233 N.C. App.—No. 3 Pages 241-430

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 22, 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 1 APRIL 2014

HEADNOTE INDEX

APPEAL AND ERROR

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Interlocutory orders and appeals—no substantial right—Although defendant hospital contended that the trial court erred in a medical malpractice case when it awarded attorney fees on plaintiff's motions to compel, the issue was dismissed. Defendant failed to argue a substantial right. **Medlin v. N.C. Specialty Hosp., LLC, 327.**

Interlocutory orders and appeals—privilege—substantial right—The Court of Appeals considered defendant hospital's appeal as to issues regarding privilege but did not consider the additional issues in an interlocutory order that did not affect a substantial right. **Medlin v. N.C. Specialty Hosp., LLC, 327.**

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Interlocutory orders and appeals—public official immunity—A public official's right to be immune from suit is a substantial right justifying an interlocutory appeal and the appeal of a police officer from the denial of his motion for summary judgment based on public official immunity was properly before the Court of Appeals. However, the Court of Appeals declined to exercise its discretion to consider non-immunity issues in the interests of judicial economy. **Brown v. Town of Chapel Hill, 257.**

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Sanctions—frivolous appeal—reasonable attorney fees—The Court of Appeals taxed defendant hospital personally with the costs of this frivolous appeal and the attorney fees incurred in this appeal by plaintiff. Pursuant to N.C. R. App. P. 34(c), the case was remanded to the trial court for a determination of the reasonable amount of attorney fees incurred by plaintiff in responding to this appeal. **Medlin v. N.C. Specialty Hosp., LLC, 327.**

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Claims by yacht club—separate from claims of individual members—Claims by the Federal Point Yacht Club (FPYC) arising from use of the facilities were not barred by *res judicata* after fourteen individual members dismissed no-contact orders with prejudice. FPYC was neither the same party nor privy to the fourteen individual members of FPYC who filed no-contact orders against defendant. **Fed. Point Yacht Club Ass'n, Inc. v. Moore, 298.**

arising from an outbreak of *E. coli* at the North Carolina State Fair was misplaced. Plaintiffs' argument assumed that the Industrial Commission's decision turned on whether plaintiffs had adequately established that defendant knew or should have known about the risk of *E. coli*, but defendant admittedly knew there was some risk of an *E. coli* infection when operating a petting zoo. Plaintiffs were not required to show that defendants knew or should have known about the risk. **Rolan v. N.C. Dep't of Agric. & Consumer Servs., 371.**

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SATELLITE-BASED MONITORING

Aggravated offense—second-degree rape—elements of offense—reliance on underlying facts harmless—The trial court improperly relied on several underlying facts of defendant's second-degree rape offense in its determination that defendant had committed an aggravated offense for satellite-based monitoring (SBM) purposes. Although the trial court was only to have considered the elements of the offense of which defendant was convicted, the offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2) constituted an aggravated offense, so any reliance on the underlying facts of defendant's offense was harmless. **State v. Talbert, 403.**

Second-degree rape—aggravated offense—The trial court did not err in a satellite-based monitoring (SBM) case by finding that defendant's second-degree rape conviction constituted an aggravated offense, subjecting him to lifetime SBM. Bound by the decision in *State v. Oxendine*, 206 N.C. App. 205, the Court of Appeals determined that the elements of second-degree rape under N.C.G.S. § 14-27.3(a)(2) are sufficient to constitute an "aggravated offense" as defined in N.C.G.S. 14-208.6(1a). **State v. Talbert, 403.**

SEARCH AND SEIZURE

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WORKERS' COMPENSATION

Average weekly wage—Form 21 agreement—rescission—verification provision—reasonable time—The Industrial Commission erred in a workers' compensation case by reforming the amount of plaintiff employee's average weekly wage from the amount contained in the Form 21 agreement that had been approved by the Full Commission in 2007. The Full Commission lacked the authority to change plaintiff's average weekly wage since any mistake by the parties in its calculation was a mistake of law, not of fact and, therefore, not subject to rescission. However, a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a "reasonable time" has passed. **Miller v. Carolinas Med. Ctr.-Ne., 342.**

