designated a complex business case and assigned to the Honorable Calvin E. Murphy.

On 29 July 2011, the trial court entered a case management order giving the parties until 30 April 2012 to complete fact discovery and until 31 July 2012 to complete all discovery. On 30 August 2011, approximately

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1. SafetySurveillor, the successor product of Setnet and PharmWatch, replaced those two software programs and was the only relevant product for purposes of Product Implementation in 2010.

40 days after the entry of the case management order, Premier filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure or, in the alternative, a motion for summary judgment pursuant to Rule 56.

The trial court conducted a hearing on 14 December 2011 and entered its order and opinion on 11 December 2012 granting summary judgment in Premier's favor on its declaratory judgment claim as well as on Defendants' counterclaims for breach of contract, attorneys' fees, and recovery of audit expenses.[2] Defendants appealed to this Court.

Analysis

On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. *Shroyer v. Cty. of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421, 547 S.E.2d 850, 852 (2001).

In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact. *See McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 333, 713 S.E.2d 495, 500 ("Courts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts."), *disc. review denied*, 365 N.C. 353, 718 S.E.2d 376 (2011); *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) ("[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court.").

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). In determining the parties' intent, the court must construe the contract "in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992).

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2. The trial court granted summary judgment in favor of Defendants on Premier's claim for attorneys' fees after concluding that there was no statutory basis for an award of attorneys' fees in Premier's favor.

The key language in the Agreement that lies at the heart of this dispute states as follows:

> "Product Implementation" means a Hospital Site that has (A) *subscribed to or licensed* the Company's Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product), *whether such product is provided, sold or licensed* (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company . . . .

(Emphasis added.)

The parties offer different views on how the italicized language quoted above should be interpreted. Relying on the "subscribed to or licensed" phrase, Premier contends that in order for Product Implementation to occur, a Hospital Site must affirmatively take steps to subscribe to or license the SafetySurveillor product. Based on this interpretation, Premier claims that it fully satisfied its obligations under the Agreement by making Earnout payments for 213 of the 263 Hospital Sites that had formal written subscription agreements with Premier.[3]

Defendants, conversely, assert that Premier's interpretation of Product Implementation is too narrow. They argue that the "whether such product is provided, sold or licensed" phrase broadens the circumstances under which an annual Earnout payment can accrue. As such, Defendants contend that the "subscribed to or licensed" component of Product Implementation is satisfied simply by virtue of Premier's provision of the SafetySurveillor product to a facility. Based on this reasoning, Defendants contend that Premier was not entitled to summary judgment because the results of Dr. Peterson's audit — specifically the data showing the numerous facilities from which single-event alerts were fired — indicated that Premier had "provided" the SafetySurveillor program to over 1,000 facilities, thereby causing Product Implementation to occur *regardless* of whether those facilities had actually taken steps to subscribe to or license the product.

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3. Pursuant to the Agreement, the first 50 Hospital Sites where Product Implementation occurs are excluded when calculating the appropriate Earnout Amount total. Thus, payment was made for only 213 of these 263 Hospital Sites.

Premier responds by arguing that Defendants' interpretation of Product Implementation reads the "subscribed to or licensed" language out of the Agreement. Defendants' interpretation, according to Premier, treats the "subscribed to or licensed" phrase as having been effectively superseded by the "whether such product is provided, sold or licensed" phrase.

In its order and opinion, the trial court agreed with Premier's interpretation of the Agreement, ruling that a Hospital Site was required to subscribe to or license the product in order for Product Implementation to occur. The trial court harmonized the "subscribed to or licensed" phrase with the "whether such product is provided, sold or licensed" phrase by determining that "while it does not matter who provides the product to the Hospital Site or whether the Hospital Site is charged, the Hospital Site *still must subscribe to or license the product* in order for 'Product Implementation' to occur." (Emphasis added.)

The trial court, therefore, rejected Defendants' contention that they would be entitled to an Earnout payment any time SafetySurveillor was "merely provided" to a Hospital Site because that interpretation "unreasonably construes the otherwise unambiguous language of the contract that requires a license or subscription." Based on its interpretation of the Product Implementation definition in the Agreement, the trial court concluded that summary judgment in favor of Premier was appropriate.

We agree with the trial court that Defendants' interpretation would impermissibly read the phrase "subscribed to or licensed" out of the Agreement. *See Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (explaining that when interpreting a contract "[t]he various terms of the contract are to be harmoniously construed, and if possible, every word and every provision is to be given effect" (citation and brackets omitted)). Defendants' argument hinges on the notion that Product Implementation can occur simply by virtue of a facility's receipt of the SafetySurveillor product. However, the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required. Defendants simply cannot escape the fact that the definition of Product Implementation makes clear that it is the *Hospital Site* that must "subscribe[] to or license[]" the product. Thus, contrary to Defendants' proffered interpretation, the mere receipt of SafetySurveillor by a facility is, standing alone, insufficient to trigger an Earnout payment under the Agreement.

However, our adoption of this interpretation of the Product Implementation definition does not resolve the case. To hold, as we do, that a Hospital Site must subscribe to or license the product in order for Product Implementation to occur is to raise the question of whether the additional facilities that Defendants contend qualify as Hospital Sites at which Product Implementation has occurred have, in fact, affirmatively undertaken steps to subscribe to or license the SafetySurveillor product.

It is well established that in construing contract provisions, "[w]here a contract defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation and quotation marks omitted). As neither "subscribed" nor "licensed" is defined in the Agreement, it is appropriate to examine the ordinary and plain meaning of these terms.

"Subscribe" means "to agree to receive and pay for a periodical, service, etc." Webster's New World Dictionary 588 (1995). The most applicable dictionary definition of the word "license" is "official or legal permission to do or own a specified thing." American Heritage College Dictionary 782 (3d ed. 1993). Both definitions connote an affirmative act by the recipient prior to receipt of the product or service — be it the act of agreeing to receive the product or service or the act of obtaining permission to use the product or service. Applying these definitions here, we believe that the Agreement contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier agrees to provide the SafetySurveillor product and the Hospital Site agrees to accept it and utilize its services.[4]

While the trial court correctly interpreted the Agreement as requiring the Hospital Site to take some action to subscribe to or license SafetySurveillor, we cannot agree with the trial court's conclusion that summary judgment was appropriate at this stage in the litigation. Defendants submitted evidence, consisting primarily of the affidavit of Dr. Peterson, suggesting that Premier provided SafetySurveillor to numerous additional facilities (beyond the 263 Hospital Sites acknowledged by Premier in its calculation of the Earnout Amount) for which no payment was made. Premier does not dispute Defendants' contention

4. However, because the Agreement expressly states that an Earnout payment can be triggered — assuming the other requirements are met — regardless of whether the product is provided "for a charge or at no charge," payment by the Hospital Site is not required. Similarly, an Earnout payment can be triggered whether SafetySurveillor is offered on a stand-alone basis or as part of a bundle of other products and services.

that alerts were fired from these facilities but claims that (1) there is no evidence that any of the facilities identified have subscribed to or licensed SafetySurveillor; and (2) evidence of the firing of alerts is not relevant to the issue of whether a facility has subscribed to or licensed SafetySurveillor.

While we have rejected Defendants' contention that evidence of Premier's mere provision of the SafetySurveillor product to facilities, without more, automatically triggers Product Implementation, we believe that such evidence (as shown by the firing of alerts) and the circumstances under which the product came to be received by these facilities is probative of the issue of whether the facilities did, in fact, meet the criteria for Product Implementation. However, as presently constituted, the record is devoid of specific evidence on this issue. It may or may not ultimately be determined that additional facilities beyond the 263 acknowledged by Premier qualify as Hospital Sites as to which Product Implementation has occurred; however, on the present record, we have no way of knowing the answer to this question.

In its complaint, Premier summarized the relief it was seeking as follows:

> 30. Plaintiff is entitled to a judgment declaring that it has not violated any purported rights of Defendants pursuant to the Stock Purchase Agreement or otherwise under federal, state or common law, and is not liable to Defendants for any claims, including any claims concerning the parties' respective rights or obligations pursuant to the Stock Purchase Agreement. . . .

As the party seeking summary judgment, Premier bore "the initial burden of demonstrating the absence of a genuine issue of material fact" as to whether it had fully satisfied its payment obligations under the Agreement. *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, ___ N.C. App. ___, ___, 742 S.E.2d 535, 540 (2012) (citation and quotation marks omitted).

The trial court appears to have reasoned that Premier met this burden because (1) Product Implementation could only occur when a Hospital Site entered into a formal written agreement with Premier; and (2) neither party produced evidence "that refutes the fact that [Premier] paid Defendant[s] for each Hospital Site that subscribed to or licensed the product" through a formal, written subscription or licensing agreement. However, as explained above, while the Agreement requires some affirmative act by a Hospital Site to subscribe to or license the

SafetySurveillor product in order for Product Implementation to occur, the Agreement does not specifically require a formal, written agreement between Premier and the Hospital Site. The fact that Product Implementation can occur even when the SafetySurveillor product is provided to the Hospital Site at no cost suggests that a more informal process may, in fact, have existed.

The trial court also concluded that Dr. Peterson's affidavit constituted parol evidence that attempted to impermissibly add to or revise the unambiguous language of the Agreement. We agree that Dr. Peterson's affidavit about the parties' intent when negotiating the Agreement should not be allowed to alter the contractual terms that the parties agreed upon as contained in the four corners of the Agreement; however, as explained above, we believe that Dr. Peterson's affidavit contained evidence probative on the issue of whether the additional facilities referenced in his audit may have subscribed to or licensed SafetySurveillor. Accordingly, further factual development is necessary to explore what affirmative acts — if any — were taken by the facilities identified by Defendants to obtain the SafetySurveillor product so that any such acts can be evaluated in accordance with our interpretation of the "subscribed to or licensed" language in the Agreement.

For these reasons, we conclude that this matter must be remanded to the trial court for a fuller development of the factual record. While we do not foreclose the possibility that summary judgment may ultimately be appropriate in this matter, we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists. *See Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) (reversing premature entry of summary judgment and remanding to give parties "the opportunity to further develop the facts"). Because we are vacating the entry of summary judgment and remanding for further proceedings, we also vacate the trial court's rulings on both parties' claims for attorneys' fees. We express no opinion as to whether either party may be entitled to attorneys' fees once the trial court has rendered a final judgment in this action on remand.

Conclusion

For the reasons stated above, we vacate the trial court's order and opinion and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

RESPESS v. RESPESS

[232 N.C. App. 611 (2014)]

ALANA WILLIAMS RESPESS, PLAINTIFF
v.
MURPHY TODD RESPESS, DEFENDANT AND
BOYD AND SUSAN RESPESS, INTERVENORS

No. 13-760

Filed 4 March 2014

1. Child Visitation—best interests of children—findings

The trial court did not commit reversible error by denying defendant visitation with his minor children. Although defendant argued, based on the holding of *Moore v. Moore*, 160 N.C. App. 569, that the trial court did not comply with the provisions of N.C.G.S. § 50-13.5(i), the holding of *Moore* diverged sharply from the controlling precedent and did not control this case. In this case, the trial court found that it would not be in the children's best interests to have any visitation with defendant and this ultimate finding of fact was supported by numerous evidentiary findings of fact.

2. Child Custody and Support—retroactive child support—remanded—actual expenditures

A trial court's award of retroactive child support was reversed and remanded for further findings. *Carson v. Carson*, 199 N.C. App. 101, and *Robinson v. Robinson*, 210 N.C. App. 319, construed together, require that an award of retroactive child support be supported by evidence of plaintiff's actual expenditures for the children during the period for which she seeks retroactive support.

3. Child Custody and Support—support—imputed income

The trial court erred in a child support action in its determination of the amount of income it imputed to defendant where that amount was not supported by the findings or the evidence. Defendant did not challenge the trial court's findings as to the effect of his intentional "course of sexually abusing" his daughter and the resultant loss of his career as a stockbroker and insurance agent and the court's determination that it was appropriate to impute income to defendant should be upheld. However, the order must be remanded for findings detailing how the trial court arrived at the amount of income to be imputed to defendant.

4. Child Custody and Support—child support—automobile—value

The trial court did not err by awarding plaintiff a 1997 Ford Expedition as an "additional form of child support" without

determining the vehicle's value and deducting it from the child support award. N.C.G.S. § 50-13.4(e) does not require the trial court to determine the value of personal property applied toward a child support arrearage; defendant did not offer any support for his contention that such a transfer is analogous to a transfer of real property; and defendant did not offer any authority for the Court of Appeals to supplement the statute with an additional requirement not found therein.

5. Child Custody and Support—support—willful refusal to pay

The trial court did not err by finding that defendant had willfully failed to pay any child support without excuse where defendant presented evidence of his inability to find employment. The trial court was not required to believe defendant's testimony and the trial court's finding was supported by evidence in the record.

6. Child Custody and Support—attorney fees findings—plaintiffs expenses

A child support and custody case awarding attorney fees to plaintiff was remanded for additional findings where the trial court made no findings as to plaintiff's expenses or her assets and estate. Defendant cited no authority for the proposition that the trial court had to make findings about his ability to pay before it could award attorney's fees to plaintiff, and the North Carolina Supreme Court has held that a determination of whether a party has sufficient means to defray the necessary expenses of the action does not require a comparison of the relative estates of the parties.

Appeal by defendant from order entered 16 October 2012 by Judge Christopher B. McLendon in Beaufort County District Court. Heard in the Court of Appeals 11 December 2013.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., Lloyd C. Smith, III, and R. Gray Jernigan for plaintiff-appellee.

Ward and Smith, P.A., by John M. Martin, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by denying visitation with the minor children to defendant. The trial court did not err by ordering that plaintiff was entitled to child support or by imputing income to defendant. The order of the trial court is remanded for additional findings on the

amount of income to be imputed to defendant and the amount of retroactive child support. The trial court did not err by transferring a vehicle to plaintiff as part of defendant's child support arrearage without calculating the value of the vehicle. The trial court's award of attorney's fees to plaintiff included the findings of fact required by N.C. Gen. Stat. § 50-13.6, and the trial court did not err in calculating a reasonable amount of attorney's fees. However, we remand this issue to the trial court for findings as to plaintiff's reasonable expenses as they pertain to her ability to pay for counsel.

I. Factual and Procedural Background

Plaintiff Alana Respess and defendant Todd Respess were married on 22 August 1986, separated in 2006, and were divorced on 15 June 2009. They have four children: Jessica, born in 1987; Amanda, born 1993; Allysa, born 1998; and Noah, born in 2002. In 2005 defendant admitted to plaintiff that he had engaged in inappropriate sexual activity with Jessica, and on 3 May 2007 defendant pled guilty to five felony counts of indecent liberties with a child. In Case No. 05 CRS 54090, he was sentenced to 16 to 24 months imprisonment, suspended for 36 months of supervised probation on condition that he register as a sex offender, submit to electronic monitoring, have only supervised visitation with his children, and serve a four month active sentence. This sentence was completed in December 2009. In Case No. 07 CRS 1209, defendant pled guilty to four additional counts of indecent liberties, and was sentenced to consecutive terms of 16 to 24 months imprisonment, with the first to begin at the expiration of the active sentence in 05 CRS 54090. The four sentences were suspended on the same terms as in 05 CRS 54090, with the sentences to expire on 28 August 2011, 27 April 2013, 27 December 2015, and 26 April 2017.

On 7 May 2007 plaintiff filed a complaint seeking temporary and permanent custody of the three minor children (Jessica reached majority in 2005). Plaintiff alleged that defendant had violated the conditions established by the Beaufort County DSS for visitation and that he was not "a fit and proper person" to have custody of the children. In his answer, defendant counterclaimed, seeking custody, child support,[1] and attorney's fees. In her reply, plaintiff requested that defendant be denied all contact with the minor children. On 21 May 2008 plaintiff

1. On 12 June 2007 the minor children's paternal grandparents (intervenors) moved to intervene and sought visitation with the minor children. Their motion was granted on 6 August 2007. The trial court granted the intervenors visitation. The intervenors are not a party to this appeal.

filed a complaint for divorce, child support, equitable distribution, and attorney's fees. In his answer, defendant denied the material allegations of plaintiff's complaint and counterclaimed for child support, equitable distribution, and attorney's fees. Plaintiff filed a reply on 25 August 2008. The parties were granted a divorce on 15 June 2009.

On 16 October 2012 the trial court entered an order on the issues of child custody, child support, visitation, and the attorney's fees associated with litigation of these issues. At that time only Alyssa and Noah were minors. The provisions of the court's order concerning custody, visitation, and prospective child support apply only to those two children. The court made findings concerning defendant's sexual abuse of Jessica and his subsequent behavior towards her and his other children, and concluded that it would be "totally inappropriate" and detrimental to the best interests of the children for defendant to have "visitation or custodial relationships of any type" with the minor children. The trial court also made findings concerning the effect of defendant's sexual abuse upon his employment situation, and found that it was appropriate for the court to impute an income of approximately $50,000 a year to defendant, an amount that was about half of his previous annual earnings. The trial court concluded that plaintiff was entitled to retroactive and prospective child support, and to attorney's fees.