Subject matter jurisdiction—contract modification—last act analysis—The Industrial Commission erred in a workers' compensation case by concluding that it did not have subject matter jurisdiction. A modification to plaintiff employee's contract was approved by defendant U.S. Foods Inc. in Charlotte. N.C.G.S. § 97–36 extended subject matter jurisdiction to plaintiff's claim since the final binding act occurred in North Carolina. **Burley v. U.S. Foods, Inc., 286.**

Temporary total disability modification—additional benefits claim—timeliness—The Industrial Commission did not err in a workers' compensation case by allowing plaintiff's claim for additional benefits relating to her 2006 injury even though defendants contended they were time-barred by either N.C.G.S. §§ 97-25.1 or 97-47. Plaintiff timely filed her claim for additional benefits. However, the amount of temporary total disability due to plaintiff for the periods of her disability from 2008-2010 was modified based on the Commission's improper modification of the Form 21 agreement. **Miller v. Carolinas Med. Ctr.-Ne., 342.**

ZONING

Landfills ordinance—misreading of ordinance—The trial court did not err in a zoning case by entering summary judgment in favor of defendant even though plaintiff contended that the airport radius, floodplain, truck entrance, and "catch-22" provisions of the ordinance, applicable to regional landfills, were preempted by State and Federal law. Plaintiff's arguments were based on a misreading of the challenged ordinance. **PBK Holdings, LLC v. Cnty. of Rockingham, 353.**

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.

BRISSETT v. FIRST MT. VERNON INDUS. LOAN ASS'N

[233 N.C. App. 241 (2014)]

COURTNAY T. BRISSETT, AND HUSBAND, LADWIN BRISSETT, AND BRISSETT RENTAL PROPERTIES, LLC, PLAINTIFFS

v.

FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, DALE E. DUNCAN AND KATHLEEN NEARY AS TRUSTEES FOR FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, PRODEV XVI LLC, AND JOHN F. GONZALES, JASON MATTHEW A. GOLD, THE SHOAF LAW FIRM, P.A., JAMES BOSTIC, KIM RICHARDSON, AND LABRADOR FINANCIAL SERVICES, INC., DEFENDANTS

No. COA13-685

Filed 1 April 2014

1. Evidence—hearsay—exceptions—failure to address admission—abuse of discretion

The trial court erred by excluding the transcript of a deceased attorney defendant's testimony in Virginia State Bar proceedings from the evidence admitted at trial under the hearsay exceptions argued by plaintiffs. Failure to address the admission of the evidence under N.C.G.S. § 8C-1, Rule 804(b)(5) was arbitrary and an abuse of discretion.

2. Fraud—misrepresentation—directed verdicts—expiration of statute of limitations

The trial court did not err by directing verdicts on plaintiffs' fraud and misrepresentation claims. The three-year statute of limitations began to run in 2006 and expired prior to the commencement of this action on 7 June 2010.

3. Fraud—constructive fraud—directed verdict

The trial court did not err by directing verdict on plaintiff's constructive fraud claim. There was no fiduciary duty owed to plaintiffs by defendant First Mount Vernon Industrial Loan Association.

4. Damages and Remedies—punitive damages—net worth—revenues—similar past conduct

The trial court did not abuse its discretion by allegedly denying plaintiffs the opportunity to present evidence to the jury of defendant First Mount Vernon Industrial Loan Association's (FMV) net worth, revenues, and similar past conduct in order to prove punitive damages. Plaintiffs mischaracterized the portions of the evidence they claimed were excluded in error. Further, any alleged error was harmless given that directed verdicts were entered in favor of FMV on the fraud claims and the jury never found FMV liable, thereby precluding any contemplation of damages.

5. Equity—clean hands doctrine—motion for judgment notwithstanding verdict

The trial court erred by granting defendant First Mount Vernon Industrial Loan Association's motion for judgment notwithstanding the verdict on the issue of unclean hands. It was unclear from the record on which basis the trial court entered the directed verdicts. Further, fraud was not required to preclude equitable relief on the basis of unclean hands. The judgment was reversed and the case was remanded on this issue.

Appeal by plaintiffs from judgment filed 13 September 2012 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 20 November 2013.

Watsi M. Sutton, Attorney At Law, P.A., by Jacinta D. Jones and Watsi M. Sutton, for plaintiffs-appellants.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for defendants-appellees.

McCULLOUGH, Judge.