Defendant appeals.

II. Denial of Visitation to Defendant

[1] In his first argument, defendant contends that the trial court committed reversible error by denying him visitation with the minor children. We disagree.

A. Standard of Review

"Under our standard of review in custody proceedings, 'the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Mason v. Dwinnell*, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008) (quoting *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (other citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Mussa v. Palmer-Mussa*, 366 N.C. 185,

191, 731 S.E.2d 404, 409 (2012) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (other citation omitted).

B. Analysis

Defendant argues, based on the holding of *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), that the trial court did not comply with the provisions of N.C. Gen. Stat. § 50-13.5(i), and contends the trial court's finding that it was not in the children's best interests to have visitation with him was not supported by its other findings.

Under N.C. Gen. Stat. § 50-13.1(a) "the word 'custody' shall be deemed to include custody or visitation or both." It is long-established that a trial court's determination of child custody, including visitation, must be guided by the best interests of the child:

> [W]e apprehend the true rule to be that the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental, and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations[.]

Griffith v. Griffith, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954). This standard is incorporated in N.C. Gen. Stat. § 50-13.2(a), which directs the trial court to "award the custody of [a] child to such person . . . as will best promote the interest and welfare of the child."

It is also well-established that "the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence." *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) (citing *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 733, 325 S.E.2d 237, 241 (1985)).

Although courts seldom deny visitation rights to a non-custodial parent, a trial court may do so if it is in the best interests of the child:

> [T]he welfare of a child is always to be treated as the paramount consideration[.] . . . Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.

Swicegood v. Swicegood, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967) (citing *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 133 (1953)). *See also*, *In re*

Custody of Stancil, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848-49 (1971) (" 'The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child.' ") (quoting *Willey v. Willey*, 253 Iowa 1294, 1302, 115 N.W. 2d 833, 838 (1962)). This principle is codified in N.C. Gen. Stat. § 50-13.5(i), which provides that:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child. (emphasis added).

The statutory language is straightforward and unambiguous and requires that if a trial court does not grant reasonable visitation to a parent, its order must include a finding either that the parent is "an unfit person to visit the child" or that visitation with the parent is "not in the best interest of the child." Although our Supreme Court has not issued an opinion discussing this statute, during the past 30 years this Court has issued numerous opinions applying N.C. Gen. Stat. § 50-13.5(i). For example, in *King v. Demo*, 40 N.C. App. 661, 666-667, 253 S.E.2d 616, 620 (1979), we stated that:

> Unless the child's welfare would be jeopardized, courts should be generally reluctant to deny all visitation rights to the divorced parent of a child of tender age. Moreover, G.S. 50-13.5(i) provides [that] . . . "prior to denying a parent the right of reasonable visitation, [the trial court] shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child."

(citing *Swicegood*, and *Stancil*). And, in *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980), we held that:

> In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration. . . . G.S. 50-13.5(i) provides that "[i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being

> denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child."

(citing *Swicegood*). During the 33 years since *Johnson* was decided, we have consistently followed both its application of the best interests standard to disputes between parents regarding child custody and visitation, and its acceptance of the plain language of N.C. Gen. Stat. § 50-13.5(i). *See*, *e.g.*, *Correll v. Allen*, 94 N.C. App. 464, 471, 380 S.E.2d 580, 584 (1989) ("Visitations may be denied if visitation is not in the child's best interest.") (citation omitted); *Raynor v. Odom*, 124 N.C. App. 724, 733, 478 S.E.2d 655, 660 (1996) ("G.S. 50-13.5(i) requires that 'the trial judge prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interests of the child.' "); and *Maxwell v. Maxwell*, 212 N.C. App. 614, 622, 713 S.E.2d 489, 495 (2011) ("Our General Assembly has provided that: '. . . prior to denying a parent the right of reasonable visitation, [the trial court] shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.' N.C. Gen. Stat. § 50-13.5(i) (2009)"). Thus, "it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare." *Swicegood*, 270 N.C. at 282, 154 S.E. 2d at 327.

In the present case, the trial court found, as required by N.C. Gen. Stat. § 50-13.5(i), that it would not be in the children's best interests to have any visitation with defendant. This ultimate finding of fact was supported by numerous evidentiary findings of fact, including the following:

. . .

> 12. The Court had the opportunity to observe the demeanor of each of the witnesses called by the parties and to hear their testimony.
>
> 13. The Court formed opinions as to the veracity of each witness having had the occasion to observe said witnesses and to hear their testimony.
>
> 14. On August 4, 2005 . . . the Defendant . . . confessed to [plaintiff] that he had engaged in inappropriate sexual behavior with Jessica Respess. . . .

. . .

17. In 2007, the Plaintiff . . . move[ed] to Kansas[.].

. . .

30. After the revelations of August 4, 2005 to the Plaintiff by the Defendant, [law enforcement authorities] . . . began a criminal investigation of the Defendant[.]

31. On August 18, 2005, the Defendant made a voluntary statement to Investigators . . . regarding his voluntary sexual acts with his minor daughter, Jessica.

32. Said voluntary statement, which was . . . acknowledged to be true and accurate during his testimony by the Defendant is incorporated herein[.]

. . .

34. In March of 2002 . . . Defendant slept in the same bed with Jessica who . . . [was] 14 years of age. . . . Between February 2003 and August 2004, the Defendant touched Jessica on her bare breasts many times, kissed Jessica's breasts on occasion, and rubbed Jessica's vaginal area numerous times. The Defendant estimates that he put his finger inside of Jessica's vagina and kissed her breasts on at least ten occasions.

35. Between August 2004 and August 18, 2005, the Defendant touched Jessica's breast more than ten times, rubbed her vaginal area ten to twelve times, inserted his finger inside of Jessica's vaginal area ten or twelve times, and kissed her bare breasts three or more times.

36. The Defendant allowed or caused Jessica to have an orgasm while riding straddled on top of him a number of times.

37. The Defendant was charged with multiple sex offenses and indecedent liberties with a minor child in October of 2005 in Beaufort County.

. . .

43. The Defendant was ordered by the Department of Social Services as conditions of being able to visit with his children not to be alone with the children out of the presence of the Plaintiff, not to kiss the children on the lips, not to allow them to sit on his lap . . . [and] not to

otherwise engage any type of physical touching or activity that could be determined to be sexual grooming. During the year of 2006, the Defendant . . . engaged in these prohibited activities.

. . .

45. Amanda Respess, who is now 18 years of age but is still in high school, testified as did her younger sister, Allysa. Both of these individuals gave forthright testimony which is highly creditable.

. . .

47. Based upon the testimony of Amanda Respess and Allysa Respess, which the Court finds to be creditable, the Court determines that the Defendant engaged in the following behaviors:

A. Would rub their chest to awaken them in the morning, although, they were of an age to have developed breasts.

B. Would rub lotion on their backs and their naked buttocks under the pretense of making sure their skin was soft.

C. Would spend[] hours combing their hair just as he had previously done with Jessica.

D. After the Defendant was separated from the home in August of 2005, he suggested to Amanda that, since she was a minor and an excellent shot, that an accidental shooting of the Plaintiff, her mother, would be appropriate. . . .

E. Saw both children at inappropriate times and places in violation of the restrictions placed on his visitation[.] . . .

F. Would take the minor child, Allysa, by himself to a barn behind [her] residence . . . and would threaten Allysa with physical punishment . . . if she revealed that he had taken her away from the family unit.

48. Amanda and Allysa Respess both testified that they wanted no contact with the Defendant, their father, of any type. . . .

. . .

52. After the Defendant was indicted on the multiple sexual charges . . . three men who belonged to the same church as [the Intervenors] and the Defendant, went to see the Defendant at his trailer[.] . . .

53. In this meeting . . . the Defendant stated that he "never molested anyone who hadn't reached puberty" and further stated that if "he wished to live with his daughter, it was no one else's business."

54. Between November 2005 and . . . July 2007, Judy Kilpatrick, a Department of Social Services case worker, had . . . conversations with the Defendant[, who] . . . told [her] many disturbing things which included but were not necessarily limited to the following:

A. He had a love affair with Jessica and he fell in love with her.

B. Jessica came to him and pursued him.

C. Jessica was a better wife than the Plaintiff and that he would like to have a wife like her.

D. The Plaintiff didn't satisfy his sexual needs and this was the reason he was involved with Jessica.

E. The Defendant stated "[Alana] was the problem" and the reason he engaged in sexual behavior with his minor child, Jessica.

F. The Defendant referred to his daughter, Jessica Respess, when she was a minor with the nickname "Luscious Lips" and admitted kissing her and his other children directly on the lips and nibbling with his teeth on Jessica's lower lip.

55. The Defendant also . . . told the Plaintiff . . . that the problems arising out of his destructive behavior with his daughter were the fault of the Plaintiff.

56. The Defendant, after he was charged with criminal indecent liberties . . . left notes with his daughter, Jessica, suggesting how she might testify so that his behavior did not look so bad.

. . .

58. The Defendant also, during the period of time when he was not supposed to write to or communicate with his minor children, sent messages to the minor children[.] . . .

59. The Plaintiff introduced numerous hand-written letters and notes from the Defendant to his minor children indicating that he still did not see anything wrong with what he had done, which . . . were written and delivered in violation of the restrictions imposed upon communication between the [defendant] and his children[, and] . . . contained [inappropriate] language[.] . . .

60. On May 3, 2007, the Defendant entered pleas of guilty to five counts of indecent liberties with the minor child, Jessica Respess.

61. . . . [In] File Number 05 CRS 54090, he [pled] guilty to a Class F, Level 1 Felony and was sentenced to . . . [16 to 24] months of an active sentence suspended for thirty six months of supervised probation upon the condition that he register as a sex offender, submit to electronic monitoring, have supervised visitation only with his children, and serve a four month active sentence in jail. This sentence expired December 29, 2009.

62. . . . [In] File Number 07 CRS 1209 in Count 1, he [pled] guilty to the charge of indecent liberties . . . [and received the same sentence as in File No. 54090,] to run at the expiration of the 05 CRS 54090 and which sentence was suspended on the same terms and conditions as the sentence handed down in O5 CRS 54090. . . . [T]his sentence would expire on August 28, 2011.

63. In this same criminal case, the Defendant [pled] guilty to a second count of indecent liberties . . . and [received] an identical sentence . . . [that] would run at the expiration of the active sentence in Count 1 and . . . expire on April 27, 2013.

64. In this same criminal case, the Defendant [pled] guilty to a third count of indecent liberties . . . and was sentenced to an identical sentence as in the first count . . . [to] run at the expiration of the active sentence in Count 2 and . . . expire on December 27, 2015.

65. In this same criminal case, the Defendant [pled] guilty to a fourth count of indecent liberties . . . and was sentenced to an identical sentence as in the first count . . . [to] run at the expiration of the active sentence in Count 3 and . . . expire on April 26, 2017.

66. If the Defendant were to have unsupervised visitation or custody as he sought in his counterclaim, he would be in violation of the terms of the Superior Court Order suspending his active sentences.

67. As a condition of the sentence imposed in . . . file number 05 CRS 54090, the Defendant served an active prison sentence . . . from May 2007 through December 2007.

. . .

71. Amanda Respess, having a date of birth of May 25, 1993 . . . [has] health problems as she has developed Neurofibromatosis, which is a disease which affects the nerve endings in the brain[.] . . .

. . .

75. Allysa Respess . . . is a very mature 13 year old girl who testified creditably in Court. . . .

. . .

77. The minor child, Noah, is in the fourth (4th) grade. He is very energetic and enjoys . . . scholastic and community activities[.]

. . .

80. The three minor children, Amanda, Allysa, and Noah, are doing extraordinarily well in Smith Center, Kansas, and their environment should not be disturbed.

81. The Plaintiff took the children to family counseling . . . with Cyndee Fintel who spoke to the Court's expert, Dr. Harold May, and recommended that there be no visitation between the minor children and the Defendant.

. . .

85. Dr. Harold May, Ph.D., of the Carolina Center . . . testified as the Court's appointed expert.

. . .

89. Dr. May has not seen the minor children in over three years and six months as of the date of this hearing.

. . .

91. The present therapist . . . for the Defendant is Michael Doughtie, who . . . testified that the Defendant . . . viewed Jessica more as a wife than as a daughter[, and that] . . . the sexual abuse of Jessica had begun at least in 1998.

92. Mr. Doughtie also testified creditably that as recently as June of 2010, the Defendant expressed concerns about "Jessica getting married" and that the Defendant was "losing her." These remarks were further evidence that the Defendant had made Jessica Respess, in his mind, both a mother and a wife figure.

93. These comments made to Mr. Doughtie combined with the Defendant's other actions such as grooming the minor children, Amanda and Allysa, are creditable and strong evidence indicating that the Defendant should never have any contact with his three younger children.

94. The Court rejects the suggestions of Dr. May that the children should have any contact with the Defendant as it is not in the children's best interest so to do.

. . .

125. The Defendant engaged in a prolonged, deliberate, and willful course of sexually abusing Jessica Respess.

. . .

146. As a further mixed finding of fact and conclusion of law, the Court concludes that the Defendant's . . . sexual molestation of his oldest daughter over a period of not less than five (5) years, his refusal to accept responsibility for it, his continued obsession with his minor daughter[,] . . . his grooming behaviors to his two youngest daughters, the threats he made to his youngest daughter[], and his refusal to accept ultimate responsibility make him a totally inappropriate person to have visitation or custodial relationships of any type with his minor children, and the Court finds as a mixed finding of fact and conclusion of law

> that it would be actually adverse to any good interest of the minor children for the Defendant to have any contact whatsoever, and the Court must be vigilant in preventing the same.

We hold that the trial court made the finding required by N.C. Gen. Stat. § 50-13.5(i) that it was not in the best interests of the minor children that defendant have visitation. This finding was supported by other, unchallenged, findings, and the trial court did not err by denying visitation to defendant.

In seeking to persuade us to reach a contrary conclusion, defendant relies primarily on the case of *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), which he contends is "controlling" and requires us to reverse the trial court. After careful review, we conclude that *Moore* is not dispositive of this issue.

Moore arose from a custody dispute between the divorced parents of a minor child. The plaintiff-father's visitation rights were suspended after the child disclosed sexual contact between the plaintiff and the child. The trial court denied the plaintiff's motion to reinstate visitation and found that it would not be in the child's best interests for plaintiff's visitation to be reinstated. *Moore*, 160 N.C. App. at 571, 587 S.E.2d at 75. On appeal, this Court reversed the trial court, based on application of a new standard for a trial court's denial of visitation rights, and held for the first time that (1) a trial court's denial of visitation is tantamount to termination of parental rights, and therefore requires the trial court to apply the "clear, cogent, and convincing" evidence standard applicable to termination cases; (2) to comply with N.C. Gen. Stat. § 50-13.5(i), a trial court must apply the standard applicable to a custody dispute between a parent and a non-parent, and may not apply the best interests of the child standard absent a written finding that the parent was unfit or had engaged in conduct inconsistent with his protected status as a parent; and (3) the trial court must state that these findings were based on clear, cogent, and convincing evidence. *Id.* at 573-74, 584 S.E.2d at 76.

In this case, the trial court found that visitation between defendant and the minor children was not in the children's best interest, but did not find that defendant was unfit or that his conduct was inconsistent with his protected parental status, and did not state that its decision to deny visitation was based on clear, cogent, and convincing evidence. Defendant argues that the trial court's ruling did not comply with the dictates of *Moore*. However, we conclude that the standard articulated

in *Moore* directly conflicts with prior holdings of this Court and our Supreme Court and therefore does not control our decision in the instant case.

"According to well-established law, '[w]here 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.' " *State v. Perry*, __ N.C. App. __, __, 750 S.E.2d 521, 534 (quoting *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)), *disc. review denied*, __ N.C. __, 749 S.E.2d 852 (2013). Thus, as a general rule, we are bound by prior opinions of this Court.

However, this Court has no authority to reverse existing Supreme Court precedent. *See Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("It is elementary that this Court is bound by holdings of the Supreme Court [of North Carolina]") (citation omitted), and *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the Court of Appeals lacks authority to overrule decisions of the Supreme Court of North Carolina and has a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court"). "Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *State v. Gardner*, __ N.C. App. __, __, 736 S.E.2d 826, 832 (2013) (citing *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005), *superseded by statute on other grounds as recognized in In re M.I.W.*, 365 N.C. 374, 376, 722 S.E.2d 469, 472, *rehearing denied*, 365 N.C. 568, 724 S.E.2d 512 (2012)).

As discussed above, numerous cases from both this Court and our Supreme Court have long held that issues of child custody and visitation are determined by the best interest of the child, based upon the preponderance of the evidence. In addition, this Court has consistently interpreted N.C. Gen. Stat. § 50-13.5(i) as written, without adding additional requirements to the statute's text or deviating from the general rules governing child custody. The holding of *Moore* diverged sharply from this controlling precedent in significant respects.

First, *Moore* directed trial courts to apply to a custody dispute between a child's parents the standard applicable to a dispute between a parent and a non-parent. In *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994), our Supreme Court held that, in a custody dispute between a child's natural parent and a non-parent, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children,

the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." However, in *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266-67, which was decided before *Moore*, our Supreme Court explicitly ruled that *Petersen* was inapplicable to a custody dispute between parents:

> We acknowledged the importance of this liberty interest [of parents] nearly a decade ago when this Court held: "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." . . . Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. Furthermore, the protected right is irrelevant in a custody proceeding between two natural parents, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the "best interest of the child" test.

(emphasis added) (quoting *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905, and citing *Price v. Howard*, 346 N.C. 68, 78-79, 484 S.E.2d 528, 534 (1997) (internal citation omitted), *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 520, 98 S. Ct. 549 (1978), and *Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001)). *Moore*'s holding that the *Petersen* presumption applies to a trial court's decision to deny visitation rights to a non-custodial parent contradicts our Supreme Court's holding that *Petersen* is "irrelevant" to a dispute between parents and that "[i]n such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.*

Moore also failed to state a substantive or precedential basis for its holding that an order denying visitation was the functional equivalent of the termination of parental rights, and therefore required a trial court to apply the standards for termination proceedings. Our jurisprudence has long recognized significant differences between a child custody order, which is subject to modification upon a showing of changed circumstances, and orders for adoption or for termination of parental rights, which are permanent. *See, e.g.*, *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975) ("A judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances

affecting the welfare of the child and, therefore, is not final in nature.") (citations omitted), and *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267 ("[A] termination of parental rights order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent[.]") (citation omitted).

We also note that in *In re T.K.*, *D.K.*, *T.K.*, *& J.K.*, 171 N.C. App. 35, 613 S.E.2d 739, *aff'd* 360 N.C. 163, 622 S.E.2d 494 (2005), we affirmed a trial court's permanency planning order, holding that the trial court properly made findings as to the best interest of the children. Judge Tyson dissented in part, and argued that the trial court had failed to follow the standards set out in *Moore*, that denial of visitation rights "effectively terminated respondent's parental rights," *T.K.*, 171 N.C. App. at 42, 613 S.E.2d at 743, and that the "trial court erred by denying respondent all visitation rights . . . without finding her to be unfit or engaging in conduct inconsistent with her parental rights. Absent proper findings supported by clear, cogent, and convincing evidence, the trial court's conclusions of law are erroneous[.]" *Id.* at 44, 613 S.E.2d at 744-45 (citing *Moore*). Our Supreme Court rejected this opportunity to ratify or adopt the holding of *Moore*, and affirmed the majority opinion.

Prior to the decision in *Moore*, binding precedent consistently held that (1) the standard in a custody dispute between a child's parents is the best interest of the child; (2) the applicable burden of proof is the preponderance of the evidence; (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50-13.5(i) if it makes the finding set out in the statute. *Moore* does not acknowledge these cases or articulate a basis on which to distinguish it from earlier cases. We conclude that *Moore* does not control the outcome of this case, and that defendant is not entitled to relief based on *Moore*.

Defendant also argues that the trial court's finding that visitation between defendant and the minors would not be in the children's best interest is not supported by its other findings. We reject this argument and note the trial court's extensive findings, quoted above. We conclude that the trial court did not commit reversible error by denying defendant visitation and that the trial court's ruling in this regard should be affirmed.

III. Child Support

In his next argument, defendant contends that the trial court erred by (1) calculating retroactive child support based upon the child support guidelines, rather than evidence of plaintiff's actual expenditures;

(2) applying the 2011 guidelines to his retroactive child support obligation, rather than the 2006 guidelines; (3) imputing an amount of income to him that was not supported by proper findings; (4) awarding plaintiff a vehicle without determining its value; and (5) finding that defendant had willfully refused to pay any child support without excuse or explanation. We agree in part.

A. Calculation of Retroactive Child Support

[2] " 'Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support. . . . Child support awarded, however, from the time a party files a complaint for child support to the date of trial is . . . [termed] prospective child support[.]' " *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (quoting *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996) (internal citations omitted)).

N.C. Gen. Stat. § 50-13.4(c) states that the trial "court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section." The guidelines in effect at the time of this hearing state that

> [i]n cases involving a parent's obligation to support his or her child for a period before a child support action was filed (*i.e.*, cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care. . . .

Standing alone, this provision would allow a trial court to calculate retroactive child support by reference to the guidelines. However, in *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011), we held that " '[r]etroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period.' Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary." (quoting *Rawls v. Rawls*, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989), and citing *Savani v. Savani*, 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991)).

The rule stated in the Guidelines conflicts with the holding of *Robinson*. We have held that:

> Nowhere in the statute does the legislature authorize the Conference to override existing case law in formulating the Guidelines. Although the Guidelines are formulated by the Conference of Chief District Judges pursuant to authority granted them by the legislature in N.C. Gen. Stat. § 50-13.4(c1), the Conference is not a legislative body, and the Guidelines are not codified in the North Carolina General Statutes. . . . Therefore, we find that if the trial court follows the Guidelines in awarding retroactive child support in cases involving unincorporated separation agreements, instead of controlling case law, the court is in error.

Carson, 199 N.C. App. at 107, 680 S.E.2d at 889. *Carson* and *Robinson*, construed together, require that an award of retroactive child support be supported by evidence of plaintiff's actual expenditures for the children during the period for which she seeks retroactive child support.

Plaintiff acknowledges the cases cited above, but argues that "the Court of Appeals was mistaken in its decision in *Robinson*." However, we "are bound by opinions of prior panels of this Court deciding the same issue." *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 441, 620 S.E.2d 201, 202 (2005) (citing *Civil Penalty*). We conclude that this issue is controlled by *Robinson* and *Carson*, and that the trial court's award of retroactive child support must be reversed and remanded for findings on plaintiff's actual expenditures for the children during the relevant time period.

B. Application of 2011 Guidelines

Next, defendant argues that the trial court erred by calculating his retroactive child support obligation using the 2011, as opposed to the 2006, guidelines. However, as we have held that the trial court erred by using the guidelines to calculate retroactive child support, we do not reach this argument.

C. Imputation of Income

[3] Defendant argues next that the trial court erred in determining the amount of income it imputed to defendant. The trial court imputed to defendant an annual income of approximately $50,000. Defendant argues that this amount was not supported by the trial court's other findings or

the evidence. We agree and remand for the trial court to make additional findings as to defendant's earning ability.

"Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party 'deliberately acted in disregard of his obligation to provide support.' Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. . . . [T]his showing may be met by a sufficient degree of indifference to the needs of a parent's children." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985), quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (internal citation omitted), and citing *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001)). In this case, defendant does not challenge the trial court's findings as to the effect of his intentional "course of sexually abusing" his daughter and the resultant loss of the licenses he needed to continue his previous career as a stockbroker and insurance agent, or the trial court's decision to impute income to him. What defendant does argue is that the trial court's ruling on the amount of income imputed to him was not supported by its findings. The court's findings on the issue of defendant's earning capacity include the following:

. . .

> 109. The Defendant earned a gross sum of One . . . ($100,000.00) in the year 2005 and if he had continued to [sell] insurance and be licensed as a . . . Stock Broker, he could have earned not less than . . . ($50,000.00) per year each year since that time.
>
> . . .
>
> 115. The Defendant has no living expenses as his wife, a banker with BB&T, apparently provides for him. . . .
>
> 116. The Defendant testified that he could not secure employment in his former employment as an insurance salesman or stock broker because of his felony convictions.
>
> 117. The Defendant reported Zero income tax in 2009 despite apparently working as a farrier and earning a gross income of . . . ($8,000.00). He also used business expenses

deductions in 2009 for a portion of his home which he admitted that he did not own or pay for.

118. In 2010, he indicated that he had lost . . . ($10,086,00) in income from his employment as a farrier, but this included . . . ($15,628.00) in car and truck expenses and . . . ($7,480.00) in supplies.

119. The Defendant's tax returns for 2009 and 2010 were not creditable evidence of his earning capacity.

. . .

124. In the present case, before his arrest and conviction, the Defendant father was employed as an insurance salesman and stock broker, and capable of earning a gross salary of at least . . . ($100,000.00) per year, a net salary of . . . ($50,000.00), or a monthly salary of . . . ($4,167.00) per month at a minimum.

. . .

132. . . . Defendant's income from all sources is imputed to be . . . ($4,167.00) per month.

The court found that defendant had previously earned $100,000 and imputed a current income of approximately $50,000, or half of his previous salary. However, the findings do not establish any basis for the court's imputation in 2011 of half of what he earned in 2005, as opposed to some other fraction or amount. "[T]he findings of fact on this issue are insufficient to support the trial court's determination of *the amount of income* that should be imputed to [defendant]. A trial court must 'make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.' " *McKyer*, 179 N.C. App. at 147-48, 632 S.E.2d at 837 (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)) (emphasis in original). We conclude that the court's determination that it was appropriate to impute income to defendant should be upheld, but that the order must be remanded for findings detailing how the trial court arrives at the amount of income to be imputed to defendant.

D. Transfer of Vehicle to Plaintiff

[4] Defendant argues next that the trial court erred by awarding plaintiff a 1997 Ford Expedition as an "additional form of child support" without

determining the vehicle's value and deducting it from the child support award. We disagree.

Defendant cites N.C. Gen. Stat. § 50-13.4(e):

> (e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of arrearages of child support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. . . .

Defendant notes that if the trial court orders the transfer of real property in payment of child support arrearages it must determine the property's value. He argues that an "analogous situation exists here," that the trial court "should have determined the Vehicle's value and deducted that amount from the total child support award" and that the court's "failure to do so constitutes error." However, N.C. Gen. Stat. § 50-13.4(e) does not require the trial court to determine the value of personal property applied towards child support arrearage and defendant does not offer any support for his contention that such a transfer is "analogous" to a transfer of real property or any authority for us to supplement the statute with an additional requirement not found therein.

And, defendant does not dispute the trial court's finding of fact that:

> 144. The only vehicle the Plaintiff [had] available to her is a 1997 Ford Expedition until May 2010 which has 285,000 miles on it as of the date of this hearing which she has had since the parties' separation although this vehicle has been titled to the Defendant. She is seeking this vehicle as an additional form of child support from the Defendant. The Defendant has agreed for said in kind child support to be also paid since the Plaintiff has maintained all expenses of this vehicle. The Defendant will sign over title of said vehicle to the Plaintiff on or before June 15, 2012. . . .

Thus, defendant concedes that (1) the vehicle was fifteen years old and had 285,000 miles on it at the time of the hearing; (2) although it had been titled in his name, plaintiff had assumed responsibility for "all expenses" of the vehicle; and (3) he consented to transfer of the vehicle as an additional form of child support.

"[T]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (citation omitted). Defendant does not assert any prejudice from the court's alleged error. In addition, defendant does not dispute that he consented to transfer the vehicle to plaintiff, a finding supported by his testimony. Given the defendant's failure to articulate a legal basis for interpreting N.C. Gen. Stat. § 50-13.4(e) in a manner not supported by the statute's text, any prejudice arising from the court's alleged error, or any reason to grant relief on the basis of a transfer to which he consented, we decline to hold that the court erred by transferring the 1997 vehicle to plaintiff without making a specific finding as to its value.

E. Failure to Pay Any Child Support After August 2006

[5] In defendant's next argument, he argues that the trial court erred by finding "that, although [he] has resources to pay some child support, he [had] 'willfully failed to pay any child support without excuse.' " Defendant does not dispute that he failed to pay any child support after August 2006, but argues that he presented evidence of his inability to find employment. However, the court was not required to believe defendant's testimony. We hold that this finding was supported by evidence in the record.

III. Attorney's Fees

[6] In his final argument, defendant contends that the trial court erred by awarding attorney's fees to plaintiff. Defendant argues that the trial court erred in finding that defendant had the ability to pay attorney's fees, basing its award of attorney's fees in part on its finding that defendant had acted in bad faith, and finding that plaintiff had insufficient means to pay attorney's fees. We agree in part.

1. Standard of Review

N.C. Gen. Stat. § 50-13.6 (2013) states that in any proceeding for child custody or support:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is

> adequate under the circumstances existing at the time of the institution of the action or proceeding[.] . . .

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

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

Hennessey v. Duckworth,__ N.C. App. __, __, 752 S.E.2d 194, __ (2013) (quoting *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted). Pursuant to N.C. Gen. Stat. § 50-13.6, in a custody action, a trial court "has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved[.] . . . Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980).

2. Analysis

The trial court made the following findings:

> 1. This action for child custody was brought by the Plaintiff in good faith and she is without sufficient funds to defray the expenses of this custody lawsuit including all of her attorneys' fees.
>
> 2. As this is a proceeding for child support of the parties' three minor children, the Plaintiff may be entitled to the entry of an Order requiring the [defendant] to pay some or all of her reasonable attorneys' fees pursuant to N.C.G.S. Section 50-13.6.
>
> 3. The Defendant, who is the party who is going to be ordered to furnish support, has refused to provide support of any type, and has refused to provide support which is adequate under the circumstances existing at the time of the institution of this action or proceeding.

Defendant does not dispute that these findings meet the statutory requirements discussed above. He does not challenge the trial court's

determination of a reasonable amount of attorney's fees, which we affirm. However, defendant raises other arguments about the court's award of attorney's fees to plaintiff.

Defendant argues first that the trial court erred by finding that he "has resources" available to pay attorney's fees. Defendant directs our attention to evidence he presented tending to show that he faces economic challenges. However, the trial court was not required to find his evidence credible. He also argues that the trial court should not have considered the fact that his living expenses are being paid by his wife, because she has no legal obligation to support his children. However, "where a party's new spouse shares responsibility for the party's expenses and needs, it is proper for the court to consider income received by the new spouse[.]" *Harris v. Harris*, 188 N.C. App. 477, 487, 656 S.E.2d 316, 321-22 (2008) (citing *Wyatt v. Wyatt*, 35 N.C. App. 650, 651-52, 242 S.E.2d 180, 181 (1978).

The underlying premise of this argument is that before it could award attorney's fees to plaintiff, the trial court had to make findings about his ability to pay these fees. Defendant cites no authority for this proposition and our Supreme Court has held that " 'we do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action requires a comparison of the relative estates of the parties' " and "that N.C.G.S. § 50-13.6 does not require the trial court to compare the relative estates of the parties[.]" *Van Every v. McGuire*, 348 N.C. 58, 59-60, 497 S.E.2d 689, 690 (1998) (quoting *Taylor*, 343 N.C. at 57, 468 S.E.2d at 37. We conclude that the trial court was not required to find that defendant "had resources" available in order to award attorney's fees to plaintiff, making it unnecessary for us to analyze the evidentiary support for this finding of fact.

Defendant also argues that the trial court erred by basing its award of attorney's fees on his "bad faith in requesting custody or visitation." This argument lacks merit. In Finding No. 145, the trial court stated that:

> 145. Moreover, the Court, as a mixed finding of fact and conclusion of law, determines that the Defendant's insistence upon a trial seeking custody or visitation of his children and defending against the claims of his former wife, the Plaintiff, for the same and for her claims of child support are in bad faith, not well taken, and he has adequate resources available to him to reimburse her for some or all of her attorney's fees.

Defendant concedes that "this Finding/Conclusion was not included in the findings related to the attorney's fees award[.]" There is no evidence that the trial court's award of attorney's fees to plaintiff was "based on" its passing reference to bad faith in this finding. Defendant is not entitled to relief based upon this argument.

Defendant also challenges the evidentiary support for the trial court's finding that plaintiff "is without sufficient funds to defray the expenses of this custody lawsuit including all of her attorneys' fees[.]" The trial court made the following findings regarding plaintiff's income, expenses, and estate:

. . .

> 102. The Plaintiff has been a nurse registered by the State of North Carolina from 1987 through 2007, and has been a Registered Nurse in Kansas from 1999 until [the] present.
>
> 103. The Plaintiff is presently employed with the Smith Center School District as the School Nurse. She also runs the concession stand to earn extra money. The Plaintiff's gross monthly earnings from all sources is . . . ($3,033.42). The Plaintiff has earned approximately . . . ($3,033.00) per month from all sources since August 2006.
>
> 104. The Plaintiff paid a total of . . . ($7,740.70) in premiums for the three minor children's, Amanda, Allysa, and Noah, health insurance coverage[.] . . .
>
> 105. The children were approved for Health Wave coverage on October 26, 2009, so the Plaintiff could secure health insurance on her three minor children at no additional cost.
>
> 106. The Plaintiff has sought to recover a portion of the out of pocket expenses paid by her . . . as a portion of the retroactive and prospective child support in the percentage of the Plaintiff's income to the Defendant's income as hereinafter determined and imputed by the Court.
>
> . . .
>
> 132. The Plaintiff's income from all sources is . . . ($3,033.00) per month[.]

The court's findings are sufficient with regards to plaintiff's income. However, the trial court made no findings as to her expenses or her

assets and estate. We remand for additional findings to support the trial court's finding that plaintiff had insufficient means to defray the cost of counsel.