Courtnay T. Brissett ("C. Brissett"), Ladwin Brissett ("L. Brissett") (together "plaintiffs"), and Brissett Rental Properties, LLC (the "rental company"), appeal from judgment filed 13 September 2012. For the following reasons, we find no error in part and reverse in part.

I. Background

In late 2004 and early 2005, plaintiffs purchased a number of distressed residential properties in New Bern, North Carolina as rental properties. Thereafter, at the advice of a CPA, plaintiffs had an attorney set up the rental company to hold the properties.

In late 2005, plaintiffs decided to begin rehabilitating the properties and began looking for financing. After several unsuccessful attempts to obtain financing from banks, plaintiffs, with the assistance of defendants Kim Richardson and James Bostic of defendant Labrador Financial Services, entered a loan agreement with defendant First Mount Vernon Industrial Loan Association ("FMV") to acquire funds to rehabilitate six of the properties. Defendant Jason A. Gold, of defendant The Shoaf Law Firm, conducted the closing of the transactions on 9 January 2006. Plaintiffs had no relationship and did not communicate with FMV until after the closing.

As required by the closing instructions, plaintiffs signed documents at the closing deeding the six properties to ProDev XVI, LLC ("ProDev"), an entity established for the sole purpose of facilitating the loan. C. Brissett also signed the ProDev Operating Agreement and ProDev Organizational Agreement, which established C. Brissett as the 40% member and manager of ProDev and John Gonzales, a board member of FMV, as the controlling 60% member of ProDev. These ProDev documents also provided that C. Brissett would be conveyed Gonzales' 60% interest in ProDev upon payoff of the loan. The purpose of FMV requiring the conveyance of the properties to ProDev as a condition precedent to making the loan was to ease the collection process upon default and to protect FMV's interests from bankruptcy.

Plaintiffs executed all documents at the closing without reading them and without asking any questions. As a result, plaintiffs were not aware of the nature of the transaction.

Plaintiffs did not come to understand the terms of the documents executed at the closing until they encountered problems while attempting to refinance one of the completed properties later in 2006, at which point plaintiffs learned ProDev owned the property. By that time, plaintiffs had received approximately $131,500 in loan disbursements from FMV to rehabilitate the properties. The loan went into default in early 2007 and no further disbursements were made. Furthermore, upon default Gonzales exercised his right as the controlling member of ProDev to remove C. Brissett from her role as the managing member of ProDev.

On 7 June 2010, plaintiffs commenced this civil action with the filing of summonses, complaint, and notice of *lis pendens* in Craven County Superior Court. In the complaint, plaintiffs asserted numerous claims against the named defendants, including claims against FMV to quiet title, breach of contract and rescission, misrepresentation, *lis pendens*, unfair and deceptive trade practices, fraud in the inducement, constructive fraud, and civil conspiracy and conspiracy in facilitation of fraud.[1]

1. The only claims to reach trial were those claims against FMV and its trustees. Upon motion and affidavit for entry of default, on 25 January 2011, the trial court entered default against ProDev, Bostic, Richardson, Labrador Financial Services, and The Shoaf Law Firm. Thereafter, following Gonzales' death and the substitution of Gonzales' Estate as allowed by the trial court's 12 October 2011 order, plaintiffs voluntarily dismissed their claims against Gonzales' Estate and Gold by notices filed 27 August 2012 and 4 September 2012, respectively.

FMV and its trustees, defendants Dale E. Duncan and Kathleen Neary, filed an answer to plaintiffs' complaint on 10 August 2010. The answer included various affirmative defenses, a counterclaim for reformation of certain deeds to correct typographical and other mistakes, and crossclaims against ProDev, Gold, The Shoaf Law Firm, Bostic, Richardson, and Labrador Financial Services. Plaintiffs replied on 6 October 2010.

FMV and its trustees later filed an amended answer, counterclaims, and cross-claims on 24 October 2011. In addition to the original counterclaim for reformation of deeds, FMV and its trustees asserted counterclaims for guaranty, unjust enrichment, and an equitable lien or constructive trust. Plaintiffs replied on 25 April 2012.

On 4 September 2012, the case was called for trial in Craven County Superior Court, the Honorable Paul Jones, Judge presiding. Prior to impaneling a jury, the court heard arguments on motions *in limine*. In regard to FMV's and its trustees' motion to exclude all evidence of Virginia State Bar proceedings against Duncan and Gonzales, the trial court ordered the transcripts of the proceedings to be excluded.

The following morning, 5 September 2012, a final pretrial order with stipulations as to undisputed facts was filed and the jury trial began.

On 6 September 2012, prior to testimony resuming for a second day, FMV and its trustees informed the trial court that they would move for a directed verdict at the close of plaintiffs' evidence and submitted a trial brief for the court's consideration. Thereafter, at the close of plaintiffs' evidence on 7 September 2012, FMV and its trustees moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50. Following a weekend recess, on 10 September 2012, plaintiffs responded with a trial brief opposing the motion for a directed verdict and the trial court heard arguments on the matter. The trial court then granted the motion for a directed verdict as to the following claims for relief against various parties: (3) Misrepresentation, (5) Unfair and Deceptive Trade Practices, (9) Fraud in the Inducement, (10) Constructive Fraud, (11) Unfair and Deceptive Trade Practices, (12) Constructive Trust, (16) Constructive Fraud, and (17) Civil Conspiracy and Conspiracy in Facilitation of Fraud.

FMV put on only documentary evidence and subsequent to a charge conference, the trial court instructed the jury on the following six issues:

> (1) Did the deeds from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] meet the requirements of the law for conveying valid title?

(2) Was the consideration given to [C. Brissett] and [L. Brissett] and [the rental company] for executing the deeds from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] grossly inadequate under the circumstances?

(3) Did the deed of trust from [C. Brissett] and [L. Brissett] and [the rental company] to [ProDev] meet the requirements of the law for creating a valid debt?

(4) Is [FMV] entitled to have a lien on the five properties?

(5) What is the amount of [FMV's] lien which does not include interest on said amount if any?

(6) Did [FMV] act with "unclean hands" in its conduct, or in the conduct of its agents, relating to the loan transaction of January 9, 2006?

After deliberating, the jury reached a unanimous decision on all issues except for issues two and six, to which the jury was deadlocked eleven to one. As to issues one and three, the jury determined the deeds did not meet the requirements of the law for conveying valid title or creating a valid debt. As to issues four and five, the jury determined FMV was entitled to a lien on the five properties in the amount of $131,500.

The case was held open until 12 September 2012 when the trial court considered post-trial arguments. At that time, FMV moved for a judgment notwithstanding the verdict ("JNOV") pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); essentially asking the court to decide the undecided issues as a matter of law. Plaintiffs responded with their own motions for a JNOV and a new trial.

At the conclusion of the arguments, the trial court denied plaintiffs' motions and granted FMV's motion, deciding issues two and six in favor of FMV.

On 13 September 2012, the trial court filed a judgment reforming the deed of trust so that FMV has a lien on the properties in the amount of $131,500 with a right to foreclose on the lien by power of sale. The judgment further dismissed all claims by plaintiff against FMV and its trustees and ordered the *lis pendens* filed in the action to be of no further force and effect and to be canceled by the Craven County Clerk of Superior Court.

Plaintiffs filed notice of appeal from the 13 September 2012 judgment on 11 October 2012.

II. Discussion

Plaintiffs raise the following five issues on appeal: whether the trial court erred by (1) granting FMV's motion to exclude the transcript of Gonzales' testimony during Virginia State Bar proceedings; (2) directing a verdict in favor of FMV on plaintiffs' fraud and misrepresentation claims; (3) directing a verdict in favor of FMV on plaintiffs' constructive fraud claim; (4) denying plaintiffs the opportunity to present evidence of FMV's net worth, revenues, and similar past conduct; and (5) entering a judgment notwithstanding the verdict on the issue of unclean hands.

1. Exclusion of Evidence

[1] Plaintiffs first argue the trial court erred in excluding the transcript of Gonzales' testimony in Virginia State Bar proceedings from the evidence admitted at trial.

"Admission of evidence is 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.' " *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997)). An abuse of discretion warranting reversal results " 'only upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002). Relevancy is a question of law reviewed *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Evidence is relevant when it has a "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 (2013).

Apart from the present case, plaintiffs filed complaints against Duncan and Gonzales with the Virginia State Bar. In proceedings stemming from those complaints, Duncan and Gonzales testified before the Virginia State Bar about their involvement with FMV, ProDev, and the financing scheme giving rise to this case. At the conclusion of the proceedings, Duncan and Gonzales each had their license to practice law in Virginia revoked for a period of time.