Conclusion

We affirm the trial court's ruling denying defendant visitation with the minor children, its determination that plaintiff was entitled to child support, its ruling that it was proper to impute income to defendant, and its transfer of the 1997 vehicle to plaintiff. We reverse and remand the order with regard to the amount of retroactive child support to which plaintiff may be entitled, the amount of income that may be imputed to defendant, and for additional findings regarding plaintiff's expenses as it pertains to her claim for attorney's fees. In its discretion, the trial court may take such additional evidence as it deems necessary.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LAMAR MONQUEE CARPENTER, Defendant

No. COA13-898

Filed 4 March 2014

1. Evidence—photographs—properly authenticated—relevant—not unduly prejudicial

The trial court did not commit plain error in a robbery case by admitting three photographs of defendant and his tattoos taken at the jail after his arrest. The photographs were properly authenticated and were relevant to the issue of the identity of defendant as the perpetrator. Furthermore, the trial court did not abuse its discretion by denying defendant's motion to exclude them under Rule 403. The photographs were probative of defendant's identity and were not unduly prejudicial as the trial court specifically found that it was unable to determine from the pictures that they were taken in a jail.

2. Robbery—with a dangerous weapon—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery. Taken in the light most favorable

to the State, the evidence was sufficient to convince a reasonable juror that defendant was one of the perpetrators of the armed robbery.

3. Constitutional Law—effective assistance of counsel—dismissed without prejudice—motion for appropriate relief

Defendant's argument that he received ineffective assistance of counsel, in violation of his Sixth Amendment rights, when his trial counsel failed to cross-examine the two eyewitnesses with prior inconsistent statements they had made to police and the prosecutor was dismissed without prejudice to his ability to raise it through a motion for appropriate relief.

Appeal by defendant from Judgments entered on or about 21 March 2013 by Judge V. Bradford Long in Superior Court, Forsyth County. Heard in the Court of Appeals 9 January 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Aimee Margolis, for the State.

Unti & Lumsden LLP, by Sharon L. Smith, for defendant-appellant.

STROUD, Judge.

Lamar Carpenter ("defendant") appeals from judgments entered on or about 21 March 2013 after a Forsyth County jury found him guilty on two counts of robbery with a dangerous weapon and one count of possession of a firearm by a convicted felon. We conclude that defendant has failed to show error at his trial, but dismiss his ineffective assistance of counsel claim without prejudice to his ability to raise it by motion for appropriate relief.

I. Background

On 7 February 2011, defendant was indicted in Forsyth County for robbery with a dangerous weapon. This indictment was superseded on 23 January 2012 by one charging two counts of robbery with a dangerous weapon and again on 13 August 2012 by indictments charging two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. Defendant pled not guilty and the case proceeded to jury trial.

At trial, the State's evidence tended to show that on 23 April 2010, Ahmed Khabiry and Shafic Andraos were working at a gas station and convenience store in Winston-Salem. Mr. Khabiry was working as

a manager and clerk, while Mr. Andraos, the owner of the store, was working in the back office. At around 9:00 or 9:30 that morning, a young man walked into the convenience store and attempted to use the ATM. Neither Mr. Khabiry nor Mr. Andraos recognized the man. That same man returned a few minutes later with a second man. Both men were wearing bandanas covering the lower half of their faces. Mr. Khabiry was outside sweeping the parking lot when he saw the men arrive. He started heading back inside to assist them when he noticed the first man was carrying a silver gun in his hand. Mr. Khabiry grabbed for the gun, but the second robber came up, pointed another silver gun at him, and pushed him inside. The first robber took Mr. Khabiry back behind the counter to the cash register, while the second robber went back to the office where Mr. Andraos was working.

Mr. Khabiry recognized the second robber as one of his regular customers, who he had nicknamed "Big Money," but did not recognize the first robber. He recognized "Big Money" from his build and voice, and also from his tattoo. In court, Mr. Khabiry identified defendant as the second robber and the man he knew as "Big Money."

The first robber told Mr. Khabiry to open the cash register, which he did, and then demanded Mr. Khabiry hand over his wallet. When Mr. Khabiry informed the first robber that he did not have a wallet on him, the robber told him to hand over whatever money he had in his pocket, which amounted to five dollars. The second robber took about $6,700 from the back office, where Mr. Andraos had been preparing the store's cash for deposit. Both robbers then left the store and Mr. Khabiry called the police.

Around 5 May 2010, the police asked Mr. Khabiry to look at two photo arrays, one of which contained defendant's photograph. The arrays were administered by an officer with no connection to the investigation and no knowledge of which photograph in the array was the suspect. Mr. Khabiry identified defendant as the regular customer who had robbed the store, stating he was "100 percent sure." He did not identify the man whom police suspected was the first robber.

Sometime in July 2010, defendant returned to the convenience store. Mr. Khabiry recognized him as the second robber and informed Mr. Andraos. Mr. Andraos went out to look at the car defendant was driving, wrote down the license plate number, and called the police. At trial, Mr. Andraos identified defendant as the man he saw in July whom Mr. Khabiry pointed out. Mr. Andraos testified that he noticed the same tattoo on defendant's arm in July as the one he saw on the second robber's arm, but that he did not really know defendant.

The State also introduced pictures taken of defendant while he was in jail that showed the tattoo on his right arm and still photographs taken by the store's surveillance cameras during the robbery. The surveillance camera photographs showed that the second robber had a tattoo on his forearm, but the photographs were not of sufficient quality to show the details of the tattoo.

At the close of the State's evidence, defendant moved to dismiss all of the charges against him and the trial court denied the motion. He then elected not to present evidence and renewed his motion to dismiss. Again, the trial court denied the motion. The jury found defendant guilty on two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. The trial court sentenced defendant to two consecutive terms of 97-126 months imprisonment and one term of 19-23 months imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Photographs

[1] Defendant first argues that the trial court erred in admitting three photographs of him and his tattoos taken at the jail after his arrest. He contends that the photographs were not properly authenticated, not relevant, and that the trial court erred in denying his motion to exclude them under Rule 403. We hold that the trial court did not err in admitting the photographs.

A. Standard of Review

At trial, defendant only objected to admission of the photographs under N.C. Gen. Stat. § 8C-1, Rule 403 (2011). Defendant did not raise either authentication or relevance below, but asks us to review the trial court's denial of his motion to exclude the photographs on those grounds for plain error.

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

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

Defendant did object on the basis that the evidence was inadmissible under Rule 403. We review the trial court's determination under Rule 403 for an abuse of discretion. *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Black*, 197 N.C. App. 731, 737, 678 S.E.2d 689, 693 (citation and quotation marks omitted), *app. dismissed*, 363 N.C. 657, 685 S.E.2d 108 (2009), *cert. dismissed*, 365 N.C. 208, 710 S.E.2d 38 (2011).

B. Authentication

"Photographs may be used as substantive evidence upon the laying of a proper foundation, N.C.G.S. § 8-97, and may be admitted when they are a fair and accurate portrayal of the place in question and are sufficiently authenticated." *Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 565, 402 S.E.2d 872, 873 (1991). A photograph is authentic if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2011).

Here, the photographs that defendant challenges are photographs taken of him, including his tattoo, while he was in custody in October 2010. Defendant argues that because the State introduced no evidence that defendant had that tattoo on 23 April 2010, the date of the robbery, the photographs were not what they purported to be. We disagree.

The custodial photographs did not purport to show defendant's arm at the time of the robbery. The photographs clearly show—and the State introduced them to show—that defendant had a tattoo on a particular place on his forearm at the time the photograph was taken. The officer who took the photographs testified about the procedure used to take them and testified that they fairly and accurately depicted defendant's tattoo as it appeared in October 2010. Indeed, defendant does not contest that the photographs fairly and accurately depict defendant's arm while he was in custody. Therefore, there is no authentication issue with the photographs under either N.C. Gen. Stat. § 8C-1, Rule 901(a) or N.C. Gen. Stat. § 8-97.

C. Relevance

Similarly, defendant argues that the custodial photographs were irrelevant because the State has failed to show that he had the tattoo on 23 April 2010. Defendant contends that the fact that he had a tattoo on his forearm in October 2010 is not probative at all as to identity. Again, we disagree.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). A piece of evidence does not have to positively identify the perpetrator to be relevant to the issue of identity. *See State v. Collins*, 35 N.C. App. 250, 252, 241 S.E.2d 98, 99 (1978) ("Under the facts in this case it was not necessary that the victim give testimony positively identifying the clothing as that worn by the robber, only that it was similar."); *State v. Bass*, 280 N.C. 435, 449, 186 S.E.2d 384, 394 (1972) (holding that testimony identifying the jacket the defendant was wearing at his arrest as similar to that of the perpetrator was relevant and admissible).

Here, the photographs of defendant's tattoo taken after his arrest were relevant to proving his identity as the perpetrator. Detective Clark did testify that he could not make out what the tattoo said, in the surveillance camera still photographs but noted that he could tell it was a tattoo. Additionally, the surveillance camera photographs clearly show the location and general dimensions of the tattoo of the second robber. It would be reasonable for a juror to conclude that the photographs taken after defendant's arrest show a tattoo in approximately the same location and approximately the same size as that of the second robber. That defendant had a tattoo on his forearm in October 2010 similar to that of the second robber is at least some evidence that he was the second robber. Such evidence makes it "more probable" that defendant was the perpetrator "than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Therefore, the evidence is relevant to the issue of identity. *See Whiteside*, 325 N.C. at 397-98, 383 S.E.2d at 915-16 (holding that evidence that a pair of shoes owned by defendant matched the shoe prints found at the crime scene is relevant to identity, even if the witnesses were unsure if he was wearing those shoes on the night of the crime). "Once properly admitted, the weight to be given the evidence was a decision for the jury." *Id.* at 398, 383 S.E.2d at 916.

D. Rule 403

We have held that the photographs of defendant's tattoos were properly authenticated and relevant to identify the second robber. Now, we must address defendant's argument—the only one raised below—that the photographs are inadmissible under Rule 403 because "[a]ny probative value from the custodial photographs was outweighed by the danger of unfair prejudice and confusion of the issues."

Defendant first contends that the photographs had no probative value and tended to confuse the jury, largely repeating the same arguments made as to authentication and relevance. For the reasons discussed in the sections addressing those arguments, this argument is similarly unconvincing. Next, defendant argues that the photographs were unfairly prejudicial because they showed him in a jail setting. Defendant fails to highlight anything in the photographs that clearly identify where they were taken other than "some type of institutional setting" and the reflections of two officers.

> While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

State v. Capers, 208 N.C. App. 605, 617, 704 S.E.2d 39, 46 (2010) (citation and quotation marks omitted), *disc. rev. denied and app. dismissed*, 365 N.C. 187, 707 S.E.2d 236 (2011).

Here, the trial court admitted the photographs that it determined showed the least amount of information regarding the location, but excluded as cumulative one of the photographs that showed more of defendant's jail jumpsuit. The photographs admitted by the trial court did not clearly show defendant in jail garb or in handcuffs. The pictures only showed defendant in a white t-shirt in a cinderblock room with large windows. The trial court specifically found that it was unable to determine from the pictures that they were taken in a jail. Therefore, we fail to see how the admission of these pictures was unfairly prejudicial.

Even to the extent that a juror could have deduced that the pictures were taken in a jail, the trial court did not abuse its discretion in determining that the unfair prejudice did not substantially outweigh the probative value. It is common knowledge that defendants charged with armed robbery are often arrested and that when people are arrested they are taken to jail. *See id.* at 614, 704 S.E.2d at 44-45 (noting that it is common knowledge that arrestees are handcuffed and citing *State v. Smith*, 278 Kan. 45, 49, 92 P.3d 1096, 1099–1100 (2004), which held that the "trial court did not err in admitting photographs of defendant in jail clothing because most jurors would hardly be shocked to learn that a murder suspect was taken into custody for some period of time, the only information communicated by jail clothing."). These photographs,

at most, conveyed only the limited information that defendant had been arrested, taken to jail, and photographed. Therefore, we hold that the trial court did not abuse its discretion in overruling defendant's objection based on Rule 403 and did not err in admitting the photographs of defendant.

III. Motion to Dismiss

[2] Defendant argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence identifying him as the second robber. We conclude that the trial court did not err in denying defendant's motion to dismiss.

A. Standard of Review

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

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

B. Analysis

Defendant contends that there was insufficient evidence identifying him as the second robber. He cites a number of articles and cases from other states discussing the weaknesses of eyewitness identification, especially when the identification is cross-racial and when a firearm is pointed at the eyewitness. Such arguments have no bearing on the sufficiency of the evidence when considering a motion to dismiss. If relevant at all, these arguments would go only to the credibility of an eyewitness identification. *See generally State v. Knox*, 78 N.C. App. 493, 496-97, 337 S.E.2d 154, 157 (1985) (holding that the exclusion of expert testimony on the reliability of eyewitnesses was within the trial court's discretion where the expert on voir dire only testified generally); *State v. Cotton*, 99 N.C. App. 615, 621-22, 394 S.E.2d 456, 459-60 (1990) (finding no abuse of

discretion where the trial court concluded that general expert testimony on the reliability of eyewitnesses was unduly prejudicial to the State), *aff'd*, 329 N.C. 764, 407 S.E.2d 514 (1991).

The State called two eyewitnesses who were present at the time of the robbery—the store clerk, Mr. Khabiry, and the owner, Mr. Andraos. Mr. Khabiry testified that he recognized the second robber by his eyes and his voice as one of his regular customers both from working at the convenience store and from his previous business operating an ice cream truck in the area.[1] Although he did not know the customer's name, Mr. Khabiry had been calling him "Big Money." He also testified that he recognized defendant as the second robber from his tattoo.[2] Further, as previously mentioned, although the surveillance video was not clear enough to positively identify what the second robber's tattoo said, it was clear enough for a reasonable juror to conclude that the robber's tattoo was in approximately the same location, and approximately the same size and shape, as defendant's tattoo.

Mr. Khabiry was later asked to do two photo lineups, one of which contained defendant's photograph, and one of which contained a photograph of the suspected first robber. He identified defendant's photograph as one of the robbers and as the man he knew as "Big Money." He indicated that he was 100% certain. In court, he again identified defendant as the second robber. The police officers who investigated the robbery confirmed that Mr. Khabiry had told them that he knew the second robber as "Big Money" and that he told them he recognized that robber as a regular customer, but testified that he had not mentioned anything about a tattoo. Mr. Khabiry was unable to identify anyone as the first robber.

In July 2010, defendant drove up to the gas station and walked into the convenience store. Mr. Khabiry testified that he recognized defendant and told Mr. Andraos that he was the one who had robbed them. Mr. Andraos then went outside, took down the car's license plate number and called the police. Mr. Andraos did not recognize either of the robbers, but confirmed that Mr. Khabiry had identified defendant as the second robber when he returned to the store in July.

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1. Defendant, in his interview with a detective, confirmed that he lived in that area and had been to the convenience store on a number of occasions.

2. Mr. Khabiry testified that the tattoo was on the robber's hand, but when he was examining the photograph of the robber, marked as State's Exhibit 2, which clearly shows a tattoo on the robber's arm, he again described the tattoo as being on the robber's hand. Taken in the light most favorable to the State, this inconsistency could mean that Mr. Khabiry simply misspoke when he said the tattoo was on the second robber's "hand."

Defendant argues that this evidence is insufficient to identify him as the second robber because the eyewitnesses had not mentioned a tattoo when interviewed by the police and because there was no corroborating physical evidence. First, the argument about the witness' failure to mention the tattoo simply goes to the credibility of eyewitness' testimony. "The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) (citation omitted). Defendant's second argument is simply unconvincing. He was positively identified by Mr. Khabiry as the second robber. Mr. Khabiry testified how he recognized defendant and identified him both in court and through an out-of-court photographic array. Additionally, it would be reasonable for a juror to conclude that the photographs from the day of the robbery show that the second perpetrator had a tattoo consistent with defendant's. Taken in the light most favorable to the State, the above evidence is sufficient to convince a reasonable juror that defendant was one of the perpetrators of the armed robbery. *See State v. Mobley*, 86 N.C. App. 528, 532, 358 S.E.2d 689, 691 (1987) (holding that eyewitness identification of defendant as the perpetrator is sufficient to defeat a motion to dismiss on the basis of identity). Therefore, the trial court did not err in denying defendant's motion to dismiss. *See Teague*, ___ N.C. App. at ___, 715 S.E.2d at 923.

IV. Ineffective Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel, in violation of his Sixth Amendment rights, when his trial counsel failed to cross-examine the two eyewitnesses with prior inconsistent statements they had made to police and the prosecutor.

> As a general proposition, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Hernandez, ___ N.C. App. ___, ___, 742 S.E.2d 825, 830 (2013) (citations, quotation marks, and brackets omitted).