Subsequent to the Virginia State Bar proceedings and Gonzales' death, FMV filed a motion *in limine* in this case "for an order precluding

[p]laintiffs . . . from offering any testimony or other evidence, as well as referencing in any manner the proceedings in those Virginia State Bar proceedings entitled *Virginia State Bar v. John Francis Gonzales, Esquire*, Case No. CL 09003666 and *Virginia State Bar v. Dale E. Duncan*, Case No. 09003613[.]" Specifically concerning the transcripts of the proceedings, FMV contended the transcripts were irrelevant, immaterial, and otherwise inadmissible as hearsay. In response, plaintiffs contended the transcripts were relevant, material, and admissible as an exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rules 804(b)(1), (3), and (5).

FMV's motion came on for hearing on 4 September 2012. After initially reserving judgment, the trial court concluded that plaintiffs could cross-examine defendants regarding their unethical conduct but determined the transcripts were immaterial and inadmissible hearsay.

At the outset, we address the trial court's mistaken statement that the transcripts were immaterial. Although the memorandum orders containing the results and conclusions of the Virginia State Bar proceedings may be irrelevant and immaterial in the present case because the standards in ethical proceedings differ from those in legal proceedings, Gonzales' testimony in the Virginia State Bar proceedings, as recorded in the transcript, is both relevant and material in the present case as it details the conduct that forms the basis of plaintiffs' claims.

Nevertheless, relevant and material evidence may be excluded if it is hearsay. The North Carolina Rules of Evidence provide that hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013), "is not admissible except as provided by statute or by [the] rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2013). There are exceptions to rule against hearsay, however, when a declarant is unavailable. *See* N.C. Gen. Stat. § 8C-1, Rule 804 (2013).

Now on appeal, plaintiffs argue the trial court erred in excluding the transcript of Gonzales' testimony without issuing specific findings of fact and conclusions of law regarding the admissibility of the transcript under N.C. Gen. Stat. § 8C-1, Rules 804(b)(3) and (5). In support of their argument, plaintiffs cite *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), and *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

In *Smith*, our Supreme Court addressed the admissibility of hearsay under N.C. Gen. Stat. § 8C-1, Rule 803(24), the residual exception for hearsay when the availability of a declarant is immaterial. *Smith*, 315 N.C. at 90-99, 337 S.E.2d at 843-48. In its discussion, the Court stated,

> [u]pon being notified that the proponent is seeking to admit the statement pursuant to that exception, the trial judge must have the record reflect that he is considering the admissibility of the statement pursuant to Rule 803(24). Only then should the trial judge proceed to analyze the admissibility by undertaking the six-part inquiry required of him by the rule. The trial judge must engage in this inquiry prior to admitting or denying proffered hearsay evidence pursuant to Rule 803(24).

Id. at 92, 337 S.E.2d at 844. Upon outlining the six-part inquiry, the Court in *Smith* then held that,

> before allowing the admission of hearsay evidence to be presented under Rule 803(24) (other exceptions), the trial judge must enter appropriate statements, rationale, or findings of fact and conclusions of law, as set forth herein, in the record to support his discretionary decision that such evidence is admissible under that rule. If the record does not comply with these requirements and it is clear that the evidence was admitted pursuant to Rule 803(24), its admission must be held to be error.

Id. at 97, 337 S.E.2d at 847. Thereafter, our Supreme Court adopted "parallel guidelines" for the admission of hearsay under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) in *Triplett*, noting "Rule 804(b)(5) and Rule 803(24) are substantively nearly identical[.]" *Triplett*, 316 N.C. at 7, 340 S.E.2d at 740.

> Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003).

Under the law espoused in *Smith* and *Triplett*, the trial court is only required to issue findings of fact and conclusions of law to support a decision to admit evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). There is no requirement that the trial court issue findings of

fact or conclusions of law regarding the admissibility of evidence pursuant to any other N.C. Gen. Stat. § 8C-1, Rule 804 exception. Furthermore, the trial court did not admit the hearsay evidence at issue in the present case. As this Court has stated, "[t]he six-part inquiry is very useful when an appellate court reviews the admission of hearsay under Rule 804(b)(5) or 803(24). However, its utility is diminished when an appellate court reviews the exclusion of hearsay." *Phillips & Jordan Inv. Corp. v. Ashblue Co.*, 86 N.C. App. 186, 191, 357 S.E.2d 1, 3-4 (1987).

Nevertheless, *Smith* and *Triplett* require the trial court, upon being notified that a party is seeking to admit evidence pursuant to a residual hearsay exception, to ensure the record reflects it is considering the exception and engage in the six-part inquiry "prior to admitting or denying proffered hearsay evidence[.]" *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

Although plaintiffs argued for admission of the transcript of Gonzales' testimony under the residual exception in both its memorandum and argument, the trial court gave no indication that it considered admission under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) or engaged in the required six-part inquiry when the trial court denied the admission of the transcript. We hold this failure to address the admission of the evidence under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) was arbitrary and an abuse of discretion. Moreover, given that Gonzales is now deceased, plaintiffs provided notice of their intent to admit the transcript, the trial court denied admission of the transcript after plaintiffs argued for its admission under the only other applicable hearsay exceptions, the Virginia Bar proceedings have sufficient circumstantial guarantees of trustworthiness, Gonzales' testimony was material, and Gonzales was the best source of evidence regarding his role with FMV and ProDev, we believe the transcript of Gonzales' testimony would likely be admitted under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) if properly considered.

In addition to determining the trial court erred, we hold plaintiffs were prejudiced by the error. Although directed verdicts were entered on plaintiffs' fraud, misrepresentation, and constructive fraud claims, and some evidence of Gonzales' role with FMV and ProDev was introduced through stipulations and testimony from FMV president, Arthur Bennett, we find the exclusion of the transcript of Gonzales' testimony was not harmless where Gonzales' testimony is significant to the issue of unclean hands, on which the jury was deadlocked at trial.

2. and 3. Directed Verdicts

As mentioned in the background, at the close of plaintiffs' evidence, FMV and its trustees moved for a directed verdict on all issues pursuant

to N.C. Gen. Stat. § 1A-1, Rule 50. Upon consideration of the trial briefs and arguments by both sides, the trial court granted FMV's motion for a directed verdict on plaintiffs' claims of fraud, misrepresentation, and constructive fraud, among others.

Now, in plaintiffs' second and third issues on appeal, plaintiffs argue the trial court erred in directing verdicts in favor of FMV on the fraud, misrepresentation, and constructive fraud claims. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). Thus, our review is *de novo*. *See Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004) ("Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*.").

Fraud and Misrepresentation

[2] Regarding plaintiffs' fraud and misrepresentation claims, plaintiffs contend the trial court erred in directing a verdict in favor of FMV because there was sufficient evidence for the jury to infer that the statute of limitations had not run. We disagree.

N.C. Gen. Stat. § 1-52(9) provides that actions for "relief on the ground of fraud or mistake" must be brought within three years. N.C. Gen. Stat. § 1-52(9)(2013). Yet, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* Our Supreme Court has "previously construed this provision to 'set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it.'" *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (quoting *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980)). "For purposes of N.C.G.S. § 1-52(9), 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances.'" *Id.* (quoting *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)).

As noted above, plaintiffs argue there was sufficient evidence from which the jury could infer the statute of limitations had not expired prior to 7 June 2010, the date plaintiffs commenced this action. In support of their argument, plaintiffs quote *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976), for the proposition that "[w]hether the plaintiff in

the exercise of due diligence should have discovered the facts [regarding the existence of potential fraud] more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or conflicting." *Id.* at 468, 230 S.E.2d at 163.

Plaintiffs' argument lacks merit. Considering the evidence in this case, we find no issues for the jury to determine.

Both at trial and in their brief on appeal, plaintiffs acknowledge that they began to become suspicious about the loan when they were unable to refinance one of the properties in August or September of 2006. As L. Brissett testified, it was around this time that they learned of Gonzales' role in the transaction. L. Brissett further testified that he could not locate his copy of the closing documents and demanded Gold send him copies. Upon receipt of the copies of the closing documents in October 2006, plaintiffs noticed some of C. Brissett's signatures did not look like her own. C. Brissett subsequently documented plaintiffs' realization that they were being defrauded in a 29 December 2006 letter.

We find this evidence conclusive that plaintiffs were aware of the fraud in 2006. Therefore, the three-year statute of limitations began to run in 2006 and expired prior to the commencement of this action on 7 June 2010.