Defendant asserts that there was no possible strategic reason that his trial counsel would fail to cross-examine the eyewitnesses on any prior inconsistent statements they made. The State counters that there were a number of possible strategic reasons that defendant's trial counsel would elect not to cross-examine the witnesses using those prior statements. As we cannot resolve this dispute on the cold record before us, we dismiss defendant's ineffective assistance claim as premature without prejudice to his ability to raise it through a motion for appropriate relief.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in admitting the photographs of defendant and his tattoos taken at the jail and that the trial court did not err in denying defendant's motion to dismiss. We dismiss defendant's ineffective assistance of counsel claim without prejudice to his ability to raise it by motion for appropriate relief.

NO ERROR; DISMISSED in part.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
MATTHEW PELHAM FLEIG

No. COA13-1001

Filed 4 March 2014

1. Appeal and Error—untimely notice of appeal—writ of certiorari

The Court of Appeals granted defendant's petition for writ of certiorari where defendant's attorney failed to timely file notice of appeal.

2. Sentencing—consolidated judgment—selling marijuana—delivering marijuana—single transaction

The trial court erred by sentencing defendant to a consolidated judgment of 6-8 months for the two separate offenses of selling

marijuana and delivering marijuana per N.C.G.S. § 90-95(a)(1). Since defendant's acts of sale and delivery arose from a single transaction, defendant was improperly sentenced on the separate offenses of sale and delivery of marijuana.

Appeal by defendant from judgment entered 20 March 2013 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 3 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Ann W. Matthews, for the State.

James W. Carter, for defendant.

ELMORE, Judge.

On 20 March 2013, a jury found Matthew Pelham Fleig (defendant) guilty of multiple drug offenses. The subject of this appeal concerns judgment entered on those offenses in 11 CRS 055170 that stemmed from 10 August 2010: 1.) felony sale of marijuana; 2.) felony delivery of marijuana; and 3.) misdemeanor possession of marijuana. Judge W. Allen Cobb, Jr. consolidated these convictions and imposed a term of imprisonment for six-months minimum, eight-months maximum. That sentence was suspended, and defendant was placed on probation for thirty months and required to served a thirty-day active sentence. Defendant now appeals and contends that the trial court erred by sentencing him for both sale and delivery of marijuana. After careful consideration, we remand for a new sentencing hearing with instructions to vacate either the 1.) sale of marijuana conviction or 2.) delivery of marijuana conviction.

I. Facts

On 5 August 2010, the Jacksonville Police Department conducted a traffic stop of Sarah Lyon's vehicle, and it was discovered that the passenger in her car possessed marijuana, a marijuana grinder, and digital scales. After further investigation, Lyon was never charged with any criminal offenses. Thereafter, she was asked by the Jacksonville Police Department if she knew any individuals who were involved in the sale of narcotics in the local area. She provided the police with defendant's name and agreed to assist them in conducting a controlled buy of marijuana from defendant. On 10 August 2010, officers recorded a phone conversation between Lyon and defendant in which she asked to purchase marijuana from him. Defendant agreed, and the police department gave

Lyon a twenty-dollar bill to buy the marijuana. Equipped with a recording device, Lyon drove to defendant's house, picked him up, and they drove to another location in the neighborhood to conduct the drug deal. Lyon provided defendant with twenty dollars, and he gave her a "dime bag" of marijuana (bag) in return. Knowing that one bag was not a sufficient amount of marijuana for the price of twenty dollars, Lyon immediately requested an additional bag. Defendant did not have any additional marijuana on his person because he thought Lyon only wanted one bag, but he agreed to give Lyon the additional quantity she requested. They drove back to his house to retrieve more marijuana, defendant obtained another bag, and he gave it to Lyon. Lyon did not pay defendant, nor did defendant request, additional money for the second bag. After Lyon received the second bag, she left defendant's house and relinquished the recording device and marijuana to the Jacksonville Police Department.

II. Analysis

a.) Writ of Certiorari

[1] Defendant seeks appellate review by petition for writ of certiorari because of his trial counsel's failure to give proper notice of appeal pursuant to North Carolina Appellate Procedure Rule 4. For the reasons that follow, we allow defendant's writ of certiorari.

Rule 4 mandates that appeal from a judgment rendered in a criminal case must be given either orally at trial or by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4. Should a defendant fail to timely appeal, a writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments[.]" N.C.R. App. P. 21. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when "a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal." *State v. Gordon*, ___ N.C. App. ___, ___, 745 S.E.2d 361, 363 (2013) *review denied*, 749 S.E.2d 859 (2013).

Here, defendant's counsel did not give oral notice of appeal at trial because he needed to speak with defendant to ascertain whether defendant sought to appeal the judgment. After conferring with defendant, defendant's attorney gave oral notice of appeal five days later in Onslow County Superior Court. However, defendant's counsel failed to file a written notice of appeal with the Onslow County Clerk of Superior Court and serve copies upon the State within fourteen days after entry of judgment. As a result, defendant's right to appeal was lost. However,

the lost appeal was no fault of defendant's but an error by his trial attorney. Accordingly, we grant defendant's petition for writ of certiorari and address the merits of his appeal.

b.) Sentencing Error

[2] Defendant argues that the trial court erred in sentencing him to a consolidated judgment of 6-8 months for the two separate offenses of selling marijuana and delivering marijuana per N.C. Gen. Stat. § 90-95(a)(1). Specifically, defendant argues that that he was sentenced twice for conduct that constituted a single offense. We agree.

"[We review alleged sentencing errors for] 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). Under N.C. Stat. § 90-94 (2013), marijuana is classified as a schedule VI controlled substance. Pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2013), it is unlawful for an individual to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" The statute establishes three distinct offenses: "(1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance." *State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (emphasis in original). A sale is defined as "a *transfer* of property for a specified price payable in money" while a delivery is "the actual [sic] constructive, or attempted transfer from one person to another of a controlled substance[.]" *Id.* at 382, 395 S.E.2d at 127 (citations and quotations omitted) (emphasis in original). In addressing offense (2) above, our Supreme Court has ruled that "each single transaction involving transfer of a controlled substance" creates a single offense, "which is committed by either or both of two acts—sale or delivery." *Id.* Thus, a defendant "may not . . . be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer." *Id.* (emphasis in original).

Here, the transaction began when Lyon gave defendant twenty dollars, and defendant gave her a bag in return. The transaction continued because neither sale nor delivery of the marijuana was complete. A negotiation ensued as Lyon requested an additional bag because of the amount of money she had provided to defendant. Defendant acquiesced, retrieved more marijuana from his house, and completed the sale by delivering the bag to Lyon. Thus, the transaction concluded when defendant gave the second bag to Lyon. The transfer

of the second bag from defendant to Lyon simultaneously completed sale and delivery of the drug transaction because Lyon received the total quantity of marijuana she requested for the specified price of twenty dollars. Since defendant's acts of sale and delivery arose from a single transaction, defendant was improperly sentenced on the separate offenses of sale and delivery of marijuana. Thus, we remand this matter for resentencing notwithstanding the consolidated judgment. *See id.* at 383, 395 S.E.2d at 127-28 (holding that when separate convictions for sale and delivery were in error and consolidated into one judgment, this Court must remand because we are "unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery" in calculating the imposed sentences); *See also State v. Rogers*, 186 N.C. App. 676, 678, 652 S.E.2d 276, 277 (2007) (remanding for resentencing where the trial court erred by sentencing defendant for both sale and delivery of a controlled substance). On remand, either the conviction for 1.) sale of marijuana or 2.) delivery of marijuana in 11 CRS 055170 should be vacated to reflect that defendant was convicted of a single count of "sale or delivery" of marijuana.

III. Conclusion

In sum, the trial court erred by sentencing defendant for the sale and delivery of marijuana when his conduct constituted a single offense. Therefore, we remand for a new sentencing hearing with instructions to vacate either the 1.) sale of marijuana conviction or 2.) delivery of marijuana conviction in 11 CRS 055170.

Remanded.

Chief Judge MARTIN and Judge HUNTER, Robert N., concur.

STATE v. RUFFIN

[232 N.C. App. 652 (2014)]

STATE OF NORTH CAROLINA
v.
LOCREAIG DONNELL RUFFIN

No. COA13-744

Filed 4 March 2014

1. Rape—second-degree—rejection of plea offer—failure to state increased maximum sentence

The trial court did not commit reversible error by failing to state the maximum sentence for second-degree rape. Defense counsel informed the trial court that defendant had decided to reject a plea offer and proceed to trial on a charge of first-degree rape, and thus, the trial court's failure to inform defendant of the increased maximum sentence for second-degree rape under N.C.G.S. § 15A-1340.17(f) was not error.

2. Evidence—prior crimes or bad acts—cross-examination

The trial court did not err by allowing the district attorney to cross-examine defendant about alleged prior convictions after defendant initially indicated that he did not recall any, nor did the court err by allowing the prosecutor over objection, to read from a list of charges on an unverified DCI printout. Even assuming, *arguendo*, that the trial court erred by allowing the cross-examination, defendant failed to show prejudice.

3. Rape—second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree rape based on insufficiency of the evidence even though the parties consumed alcohol and the victim acknowledged engaging in several prior instances of consensual sex with defendant. Contradictions and discrepancies did not warrant dismissal of the case, but were for the jury to resolve.

Appeal by defendant from judgment entered 29 January 2013 by Judge Benjamin G. Alford in Washington County Superior Court. Heard in the Court of Appeals 8 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

STEELMAN, Judge.

Where defense counsel informed the trial court that defendant had decided to reject a plea offer and proceed to trial on a charge of first-degree rape, the trial court's failure to inform defendant of the increased maximum sentence for second-degree rape under N.C. Gen. Stat. § 15A-1340.17(f) was not error. The trial court did not err in allowing the prosecutor to cross-examine defendant about prior out of state criminal convictions or in denying defendant's motion to dismiss the charge of second-degree rape for insufficient evidence.

I. Factual and Procedural Background

In January of 2012, J.B., who lived in Plymouth, North Carolina, met defendant through a telephone dating service. After talking to defendant on the phone for several weeks, she invited him to visit in person on the weekend of 8 January 2012. On 6 January 2012, a friend of J.B.'s picked up defendant in Greenville and brought him to Plymouth. When J.B. finished work, she and defendant purchased beer and food and went to a motel, where they talked, ate, drank beer, and had consensual sex. That night, defendant talked about his father, who he felt had mistreated him. The next day, J.B. went to work in the morning and afterwards she and defendant went to her trailer with more beer. J.B. slept about two hours, cooked food for defendant, and they had consensual sex.

Defendant continued drinking during the day and during the evening he became increasingly agitated about issues that he had with his father, and threatened to harm J.B. or himself. Defendant retrieved a machete from J.B.'s closet, pushed her onto the bed, punched J.B., choked her, held the machete to her neck, and forced her to have sex with him. After the forcible intercourse, defendant made her take a shower with him, after which they dressed and both took some sedative-laced pain pills. J.B. and defendant dozed briefly, but when defendant awoke he was still very agitated and "proceeded to scream and holler." J.B. ran into a bathroom and called 911, at which point defendant ran out of the trailer.

When Deputies Ricks and Spencer of the Washington County Sheriff's Department arrived at J.B.'s trailer, Deputy Ricks noted that J.B. was "crying hysterically and shaking." The deputies took a statement from J.B., obtained a photo of defendant, photographed J.B.'s bruises, and took her to the hospital.

Defendant was arrested a few hours later, and at around 10:00 a.m. on 8 January 2012, Deputy Spencer met with defendant at the Washington County jail. Defendant waived his *Miranda* rights, and gave Spencer a statement about the events of the previous 36 hours. His account of the time he had spent with J.B. was similar to J.B.'s statement; specifically, he admitted to Spencer that he had forced J.B. to have sex on Saturday. He told Spencer that J.B. had threatened him with the machete, and that in response "he got angry and went and got the machete and put it up to her neck and threatened to cut her head off and then forced her to have sex with him[.]" J.B. had stated that defendant had raped her once; however, defendant told Spencer that he forced himself on her twice. After Spencer reduced defendant's statement to writing, defendant read and initialed it.

Defendant was indicted on 23 July 2012 in an indictment whose language described second-degree rape, but whose caption and cited statute identified the charged offense as first-degree rape. Prior to trial, the trial court ruled that the indictment charged defendant with second-degree rape.

Defendant was tried before a jury on 28 and 29 January 2013. Defendant's mother testified that defendant, who grew up in Connecticut, suffered a head injury at age two, after which "his brain didn't develop like normal" and that he read at a third or fourth grade level and had difficulty with long term memory. Defendant's mother also testified that after defendant moved to North Carolina about three years earlier, he lived in Greenville for two years, and had spent "one year in jail."

Defendant testified that he was 36 years old, lived in Greenville, North Carolina, and was unemployed but received disability payments for "mental retardation." He recalled speaking with Spencer, but contended that he was "drunk" at the time and did not remember his answers to her questions, or remember telling Spencer that he had forced J.B. to have sex. He testified that he could not read the statement that he had initialed. On cross-examination, defendant testified that he could not recall what happened during the weekend of 8 January 2012, and that he did not "know of" or recall any criminal convictions from Connecticut. Over objection, the prosecutor asked defendant about 5 prior criminal convictions in Connecticut. Defendant denied any recollection of those convictions. When asked on redirect examination, defendant testified that he remembered being arrested, but not what he was charged with.

On 29 January 2013 the jury found defendant guilty of second-degree rape. The trial court sentenced defendant to an active sentence

of 73 to 100 months. Subsequently, the Department of Public Safety informed the trial court that the maximum sentence of 100 months did not correspond to the minimum sentence of 73 months, since defendant was convicted of a reportable sex offense as defined in N.C. Gen. Stat. § 14-208.6(4), and therefore was required to be sentenced under N.C. Gen. Stat. § 15A-1340.17(f). On 11 March 2013, the trial court amended its judgment and entered a maximum sentence of 148 months.

Defendant appeals.

II. Analysis

A. Defense Counsel Places the Plea Arrangement Offered by the State into the Record

[1] In his first argument, defendant contends that the trial court committed reversible error by misstating the maximum sentence for second-degree rape. Defendant asserts that the trial court's failure to inform defendant of the maximum sentence for a conviction of a reportable sex offense "deprived the defendant of a full understanding of the ramifications of turning down the State's plea offer." We disagree.

N.C. Gen. Stat. § 15A-1340.17(f) states that:

> . . . [F]or offenders sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months.

N.C. Gen. Stat. § 14-208.6(4) defines "reportable offense" to include a conviction for "a sexually violent offense, or an attempt to commit any of those offenses[,]" and N.C. Gen. Stat. § 14-208.6(5) defines a "sexually violent offense" to include second-degree rape. Thus, upon defendant's conviction for second-degree rape, his maximum sentence is subject to the provisions of N.C. Gen. Stat. § 15A-1340.17(f).

In this case, after the jury was impaneled, but before the first witness was called to testify, defendant's attorney asked to "place on the record" that defendant was charged with first-degree rape, a Class B1 felony, and that the State had offered to allow him to plead guilty to a Class D felony. Defendant had decided not to accept the plea offer and to proceed to trial. Defense counsel did not identify the Class D felony

to which defendant could plead guilty[1] or state the specific terms of the plea offer. After defense counsel put defendant's decision to proceed to a jury trial on the record, the trial court ruled that the indictment actually charged the offense of second-degree rape, a Class C felony. The trial court then addressed defendant:

> THE COURT: The Court has reviewed the indictment and finds that it does properly allege second-degree rape which is a Class C felony, and you're reading from the second level, and, Mr. Ruffin, if you got convicted of this, then the Court could sentence you to a minimum sentence of anywhere between 50 months in the mitigated range to a maximum minimum sentence of 83 months. If you got 50 months, that would correspond to a maximum of 72 months. If you got 83 months, then that would correspond to a maximum of 112 months. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. Anything the State wants to say about that?
>
> PROSECUTOR: No, Your Honor.
>
> THE COURT: Okay. [defense counsel], anything further?
>
> DEFENSE COUNSEL: No, Your Honor.
>
> THE COURT: Okay. And, Mr. Ruffin, at this time is it your desire to proceed on with the trial of this case knowing that the indictment charges second-degree rape, a Class C felony?
>
> DEFENDANT: Yes.

On appeal, defendant argues that "the trial court's improper statement of the maximum punishment deprived the defendant of an informed decision as to whether or not he should accept the State's plea offer[.]" As set out above, after the trial court ruled that defendant was charged with a Class C offense, and not a Class B1 felony, the court informed defendant that if convicted he might receive a minimum sentence of 50 to 83 months, corresponding to a maximum sentence of 72 to 112 months. The trial court did not inform defendant that, if he

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1. The only potential Class D felony that is apparent on the record before us would be attempted second degree rape.

were convicted of second-degree rape, his maximum sentence would be determined under N.C. Gen. Stat. § 15A-1340.17(f), which would result in a longer maximum sentence than under the felony sentencing grid set out in N.C. Gen. Stat. § 15A-1340.17(c). However, based upon the facts of this case, we hold that this omission did not deprive defendant of an informed decision or entitle him to appellate relief.