Despite evidence the fraud was discovered in 2006, plaintiffs argue that "[a]lthough [they] may have suspected that [FMV] was involved with the transfer of their properties to [ProDev], and even potentially involved with the forgery of [C. Brissett's] signature on several documents, the plaintiffs did not reasonably discover [FMV's] actual ties to the fraudulent scheme until 2007 or 2008." We are not convinced; discovery includes "when the fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386 (quotation marks omitted).[2]

Constructive Fraud

[3] Regarding plaintiffs' constructive fraud claim, plaintiffs argue the trial court erred in directing a verdict in favor of FMV because there was sufficient evidence to establish a presumption of a breach of fiduciary

2. Although plaintiffs do not mention it on appeal, we note that FMV also argued for a directed verdict on the fraud and misrepresentation claims on the ground that essential elements of those claims were missing. The trial court, however, did not explain the basis for its ruling. Because we find the directed verdict was proper because the statute of limitations had expired, we do not address the elements of the fraud and misrepresentation claims.

duty where FMV required plaintiffs to convey title to the properties to ProDev, a company controlled by Gonzales and formed for the sole purpose of holding title to the properties. We disagree.

"In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a 'relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'" *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). "Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Keener Lumber Co., Inc. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002).

As this Court has recently explained,

> [a] fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Beyond the usual occurrence, such as that found between a lawyer and client, the relationship "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Id.* (citation omitted) (internal quotation marks omitted).

Dallaire v. Bank of America, N.A., __ N.C. App. __, __, 738 S.E.2d 731, 735 (2012). This Court, however, has acknowledged that an ordinary debtor-creditor relationship does not generally give rise to a fiduciary relationship. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992).

Although plaintiffs admit that an ordinary creditor-debtor relationship does not create fiduciary duties, plaintiffs contend a fiduciary relationship exists between a mortgagee and mortgagor when the mortgagee uses a "straw man" to divest the mortgagor of his equity of redemption. In support of their argument, plaintiffs cite *Hinton v. West*, 207 N.C. 708, 178 S.E. 356 (1935).

The defendant in *Hinton*, in exchange for various items of value, made out a note and took a mortgage on 48 acres of land owned by the

plaintiff. *Id.* at 709, 178 S.E. at 356. Upon default and a looming threat of foreclosure, the plaintiff, at the insistence of the defendant, relinquished his equity of redemption by conveying 42 acres of the land by deed to the defendant, as trustee for defendant's brother, to satisfy the debt and avoid foreclosure. *Id.* at 710, 178 S.E. at 357. Yet, following the transfer, defendant took control and made improvements on the acreage. *Id.* In reviewing the transaction, our Supreme Court noted that the [defendant] was the only party with whom the [plaintiff] dealt and was acting in a "dual capacity as trustee and agent for [his brother], and was the primary party to the purchase." *Id.* at 714, 178 S.E. at 359. The Court then reversed the trial court's judgment of a nonsuit holding, that where the defendant, as trustee, acted for himself to acquire the plaintiff's equity of redemption for inadequate consideration, "there was sufficient evidence to be submitted to a jury, and a presumption arose from the evidence, if believed by them, which would require the defendant[] to show that the transaction was fair and free from oppression." *Id.*

Plaintiffs argue the same result is warranted in the present case because FMV, through Gonzales, stood on both sides of the transaction and failed to disclose Gonzales' affiliation with FMV. We disagree and find the present case distinguishable.

Although the result of plaintiffs' default, where Gonzales takes control of ProDev and the subject properties to the benefit of FMV, is similar to a foreclosure under a deed of trust, the relationship between plaintiffs and FMV is not a mortgagor-mortgagee relationship. As stipulated by the parties, "[n]one of the [p]roperties [were] the personal residence of the [plaintiffs] on the date of closing, and the loan was in all respects a commercial loan for the [plaintiffs] to use [to] rehabilitate the [p]roperties." Moreover, there was no prior relationship between FMV and plaintiffs to establish a fiduciary relationship. In fact, it was stipulated that "[FMV] had no contact or communication with the [plaintiffs] until after the loan was closed." Based on these facts, we distinguish this case from *Hinton* and the cases where fiduciary duties have been imposed based on the special relationships between debtors and creditors and hold there was no fiduciary duty owed to plaintiffs by FMV. Thus, the trial court did not err in entering a directed verdict on plaintiffs' constructive fraud claim.