Assuming that (1) defendant were convicted of either first-degree rape, second-degree rape, or attempted second-degree rape; (2) defendant was a prior record level II offender, which was the record level used by defense counsel and the trial court in their colloquy with defendant, and; (3) rounding the length of each sentence to the nearest month, the range of sentences to which defendant was exposed was:

Offense Class	Minimum Sentence Range (Months)	Corresponding Maximum Sentence from Sentencing Grid	Increased Maximum Sentence
B1	221 276	278 344	325 391
C	67 83	93 112	140 160
D	59 73	83 100	131 148

Defense counsel represented to the trial court that defendant had elected to be tried for a Class B1 offense, for which he faced a minimum sentence of 221 months, or 18 years, and that he had rejected an opportunity to plead guilty to a Class D offense, for which the minimum sentence was 59 months, or approximately 5 years. Given that defendant had decided to risk a sentence of <u>at least</u> 18 years rather than plead guilty, there is no basis to infer that he might have changed his mind based on the difference between the maximum presumptive sentence for a Class C offense as derived from the sentencing grid – 112 months, or about 9 years – and the increased maximum sentence for a Class C offense, which is 159 months, or about 13 years. We conclude that on the facts of this case, the trial court's omission of the increased maximum sentence under N.C. Gen. Stat. § 15A-1340.17(f) does not entitle defendant to relief.

In arguing for a different result, defendant urges us to apply N.C. Gen. Stat. § 15A-1022(a) to the facts of this case. This statute provides that a superior court judge may not accept a defendant's guilty plea

"without first addressing him personally" and informing him of his right to remain silent, ascertaining that he understands the charge against him, his right to plead not guilty, and the range of possible sentences he might receive, and "[i]nforming him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him[.]" N.C. Gen. Stat. § 15A-1022(a)(4).

"Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) (citing *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980)). However, a defendant who elects to proceed to trial is exercising, rather than waiving, his constitutional rights. A trial court is not required to make an inquiry into a defendant's decision not to plead guilty. Further, in this case defense counsel represented to the trial court that defendant had already made the decision to proceed to trial on a charge of first-degree rape. Counsel did not request the trial court's assistance in persuading defendant to change his mind, or indicate doubts as to defendant's competence to make this decision, but simply stated that he wanted to put defendant's decision "on the record." We conclude that N.C. Gen. Stat. § 15A-1022 is not applicable to this case and that defendant is not entitled to relief on this basis.[2]

B. Cross-examination of Defendant

[2] In his next argument, defendant contends that the trial court erred by "allowing the district attorney to cross-examine the defendant about alleged prior convictions after the defendant initially indicated that he did not recall any" and that the court erred in allowing the prosecutor "over objection, [to] read from a list of charges on an unverified DCI printout." We disagree.

As a general rule, the "scope of cross-examination lies within the discretion of the trial judge, and the questions must be asked in good faith." *State v. Forte*, 360 N.C. 427, 442-443, 629 S.E.2d 137, 147 (2006)

2. Defendant also argues that the trial court erred by not advising defendant of "the highest level in the aggravated range[.]" However, N.C. Gen. Stat. § 15A-1340.16(a6) provides that the "State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial[.]" The record is devoid of any indication that the State provided defendant with the requisite pretrial notice of intent to prove the existence of any aggravating factors, or that the State expressed such an intention during the trial. We hold, based on the record before us, that the issue of aggravating factors was not pertinent to this trial.

(citing *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971)). N.C. Gen. Stat. § 8C-1, Rule 609(a) provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness . . . during cross-examination[.]" In addition, "evidence which would otherwise be inadmissible may be permissible on cross-examination 'to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom.' " *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (quoting *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993)). However, "a cross-examiner can elicit only 'the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a)[.]' " *Id.* (quoting *Lynch*, 334 N.C. at 410, 432 S.E.2d at 353).

In this case, defendant was asked on cross-examination if he had been convicted of criminal offenses while he lived in Connecticut. He responded: "Not that I know of, that's a long time." The prosecutor then questioned defendant about specific criminal convictions, based on a document described at trial as "a DCI printout showing the convictions."[3] The prosecutor did not attempt to elicit details about the facts of the offenses, or pursue the matter further when defendant denied remembering his alleged prior convictions. On appeal, defendant does not dispute that the document relied upon by the prosecutor provided a good faith basis for his questions, and does not argue that the trial court abused its discretion in allowing this cross-examination or that the prosecutor exceeded the permissible scope of cross-examination. We conclude that there was no error in allowing the prosecutor to cross-examine defendant about prior convictions.

Defendant appears to argue on appeal that the district attorney was barred from questioning him about his criminal record unless (1) his questions would also have been admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), and (2) the prosecutor was in possession of a verified copy of the Connecticut judgments meeting the requirements for determining a defendant's prior record level for purposes of Structured Sentencing under N.C. Gen. Stat. § 15A-1340.14. Defendant cites no authority for either proposition, and we reject these arguments.

Moreover, even assuming, *arguendo*, that the trial court erred by allowing the cross-examination, defendant has failed to show prejudice.

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3. This document has not been included in the record of this case.

Under N.C. Gen. Stat. § 15A-1443(a), a "defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." Defendant does not argue that the trial would have had a different result had the cross-examination not been permitted, and our own review does not suggest that the cross-examination had an effect on the jury's verdict. Moreover, we note that defendant's mother testified that defendant had spent "a year in jail" and that on redirect examination defendant testified that he remembered his arrests, just not the names of the charged offenses. Given that defendant elicited additional evidence of his criminal history, and given the substantial evidence presented by the State, we cannot hold that defendant was prejudiced by this cross-examination.

C. Sufficiency of the Evidence

[3] In his last argument, defendant contends that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. We disagree.

1. Standard of Review

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

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781,

787 (1990) (citations omitted). In this case, since defendant presented evidence, we only review the sufficiency of the evidence as of the close of all of the evidence. *See State v. Britt*, 87 N.C. App. 152, 154, 360 S.E.2d 291, 292 (1987).

2. Analysis

N.C. Gen. Stat. § 14-27.3(a) states that "[a] person is guilty of rape in the second-degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person[.]" Therefore, the "elements of second-degree rape are that the defendant (1) engage in vaginal intercourse with the victim; (2) by force; and (3) against the victim's will. N.C. Gen. Stat. § 14-27.3." *State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).

At trial, J.B. testified that defendant brandished a machete and beat her in order to force her to have vaginal intercourse against her will. Her testimony was corroborated by photos of her bruises and by her statements to the investigating officers. Moreover, Deputy Spencer testified that defendant made a statement in which he admitted threatening J.B. with a machete in order to force her to have sex. This evidence was sufficient to merit the submission of the charge of second-degree rape to the jury.

On appeal, defendant does not dispute the existence of the evidence discussed above. Rather, he directs our attention to other evidence, such as the parties' consumption of alcohol, and the fact that J.B. acknowledged engaging in several prior instances of consensual sex with defendant, that tended to weaken the State's case. However, "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The trial court did not err in denying defendant's motion for dismissal.

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
PAUL EDWARD SALE

No. COA13-863

Filed 4 March 2014

1. Sentencing—misdemeanor—probation—longer than statutory mandate

A case was remanded where the State conceded that the trial court erred by failing to enter specific findings as to why a probationary period longer than that mandated by statute for a misdemeanor offense was necessary.

2. Appeal and Error—appeal from probation—special condition—no appellate authority

The Court of Appeals was without authority to review the trial court's imposition of a special condition of probation that defendant, a law enforcement officer, may not be "employed in any type of law enforcement" while on probation. Defendant entered an *Alford* plea, so that defendant did not have a right to appeal pursuant to N.C.G.S. § 7A-27 and he did not contest the judgment on any ground in N.C.G.S. § 15A-1444(a2), which delineates the grounds for appeal from a guilty or no contest plea. The Court of Appeals is restricted in its authority to issue a writ of *certiorari* by Rule 21 of the North Carolina Rules of Appellate Procedure, and none of the provisions of that Rule were triggered.

Appeal by defendant from judgment entered 18 March 2013 by Judge L. Todd Burke in Montgomery County Superior Court. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Christina S. Hayes, for the State.

Richard Croutharmel for defendant-appellant.

HUNTER, Robert C., Judge.

Paul Edward Sale ("defendant") appeals from judgment imposing 36 months of supervised probation after defendant entered an *Alford* plea to one count of obstructing justice. On appeal, defendant argues:

(1) the trial court erred by failing to make findings of fact as to why a probationary period longer than 18 months was necessary; and (2) the trial court abused its discretion by imposing a probation condition limiting defendant's employment opportunities that was overly broad and unduly burdensome.

After careful review, we remand for resentencing and dismiss defendant's argument regarding the special condition of probation.

Background

In January 2012, defendant was charged with one count of willful failure to discharge duties based on receiving a bribe and one count of obstructing justice. In exchange for the State's dismissal of the failure to discharge duties offense, defendant entered an *Alford* plea to one count of misdemeanor obstructing justice. The prosecutor introduced the following as the factual basis for the plea.

In September 2010, defendant was working as a police officer in the town of Candor, North Carolina. During this time, defendant conducted a traffic stop of Stephanie Gibson ("Gibson") resulting in criminal charges for possession of cocaine. After that date, Gibson agreed to have intercourse with defendant in exchange for his assurance that he would have the charges dismissed. Defendant and Gibson consummated this agreement on 6 December 2010. Thereafter, defendant failed to appear for any of Gibson's court dates, but the charge against her was continued rather than dismissed. Gibson then contacted the State Bureau of Investigation, which launched an investigation and brought the underlying charges against defendant. Defendant was employed as a correctional officer at the Morrison Correctional Facility in Richmond County by the time this matter came before the trial court.

Based on defendant's *Alford* plea to one count of obstructing justice, the trial court sentenced defendant to thirty days imprisonment, but suspended this sentence for 36 months of supervised probation. The trial court further ordered that defendant: (1) pay court costs; (2) pay a fine of $1,000.00; (3) comply with the regular terms and conditions of probation; and (4) refrain from working in any law enforcement capacity during the probationary period. Defendant filed timely notice of appeal.

Discussion

I. Findings as to Length of Probation

[1] Defendant's first argument is that the trial court erred by failing to enter specific findings as to why a probationary period longer than that

mandated by statute for his misdemeanor offense was necessary. The State concedes that the trial court erred and agrees with defendant that the case should be remanded. Accordingly, we remand for resentencing.

N.C. Gen. Stat. § 15A-1343.2(d)(1) (2013) provides that a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than 6 months and no more than 18 months, unless the trial court enters specific findings that longer or shorter periods of probation are necessary. This Court has remanded for resentencing where the trial court violated section 15A–1343.2(d)(1) by entering a period of probation longer than 18 months without making the necessary findings that the extension was necessary. *See State v. Love*, 156 N.C. App. 309, 317–18, 576 S.E.2d 709, 714 (2003) (remanding for either reduction of the defendant's probation to the statutory length or entry of specific findings as to why a longer period of probation was necessary); *see also State v. Branch*, 194 N.C. App. 173, 179, 669 S.E.2d 18, 22 (2008). Thus, pursuant to *Love* and *Branch*, we remand for entry of specific findings by the trial court indicating why a longer probationary period is necessary or reduction of defendant's probation to a length of time authorized by section 15A-1343.2(d)(1).

II. Special Condition of Probation

[2] Defendant next argues that the trial court abused its discretion by entering a special condition of probation that defendant may not be "employed in any type of law enforcement" while on probation. After careful review, we dismiss this argument because we are without authority to review it.

"The jurisdiction of the Court of Appeals is limited to that which 'the General Assembly may prescribe.' " *State v. Jones*, 161 N.C. App. 60, 61, 588 S.E.2d 5, 7 (2003) (quoting N.C. Const. art. IV, § 12(2)), *rev'd on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). "Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *Id.* (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977)).

Defendant purports to have a right to appeal the trial court's imposition of a special condition of probation pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a2) (2013). However, neither statute confers a right to appeal here.

First, section 7A-27(b) explicitly excludes from its right of appeal those cases where a final judgment is entered based on a guilty plea. *See*

N.C. Gen. Stat. § 7A-27(b)(1) (2013); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2013) ("N.C. Gen. Stat. § 7A–27(b) does not provide a route for appeals from guilty pleas.") Because defendant entered an *Alford* plea, and "[a]n *Alford* plea is to be treated as a guilty plea and a sentence may be imposed accordingly," *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (citation and quotation marks omitted), he does not have a right of appeal pursuant to section 7A-27.

Second, defendant's reliance on section 15A-1444(a2) is misplaced. This statute provides that:

> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> > (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> >
> > (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> >
> > (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2) (2013). Defendant's challenge to the trial court's imposition of a special condition of probation does not fall under the provisions of this subsection. Rather than contesting the judgment on any ground enunciated in section 15A-1444(a2), defendant asserts that the trial court abused its discretion by entering a special condition of probation which unduly burdens his livelihood. Because this challenge to the court's judgment is not enunciated in section 15A-1444(a2), this statute does not confer a right to appeal.

Furthermore, we have no authority to issue a writ of certiorari to reach these issues in lieu of a statutory right to appeal. Although section 15A-1444(e) states that a defendant who pleads guilty to a criminal charge "may petition the appellate division for review by writ of certiorari" where he otherwise does not have a statutory right of appeal, this Court is restricted in its authority to issue a writ of certiorari by

Rule 21 of the North Carolina Rules of Appellate Procedure. Under Rule 21(a)(1),

> The 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.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2013). The relationship between section 15A-1444(e) and Rule 21 was specifically addressed by this Court in *Jones*.

> Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A–1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A–1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

Jones, 161 N.C. App. at 63, 588 S.E.2d at 8 (citing *State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003); *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002)).

Here, none of the provisions of Rule 21(a)(1) have been triggered to confer authority on this Court to issue a writ of certiorari. First, defendant did not lose a right of appeal by failing to take timely action because: (1) as discussed above, he has no right to appeal the special condition of probation, and (2) he otherwise filed and perfected his appeal of the statutory violation addressed in issue I above in a timely manner. Second, this appeal is from a final judgment made by the trial court and is therefore not interlocutory. Third, the appeal does not stem from a denial of a motion for appropriate relief.

Therefore, we are without authority to review, either by right or by certiorari, the trial court's imposition of a special condition of probation.[1]

Conclusion

Because the trial court violated section 15A-1343.2(d)(1) by failing to enter specific findings of fact as to why a longer probationary period than that prescribed by statute was necessary, we remand for resentencing. Defendant's argument as to the imposition of a special condition of probation is dismissed.

REMANDED; DISMISSED IN PART.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA
v.
THOMAS KEITH SUTTON, DEFENDANT

No. COA13-841

Filed 4 March 2014

1. Appeal and Error—notice of appeal—petition for writ of certiorari

The Court of Appeals granted defendant's petition for writ of *certiorari* and heard defendant's appeal from the denial of his motion to suppress where defendant failed to appeal from the judgment of conviction.

2. Search and Seizure—motion to suppress—challenged findings of fact—supported by competent evidence

The challenged findings of fact in an order denying defendant's motion to dismiss were supported by competent evidence.

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1. We note that defendant filed this appeal before exhausting all of his potential remedies at the trial level. Had he filed a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (2013), the trial court may have altered the challenged condition of probation.

3. Search and Seizure—motion to suppress—findings of fact—supported conclusion of reasonable suspicion

The trial court did not err by denying defendant's motion to suppress. The findings of fact supported a conclusion of reasonable suspicion on the part of the police officer to stop and frisk defendant based on the high crime area, the officer's experience and knowledge of the area, and defendant's behavior.

On writ of certiorari to review judgment entered on or about 22 January 2013 by Judge Paul L. Jones in Superior Court, Lenoir County. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Barkley, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying his motion to suppress and a judgment convicting him of felony carrying a concealed gun contending that his right "to be free from unreasonable search and seizure" was violated when a law enforcement officer frisked him without reasonable suspicion. (Original in all caps.) For the following reasons, we affirm.

I. Background

In October of 2012, defendant was indicted for two counts of "FELONY CARRYING A CONCEALED WEAPON[.]" On 11 January 2013, defendant filed a motion to suppress moving

> for an Order suppressing all evidence, alleged contraband, defendant's identity, and all statements and testimony concerning the alleged contraband, and as grounds therefore alleges that said material[] evidence, and testimony were seized in or obtained as a result of an illegal stop that occurred on March 27, 2012, absent reasonable and articulable suspicion in violation of his Fourth and Fourteenth Amendment rights under the United States Constitution and similar provisions in the North Carolina Constitution, Article 1, Section 19.

On 31 January 2013, the trial court denied defendant's motion to suppress finding as fact:

> 1) That the arresting officer, B. Wells, was employed by the Kinston Department of Public Safety as a police officer. Officer B. Wells has more than 10 years experience in that position. That he was assigned to the Special Response Unit and also served as a K-9 Officer. That as a member of the Special Response Unit he was assigned to patrol public housing units located within the city of Kinston, North Carolina.
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> 2) That prior to March 27th, 2012, the Special Response Unit patrolled public housing, along with a task force made up of US Marshals and Drug Enforcement Agency, concentrating on viol[ent] crimes, gun crimes, etc. That in the past officers have been assaulted by individuals in public housing. That officer B. Wells is trained in the detection of drugs, weapons and other general policing tactics.
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> 3) At 14:34 hours (2:34pm) in the afternoon of March 27, 2012, officer B. Wells was patrolling near Simon Bright Apartments, which is one of the public housing apartments located in Kinston. Officer Wells had prior experience hearing shots fired on the East Bright Street area near Simon Bright Apartments. That the Kinston Department of Public Safety enforces a ban list of over 9 pages of individuals who are banned from public housing.
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> 4) That on the day in question officer B. Wells was driving a Ford Crown Victoria vehicle with the windows down where he was listening and looking for criminal activity. While in the 800 block of East Bright Street Wells observed the defendant on McDaniel Street, who was walking normally while swinging his arms. That the defendant was carrying a Styrofoam food container in his left hand.
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> 5) The Court finds as soon as the defendant starting turning east on Shine Street, he used his right hand to grab his waistband to clinch an item. The Court finds that

this was an overt act which gave reasonable suspicion to the Public Safety Officer.

6) That officer B. Wells thought the defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person. That the defendant then began to look specifically at the officer in question, that the reaction of the defendant created some urgency to stop to determine who the defendant was and that he needed to be identified. The Officer then turned around his vehicle without lights and siren and stopped the defendant for questioning.

7) That prior to being frisked, the officer did not draw a weapon or use any type of force on the defendant. That he asked the defendant if he was carrying a weapon and he doesn't remember the response of the defendant. That the officer performed a Terry Frisk upon the defendant. A gun was found on the defendant tucked in his waistband.

8) That the defendant never stated to the Officer that he was carrying a weapon. That the defendant was not handcuffed and the Officer did not have a weapon drawn. That the entire process took probably less than a minute or two. That the weapon in question was a Ruger P89 .9mm handgun with a magazine and 7 rounds of ammo, but there was no round which was chambered inside the weapon in question.

The trial court concluded:

1) That the stop of the defendant was legal and did not violate Federal and State Constitutional Standards. That the detaining Officer gave reasonable and articulable grounds for stopping the defendant that resulted in his being frisked.

2) That the rights of the defendant . . . were not violated and therefore evidence seized may be presented before the Jury at trial. That the behavior and actions of the defendant as well as the totality of the circumstances form a further basis for Denying the Motion to Suppress.

3) The Court has examined the Ruger handgun in court for size, weight and concealability to determine if it was consistent with suppression testimony. The Court finds that both federal and state courts have given patrol officers wide latitude to stop and frisk defendants based upon an articulable suspicion.

4) The Court finds that the entire process of frisking the defendant took less than 2 minutes for an investigatory stop. The Court finds the Motion to Suppress is Denied.

On or about 22 January 2013, the trial court entered a judgment against defendant for carrying a concealed gun based upon defendant's guilty plea; defendant received a suspended sentence and was placed on 24 months of supervised probation. Defendant appeals.

II. Petition for Writ of Certiorari

[1] In his plea transcript defendant reserved his right to appeal "the interlocutory order entered in the above-captioned case on January 22, 2012, denying his motion to suppress the March 27, 2012 stop." In open court, defendant's attorney stated "that he would like to appeal the interlocutory order entered in this matter today[.]" Defendant never appealed from his judgment, but he subsequently filed a petition for a writ of certiorari with this Court because he had failed to properly appeal from his judgment within the time period allotted. This Court stated in *State v. Franklin*,

> All of defendant's issues on appeal are concerning his motion to suppress, but since defendant did not file a notice of appeal from the judgment or after entry of the written order denying his motion to suppress, we must first address whether we have jurisdiction to consider defendant's appeal. In *Miller*, this Court stated,
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> > N.C. Gen. Stat. § 15A–979(b) (2009) states that: An 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. Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to consider Defendant's appeal. In North Carolina, a defendant's right to pursue an appeal from a

> criminal conviction is a creation of state statute. Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by N.C.G.S. § 15A–979(b).

Accordingly, the Court dismissed defendant's appeal. Here, however, while defendant has not properly provided notice of appeal, he has petitioned this Court for a writ of certiorari to consider his appeal.

North Carolina Rule of Appellate Procedure 21(a) provides,

> The 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.G.S. § 15A–1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Pursuant to Rule 21(a), we grant defendant's petition for a writ of certiorari and will consider the issues presented in his brief as he lost his right to appeal by failure to take timely action.

___ N.C. App. ___, ___, 736 S.E.2d 218, 220 (2012) (citations, quotation marks, and brackets omitted). Accordingly, we grant defendant's petition for certiorari.

III. Standard of Review

Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings

> in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. McKinney, ___ N.C. App. ___, ___, 752 S.E.2d 726, 727-28 (2014) (citations, quotation marks, and ellipses omitted).

IV. Findings of Fact

[2] Defendant challenges portions of findings of facts 5 and 6 as not supported by the competent evidence and also contends that portions of these findings of fact are actually conclusions of law.

A. Findings of Fact Supported by Competent Evidence

As to all of defendant's challenges regarding competent evidence to support the findings of fact, much of his argument is devoted to the credibility of the evidence and not necessarily to its absence. But the credibility of the evidence is a determination made by the trial court; "the trial court as finder of the facts *may believe or disbelieve all or any part of the testimony of a witness*," *Bowles Distributing Co. v. Pabst Brewing Co.*, 80 N.C. App. 588, 592, 343 S.E.2d 543, 545 (1986) (emphasis added). This Court reviews findings of fact only to determine if there was competent evidence to support them, not whether *all* of the evidence supported them. *See McKinney*, ___ N.C. App. at ___, 752 S.E.2d at 727, *Bowles Distributing Co.*, 80 N.C. App. at 592, 343 S.E.2d at 545.

It is said that a picture is worth a thousand words. In this case, a picture would be worth several thousand words, since the testimony in this case, the trial court's order, and other cases all necessarily use words to the very brief movements, glances, and body language that tend to form the basis for many a *Terry* stop. Lacking a picture of that moment when Officer Wells observed defendant grabbing at his waistband or side on 27 March 2012, we will address defendant's arguments as to each of these facts.

Defendant challenges the portion of finding of fact 5 that stated defendant "used his right hand to grab his waistband to clinch an item" because "Officer Wells' repeated testimony is that the defendant clinched his side . . . but he did not ever testify that the defendant grabbed his waistband." Defendant also argues that Officer Wells did not "testify that the defendant clinched 'an item.'" Defendant's arguments are hyper-technical. Clutching, clinching, and grabbing are all words which describe the same sort of movement and a person's waistband crosses his "side." Officer Wells testified that defendant "clutch[ed] his right side at this time. And it was very distinct, a clinched fist as well as almost like

trying to hold something on his body" and that the way defendant "was clinching his side" is the reason he "believe[d] the waistband would be of interest[.]" Accordingly, Officer Wells' testimony supports the challenged portions of finding of fact 5.

Defendant also challenges the portion of finding of fact 6 stating, "That the defendant then began to look specifically at the officer in question[.]" Defendant directs our attention to portions of Officer Wells' testimony which he asserts show that defendant did not "specifically" look at him. It is true that it is nearly impossible to know for certain if another person is actually looking at a particular thing — the observer can tell only if it *looks* like they are looking at it. Here the evidence shows that that is how defendant looked to Officer Wells. Officer Wells testified that as defendant "rounded . . . his turn . . . it was almost like he was surprised to see me and kind of, you know, postured up[;]" "he saw me kind of slow patrol[;]" and "[i]f he did make eye contact with me it was so quick. But it was more like he panned around me in my direction and then kind of — I know he saw me for a fact that he saw me. He had to have seen me[.]" Officer Wells' testimony supports a finding of fact that defendant "look[ed] specifically at the officer in question[.]" The challenged portion of finding of fact six does not state that defendant and Officer Wells made eye contact but only that defendant specifically saw Officer Wells, and Officer Wells' testimony supports this finding of fact.

Defendant further challenges the portion of finding of fact six that provides, "The Officer then turned around his vehicle without lights and siren and stopped the defendant for questioning." Defendant specifically states in his brief that he "agrees that the evidence supports a finding that the officer stopped him and that the officer did so without the patrol car's lights or siren. It is inaccurate, however, to say or suggest that the officer stopped the defendant only for questioning." Thus, defendant only challenges that there was competent evidence to support Officer Wells' mental intent for stopping defendant. Defendant contends that Officer Wells' true intent was not just to question but also to search defendant. Officer Wells testified that he "was going to stop [defendant] and identify who he was and see what he was trying to hide on [that] right side." Officer Wells' testimony supports a finding of fact that his intent was to question defendant, since he would presumably ask defendant his identity. "Questioning" defendant to identify him and frisking him to find out what he was trying to hide does not mean that Officer Wells planned to do a more extensive search than would be appropriate

based upon reasonable suspicion. Though the finding of fact could have been more artfully written or could have contained more details about the specific types of questions Officer Wells intended to ask, the general statement that defendant was stopped "for questioning" is supported by competent evidence. Accordingly, Officer Wells' testimony supports the challenged portions of finding of fact 5. These arguments are overruled.

B. Findings of Fact as Conclusions of Law

Defendant also contends that portions of findings of fact 5 and 6 are actually conclusions of law. To the extent that defendant is correct, we will review them as such. *See State v. Jackson*, ___ N.C. App. ___, ___, 727 S.E.2d 322, 329 (2012) ("We will review conclusions of law *de novo* regardless of the label applied by the trial court." (citation and quotation marks omitted)).

V. Reasonable Suspicion

[3] Defendant contends that the trial court did not "have reasonable suspicion, based on specific and articulable facts, that the individual is involved in criminal activity" to justify stopping and frisking defendant. Defendant's argument is difficult to summarize in a logical manner because he essentially takes each separate finding of fact or even portions thereof and argues that each finding in isolation does not create reasonable suspicion. It would be extremely difficult to find reasonable suspicion in any case if it had to be supported by each individual fact taken in isolation. But "[t]he concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules. Rather, in determining if reasonable suspicion existed, *the Court must account for the totality of the circumstances—the whole picture*." *State v. Knudsen*, ___ N.C. App. ___, 747 S.E.2d 641, 650-51 (emphasis added) (citations, quotation marks, and ellipses omitted), *disc. review denied*, ___ N.C. ___, 749 S.E.2d 865 (2013). As such, we will set forth all of the findings of fact and address them as a whole. *See id.* at ___, 747 S.E.2d at 651. Furthermore, defendant also suggests that this Court can essentially make its own findings of fact based upon the uncontested evidence before the trial court and supplement the trial court's findings of facts for a "whole picture[.]" This is incorrect, as

> [o]ur review of a trial court's denial of a motion to suppress is *strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of*

> *law.* The trial court's conclusions of law are fully reviewable on appeal.

McKinney, ___ N.C. App. at ___, 752 S.E.2d at 727-28 (emphasis added).

Defendant first contends that he was "seized;" this is true, but merely the start of the analysis. *See State v. Fleming*, 106 N.C. App. 165, 169, 415 S.E.2d 782, 784 (1992) ("When defendant approached Officer Williams, the officer immediately began to pat him down while simultaneously asking him questions. Thus, Officer Williams applied actual physical force to defendant's person and this action constituted a seizure. *Id. See also Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968). (When a law enforcement officer takes hold of an individual and pats down the outer surface of his clothing, he has seized that individual within the meaning of the Fourth Amendment.) Accordingly, the Fourth Amendment is applicable to the facts and circumstances in this case." (quotation marks omitted)).

The fact that defendant was "seized" then leads to consideration of the reasonableness of this seizure, considering all of the circumstances as

> [t]he Constitution does not prohibit all searches and seizures; it only protects against unreasonable searches and seizures. Since Officer Williams' conduct did not rise to the level of a traditional arrest requiring probable cause, his conduct must be measured in light of the reasonableness standard established in *Terry v. Ohio*. A brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable cautious police officer on the scene, guided by his experience and training. Law enforcement officers are required to have reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

Id. at 169-70, 415 S.E.2d at 785 (citations and quotation marks omitted).

> In order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity.
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> > The stop 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 his experience and

> training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.
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> The officer's reasonable suspicion must arise from his knowledge prior to the time of the stop.

State v. Blankenship, ___ N.C. App. ___, ___, 748 S.E.2d 616, 618 (2013) (citations, quotation marks, and brackets omitted).

Defendant argues, based on several different cases which he contends are on point with this case, that Officer Wells did not have reasonable suspicion to frisk him. But since the determination in each case may differ on the subtlest of facts, and lacking a picture of the moment each defendant was stopped in these cases as well, we have analyzed the cases identified by defendant with consideration of both the facts and law, which we have set out in verbatim fashion in order to emphasis these differences without unnecessary further commentary. Given the wealth of binding authority in North Carolina regarding defendant's appeal we need not consider the persuasive authority presented by defendant. Defendant first compares this case to *Fleming* wherein

> several Greensboro police officers were in the vicinity of the Ray Warren Homes housing project. The officers were members of a tactical division and were operating a drug suppression program in the project on this date. Officer J. Williams, a veteran officer of seventeen years and a member of the tactical division, described the Ray Warren Homes project as an area where numerous arrests for drug violations had been made and where crack cocaine and other contraband was sold on a daily basis. At approximately 12:10 a.m., Officer Williams observed defendant and another black male standing in an open area between two apartment buildings located on Best and Rugby Streets. When first observed, defendant and his companion were standing in the open area looking at the officers located on Best Street. Officer Williams was out of his vehicle at the time talking to the other officers. Officer Williams further testified that the gentlemen stood there and they watched us for a few minutes, and then the defendant and the other young man turned and started walking towards Rugby Street out of the area.
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> When the two young men started walking the other way, Officer Williams got into his vehicle and drove

around to Rugby Street where the gentlemen were walking out from between two buildings. He then observed the defendant and the other male walking on the sidewalk along Rugby Street towards him. Officer Williams told the court he had never seen either of the two young men in the area of the housing project. On cross examination, he admitted he decided to stop them because he had never seen them. Officer Williams got out of his vehicle and asked them to hold it a minute. At this time, defendant and the other male were approximately 35 to 40 feet from the officer. Defendant turned right towards Best Street, and Officer Williams said, Come here. Defendant hesitated for approximately one minute, then both young men complied and approached the officer.

Officer Williams testified that when defendant approached he acted real nervous. Officer Williams asked them to identify themselves and they both complied; neither were residents of the Ray Warren Homes project. When questioned about why he was in the area, defendant stated a friend had dropped him off and he was walking through. When asked if the conversation with defendant was before he patted him down, Officer Williams responded, I was talking to him as I was patting him down. Officer Williams felt an object in defendant's underwear while he was patting him down. Officer Williams testified that when he asked defendant what the object was, defendant replied crack cocaine. Pursuant to Officer Williams' instructions, defendant subsequently removed the object and placed it on Officer Williams' car hood.

Fleming, 106 N.C. App. at 166-67, 415 S.E.2d at 783 (quotation marks omitted). The defendant made a motion to suppress which the trial court subsequently denied. *Id.* at 168, 415 S.E.2d at 784. Defendant appealed. *Id.* This Court stated in its analysis,

> at the time Officer Williams first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. *The officer observed no overt act by defendant at this time* nor any contact between defendant and his companion. Next, the officer observed the two men walk between two buildings, out of the open area, toward

> Rugby Street and then begin walking down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers. At this time, Officer Williams stopped defendant and his companion and immediately proceeded to ask them questions while he simultaneously patted them down.
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> We find that the facts in this case are analogous to those found in *Brown*. Officer Williams had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area. Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a high drug area. This would not be reasonable.
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> Considering the facts relied upon by the officer, together with the rational inferences which the officer was entitled to draw therefrom, we conclude they were inadequate to support the trial court's conclusion that Officer Williams had a reasonable articulable suspicion that defendant was engaged in criminal activity.

Id. at 170-71, 415 S.E.2d at 785-86 (emphasis added) (quotation marks omitted). While many of the facts in *Fleming* are the same or similar to this case, in *Fleming*, the defendant did not make any overt actions, *id.* at 170, 415 S.E.2d at 785, and here defendant did when he "used his right hand to grab his waistband to clinch an item."

Defendant also directs this Court's attention to *In Re J.L.B.M.*, wherein

> on patrol at approximately 6:00 p.m. on 6 July 2004, Officer D.H. Henderson (Officer Henderson) responded to a police dispatch of a suspicious person at an Exxon gas station in Burlington, North Carolina. The only description given of the person was Hispanic male. Officer Henderson saw a person in the gas station parking lot, later identified as the

> juvenile, who fit the description of the person. When the juvenile saw Officer Henderson, he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from Officer Henderson's patrol car. Officer Henderson pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile. Upon getting out of the patrol car and speaking with the juvenile, Officer Henderson noticed a bulge in the juvenile's pocket. Officer Henderson patted down the juvenile for weapons. Officer Henderson found and seized a dark blue, half-empty spray can of paint and a box cutter with an open blade.

176 N.C. App. 613, 615-16, 627 S.E.2d 239, 241 (2006) (quotation marks omitted). This Court held

> that in the present case, like in *Fleming*, the stop was unjustified. Officer Henderson relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the Hispanic male description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. Officer Henderson was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

Id. at 622, 627 S.E.2d at 245 (quotation marks omitted). However, unlike in the present case, in *In re J.L.B.M.*, the defendant was not in an area known for "viol[ent] crimes [and] gun crimes[;]" the defendant did not change his actions upon seeing a law enforcement officer, and the defendant took no actions which made law enforcement believe "defendant was trying to hide something and . . . made it apparent that he was concealing something on his person." *Id.* at 616, 627 S.E.2d at 241. In In re J.L.B.M., the law enforcement officer did not even notice the defendant was concealing something until "after he stopped" him. *Id.* at 622, 627 S.E.2d at 245. (emphasis added) Accordingly, *In re J.L.B.M.*, is distinguishable from the present case.

Defendant also directs our attention to cases where "this Court has found some physical mannerisms to be a factor supporting reasonable suspicion, but only in combination with facts that point to actual criminal activity." Here, we have both a high crime area and movements by defendant which Officer Wells found suspicious. The very location of

where defendant was walking was an area so ridden with crime that it was patrolled by a Special Response Unit in which Officer Wells served, which was a part of "a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrate[e] on viol[ent] crimes [and] gun crimes[.]" Furthermore, "[o]fficers have been assaulted in the area, Officer Wells has personally heard shots fired in the area, and "the Kinston Department of Public Safety enforces a ban list of over 9 pages of individuals who are banned from public housing." Accordingly, these circumstances coupled with defendant's own actions are factors in a reasonable suspicion analysis. *See State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes. Our Supreme Court has also noted that the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant are sufficient to form reasonable suspicion to stop an individual." (citations omitted); *see generally State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722 (1992) (noting cases where a high crime area has been a factor in determining reasonable suspicion).

Defendant further contends that "because carrying a concealed weapon with a valid permit is not illegal in North Carolina" reasonable suspicion is "undermined" in this case. Defendant essentially argues that since a person carrying a concealed weapon may also have a permit to carry it legally, a law enforcement officer cannot assume that a person who appears to have a weapon concealed is doing so illegally. Yet defendant's argument is undermined by North Carolina General Statute § 14-415.11, which addresses exactly what an individual is required to do if he is legally carrying a concealed weapon and he is approached by a law enforcement officer:

> Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. *The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer*, and shall display both the permit and the proper identification upon the request of a law enforcement officer.

N.C. Gen. Stat. § 14-415.11 (2011). (emphasis added) Thus, a person who is carrying a concealed weapon legally has an affirmative obligation to

disclose this fact and that he has a permit to an officer "when approached or addressed by the officer." *Id.*

Here, Officer Wells approached defendant and addressed him, but there is no indication that defendant informed him at any time that he had any legal right to carry a concealed weapon, nor is there any evidence that defendant had a valid concealed carry permit. The trial court made a finding of fact, which is not challenged by defendant, "[t]hat the defendant never stated to the Officer that he was carrying a weapon." Since North Carolina General Statute § 14-415.11 requires any person who is carrying a concealed weapon legally to disclose this fact when he is "approached" by a law enforcement officer, and defendant did not make this disclosure, Officer Wells had no reason to assume that any gun defendant may have tucked into his waistband was legally carried. *See id.* In fact, just the opposite would be true: if defendant was legally carrying a gun, Officer Wells would expect that he would immediately disclose this information when he approached defendant and his failure to do so would raise *more* suspicion that he was carrying the weapon illegally.

The binding unchallenged findings of fact and those we have already determined are supported by competent evidence, *see Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal."), support the conclusion that Officer Wells had reasonable suspicion of criminal activity. Defendant was in a public housing area that was patrolled by a Special Response Unit and "a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrat[e] on viol[ent] crimes [and] gun crimes[.]" Officer Wells was a police officer with ten years of experience and was assigned to the Special Response Unit where his responsibilities included patrolling the public housing area. "[O]fficers have been assaulted" in this area. Many individuals -- a list of at least nine pages -- are banned from the public housing area. On a prior occasion Officer Wells had heard shots fired near the area where he was patrolling on 27 March 2012. On 27 March 2012, Officer Wells saw defendant "walking normally while swinging his arms." Defendant turned and "used his right hand to grab his waistband to clinch an item" which "was an overt act[ion.]" Officer Wells believed "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Defendant "look[ed] specifically at" Officer Wells, and defendant's reaction created an "urgency to stop" defendant in Officer Wells in order to identify defendant. Officer Wells turned his vehicle around, without lights or siren, to stop defendant in order to ask

him questions. Officer Wells did not draw a weapon or use any type of force with defendant nor did he handcuff defendant, though he did frisk defendant and found a gun in defendant's waistband.

The State's arguments were based on several other cases, but we will not address these as we find *Fleming* to be more similar than those presented by the State. In *Fleming*, as in this case, the law enforcement officers were experienced officers involved with a specific law enforcement team assembled to address a specific crime problem in a specific area. *Fleming*, 106 N.C. App. at 166, 415 S.E.2d at 783. In *Fleming*, Officer Williams was a seventeen year veteran officer and a "member[] of a tactical division . . . operating a drug suppression program" in the vicinity of a housing project where the defendant was seized; *id.* at 166-67, 415 S.E.2d at 783, here, Officer Wells was a ten year veteran officer and "was assigned to the Special Response Unit . . . assigned to patrol public housing units . . . along with a task force made up of US Marshals and [the] Drug Enforcement Agency" in order to "concentrat[e] on viol[ent] crimes [and] gun crimes[.]" In *Fleming*, this Court concluded that Officer Williams did not have reasonable suspicion to seize the defendant because "at the time Officer Williams first observed [the] defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant[.]" *Id.* at 170, 415 S.E.2d at 785. This case is different, as Officer Wells saw defendant "walking normally while swinging his arms[,]" but then he turned and "used his right hand to grab his waistband to clinch an item" which "was an overt act[ion.]" Officer Wells believed "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Defendant "look[ed] specifically at" Officer Wells, and defendant's reaction "created some urgency to stop" defendant in Officer Wells in order to identify defendant. Here, the trial court specifically found that defendant engaged in a specific action, "grab[bing] his waistband to clinch an item[,]" which made Officer Wells believe "defendant was trying to hide something and his posturing made it apparent that he was concealing something on his person." Furthermore, defendant looked at Officer Wells in such a way that his reaction "created some urgency" in Officer Wells that defendant needed to be identified in a high crime area where a list of at least nine pages of individuals were banned. Accordingly, we conclude that the findings of fact do support a conclusion of reasonable suspicion on the part of Officer Wells to stop and frisk defendant as due to the high crime area,

Officer Wells' experience and knowledge of the area, and defendant's behavior, Officer Wells had a reasonable suspicion both to stop defendant and frisk him for weapons. *See generally State v. Rinck*, 303 N.C. 551, 559, 280 S.E.2d 912, 919 (1981) ("If from the totality of circumstances, a law enforcement officer has reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain an individual. If upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection." (citations omitted)). As such, the trial court properly denied defendant's motion to suppress, and defendant's argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HUNTER, JR., Robert N. and DILLON concur.

VIKING UTILITIES CORPORATION, INC., GARLAND W. TUTON, AND SUE C. TUTON, PLAINTIFFS
v.
ONSLOW WATER AND SEWER AUTHORITY, DEFENDANT

No. COA13-597

Filed 4 March 2014

1. Appeal and Error—interlocutory orders and appeals—governmental immunity—substantial right

Defendant's appeal of the denial of its motion to dismiss was interlocutory. However, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. To the extent defendant's appeal was based upon the affirmative defense of immunity, the appeal was properly before the Court.

2. Immunity—governmental—further record development necessary—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss in a breach of contract action where further development of

the record was necessary for determination of whether the defendant was entitled to assert the defense of governmental immunity.

Appeal by defendant from order filed 18 February 2013 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 9 October 2013.

Ward and Smith, P.A., by Ryal W. Tayloe and Jeremy M. Wilson, for plaintiff-appellees.

Turrentine Law Firm, PLLC, by S.C. Kitchen, for defendant-appellant.

STEELMAN, Judge.

Where further development of the record is necessary for determination of whether the defendant is entitled to assert the defense of governmental immunity, the trial court did not err by denying defendant's motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6).

I. Factual and Procedural Background

On 16 November 2007, Viking Utilities Corporation, Inc., Garland W. Tuton, and Sue C. Tuton (collectively plaintiffs), entered into an "Asset Purchase Agreement for the Acquisition of the Wastewater System Assets of Viking Utilities Corporation, Inc., by Onslow Water and Sewer Authority." The parties amended the agreement on 17 April 2008. The agreement provided that Onslow Water and Sewer Authority (defendant) would purchase Viking's wastewater system, including real property owned by plaintiffs, for $5,550,000. Defendant paid plaintiffs $500,000 at closing, and the parties agreed that most of the balance of the purchase price, $4,800,000, would be donated to defendant by plaintiffs. The agreement also contained a specific provision that defendant would receive a credit of $250,000 towards the purchase price in return for allowing plaintiffs to connect over the next five years to the wastewater system at any location served by defendant without payment of a "Tap Fee." The credit would be used at the rate of $2,500 per connection. The agreement also contained a specific representation by defendant that the transaction did not require "the approval or consent of any federal, state, local or other governmental body or agency that has not been obtained[.]"

On 27 September 2012, plaintiffs filed a complaint alleging that defendant had breached its agreement by refusing to allow plaintiffs to connect with defendant's sewer system without payment of a tap fee. The complaint sought specific performance of the agreement, a declaratory judgment that plaintiffs were entitled to 100 residential tap fees, and in the alternative asked for rescission or reformation of the agreement. On 18 October 2012, defendant filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules for Civil Procedure, for lack of jurisdiction and for failure to state a claim upon which relief may be granted. On 5 December 2012, plaintiffs filed their First Amended Complaint, which added three additional claims: (1) restitution, *quantum meruit*, and unjust enrichment; (2) estoppel; and (3) negligent misrepresentation. On 28 December 2012, defendant filed its second motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted. On 18 February 2013, Judge Cobb denied defendant's motions to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules for Civil Procedure

Defendant appeals.

II. Interlocutory Appeal

[1] Defendant's appeal of the denial of its motion to dismiss is interlocutory. However, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). To the extent defendant's appeal is based upon the affirmative defense of immunity, this appeal is properly before this Court. *See id.*

III. Motion to Dismiss

[2] In defendant's only argument on appeal, defendant contends that the trial court erred in denying its motion to dismiss. We disagree.

A. Standard of Review

We review "a trial court's denial of a motion to dismiss that raises sovereign immunity as grounds for dismissal" *de novo*. *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013).

B. Governmental Immunity

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.' " *Estate of Williams v. Pasquotank County*, 366 N.C. 195, 198, 732 S.E.2d

137, 140 (2012) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (internal quotation omitted). "Nevertheless, governmental immunity is not without limit. '[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.' Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 (quoting *Evans*, 359 N.C. at 53, 602 S.E.2d at 670 (citations omitted), and citing *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951).

In *Williams* the Court took the "opportunity to restate our jurisprudence of governmental immunity," *Williams* at 196, 732 S.E.2d at 139, and in so doing focused on the need for courts to engage in a fact-based analysis, considering various relevant factors, rather than applying bright-line rules:

> In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature. . . . [T]he threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue.

Williams at 199-200, 732 S.E.2d at 141-42. *Williams* arose from a drowning at a public park and, although noting the existence of statutory provisions affirming the public benefit of parks and recreation, it declined to hold that these provisions were dispositive. Instead, the Court held that, even if the general operation of a parks program had been statutorily designated as a governmental function, "the question remains whether the specific operation of the [swimming area where the drowning occurred] in this case and under these circumstances, is a governmental function." *Williams* at 201, 732 S.E.2d at 142. The *Williams* Court also offered certain guiding principles for future courts to apply:

> [W]hen the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

> We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Williams at 202-03, 732 at 143. Finally, *Williams* held:

> Analysis of the factors listed above when considering whether the action of a county or municipality is governmental or proprietary in nature is particularly important in light of two points we have previously emphasized. . . . "First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose." Consequently, the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.

Williams at 203, 732 S.E.2d at 143 (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 21-22, 213 S.E.2d 297, 302 (1975) (internal citations and emphases omitted).

In *Town of Sandy Creek v. E. Coast Contr., Inc.*, __ N.C. App. __, 741 S.E.2d 673 (2013) this Court applied *Williams* to the plaintiff's allegations that the defendant, the City of Northwest, had failed to properly manage its contract with an engineering firm for construction of a sewer system. We held that, although the operation of a sewer system might be a governmental function, the specific allegations of the plaintiff's complaint did not assert acts undertaken in a governmental capacity:

> These allegations of breaches of the duty of reasonable care do not concern decisions of government discretion such as whether to construct a sewer system or where to locate the sewer system. Instead, the alleged breaches concern Northwest's handling of the contract and

> Northwest's business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities. . . . [W]we find that Northwest was involved in a proprietary function while handling its business relationship with ECC and the trial court did not err in denying Northwest's motion to dismiss based on governmental immunity.

Sandy Creek, __ N.C. App. at __, 741 S.E.2d at 676-77. In this case, as in *Sandy Creek*, the plaintiffs' allegations involve its "business relationship" with defendant.

Based on *Williams* and *Sandy Creek*, we hold that determination of whether defendant is entitled to assert the defense of governmental immunity will require the trial court to consider the pertinent statutory provisions as well as factual evidence regarding plaintiffs' allegations, fees charged by defendant, whether the fees cover more than the operating costs of the water authority, and any other evidence relevant to the issue of whether, in executing and interpreting its contract with plaintiffs, defendant was acting in a governmental or proprietary capacity. Because such evidence was not before the court in ruling on a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), or (6), the trial court did not err by denying defendant's motion to dismiss at this stage of the proceedings. Our decision to affirm the trial court does not prevent the parties from seeking summary judgment, at which time they may offer documentary or testimonial evidence in support of their positions. As we are holding that the trial court did not err by denying the motion to dismiss, we do not reach the parties' arguments concerning whether, in the event that the court determines that defendant is entitled to assert the defense of governmental immunity, the defense has been waived by execution of a valid contract with plaintiffs.

Conclusion

We hold that the trial court did not err in its denial of defendant's motion to dismiss and that its order should be affirmed.

AFFIRMED.

Judges HUNTER, ROBERT C., and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 MARCH 2014)

CINOMAN v. THE UNIV. OF N.C. No. 13-902	Wake (09CVS3164)	Reversed
FOSTER v. WELLS FARGO, N.A. No. 13-974	Durham (12CVS6015)	Affirmed
HANCOX v. WINGATE UNIV. No. 13-1018	Union (13CVS158)	Dismissed
HARRIS v. A-1 BUILDERS OF N.C., INC. No. 13-1048	Randolph (12CVS2353)	Affirmed
PATTERSON v. UNIV. FORD, INC. No. 13-585	Durham (11CVS2376)	No Error
REEGER BUILDERS, INC. v. J.C. DEMO INS. GRP., INC. No. 13-622	Gaston (08CVS5609)	Reversed
STATE v. BARNHILL No. 13-678	Randolph (09CRS56732)	Affirmed
STATE v. FENNELL No. 13-1056	Pender (08CRS3155) (08CRS52362)	Remanded
STATE v. HAQQ No. 13-813	Catawba (12CRS3753)	No prejudicial error.
STATE v. JEFFERSON No. 13-668	Rockingham (10CRS231)	No Prejudicial Error; Remanded for Resentencing
STATE v. KILLETTE No. 13-836	Johnston (09CRS55879) (09CRS56059)	Affirmed
STATE v. LIPFORD N o. 13-708	Caldwell (10CRS53142) (10CRS53149) (10CRS53337) (10CRS53340)	NO ERROR in part; DISMISSED in part.
STATE v. LONG No. 13-922	Mecklenburg (07CRS238137-38) (07CRS238140)	No Error

STATE v. NIETO No. 13-430	Montgomery (08CRS50760-61)	No Error
STATE v. SPIVEY No. 13-656	Robeson (09CRS57970) (09CRS706839) (09CRS8828) (09IFS707165) (11CRS5000)	No Error
STATE v. VAZQUEZ No. 13-556	Mecklenburg (11CRS12462) (11CRS3173-74)	Affirmed
STATE v. WATLINGTON No. 13-480	Rockingham (11CRS51074-75)	No Prejudicial Error
THOMPSON v. CONTI No. 13-1091	Halifax (12CVS231)	Reversed and Remanded
VENABLE v. LOWES HOME CTRS., INC. No. 13-883	N.C. Industrial Commission (X13603)	Affirmed
WURTZ v. WURTZ No. 13-993	Iredell (10CVD2708)	Dismissed

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