4. Evidence for Punitive Damages

[4] In the fourth issue raised by plaintiffs on appeal, plaintiffs argue the trial court erred in denying them the opportunity to present evidence to the jury of FMV's net worth, revenues, and similar past conduct. Plaintiffs contend this evidence was admissible to prove punitive damages pursuant to N.C. Gen. Stat. §§ 1D-15 and 1D-35.

N.C. Gen. Stat. § 1D-15 provides "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2013). N.C. Gen. Stat. § 1D-35 then lists the types of evidence that the trier of fact may consider in determining the amount of punitive damages, if any, to be awarded. N.C. Gen. Stat. § 1D-35 (2013). The list of evidence includes evidence related to "[t]he existence and frequency of any similar past conduct by the defendant[,]" N.C. Gen. Stat. § 1D-35(2)(g), and "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth." N.C. Gen. Stat. § 1D-35(2)(i).

At the outset of our analysis on the issue, we note that plaintiffs mischaracterize the portions of the evidence they claim were excluded in error. Regarding FMV's ability to pay punitive damages, plaintiffs questioned Bennett regarding the total value of the loans by FMV in North Carolina in 2006. FMV objected on relevance grounds and the trial court sustained the objection. The trial court, however, allowed plaintiff to question Bennett as to the largest and smallest amount of loans, in terms of value, made by FMV in any year since Bennett became president. Regarding FMV's past similar conduct, plaintiffs did not merely inquire into FMV's past similar conduct, but instead questioned Bennett about the number of times FMV had been sued as a result of similar lending schemes. FMV objected and the trial court sustained the objection. Upon review of the testimony, we hold the trial court did not abuse its discretion in sustaining either of FMV's objections.

Nevertheless, assuming arguendo the trial court erred in limiting the testimony, the error was harmless given that directed verdicts were entered in favor of FMV on the fraud claims and the jury never found FMV liable, thereby precluding any contemplation of damages. *See* N.C. Gen. Stat. § 1D-15(a) (conditioning the award of punitive damages on the award of compensatory damages).

5. Judgment Notwithstanding the Verdict ("JNOV")

[5] As detailed in the background, the jury was deadlocked on the issues of adequate consideration and unclean hands. As a result, on 12 September 2012, FMV filed a motion for a JNOV pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). In the motion, FMV argued it was entitled to judgment as a matter of law because there was overwhelming evidence that plaintiffs received consideration for executing the deeds

conveying title to ProDev, as shown by the jury's determination that FMV is entitled to a lien on the properties, and "the [trial court,] having concluded that [FMV] was entitled to [d]irected verdict[s] on [p]laintiffs' claims for fraud, civil conspiracy, constructive fraud, and unfair or deceptive trade practices, . . . essentially ruled that [FMV] did not act with 'unclean hands.' " On the same day, plaintiffs filed their own motion for a JNOV and a new trial arguing there was overwhelming evidence of inadequate consideration and unclean hands. In response to FMV's argument regarding unclean hands, plaintiffs argued "[t]he elements in each of [the fraud] claims are not identical to what the [c]ourt must find to determine the issue of . . . 'unclean hands[]' " and, therefore, the directed verdicts did not foreclose a determination of unclean hands.

After hearing arguments echoing those in the motions, the trial court granted FMV's motion for a JNOV and denied plaintiffs' motions.

In the plaintiffs' final issue on appeal, plaintiffs argue the trial court erred in granting FMV's motion for a JNOV on the issue of unclean hands.[3] We agree.

"A motion for judgment notwithstanding the verdict (JNOV) 'is essentially a directed verdict granted after the jury verdict.' " *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000). Thus, "[o]n appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Id.* at 498-99, 524 S.E.2d at 595.

"The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). More specifically, this Court has stated "[t]he clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy." *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762, *affirmed*, 312 N.C. 324, 321 S.E.2d 892 (1984). In this case, a finding that FMV acted with unclean hands would prevent FMV from obtaining a lien on the subject properties.

In entering the JNOV on the issue of unclean hands, it appears the trial court agreed with FMV's argument that the trial court had already

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3. Plaintiffs do not challenge the JNOV in favor of FMV on the issue of adequate consideration because the issue is of little consequence following the jury's determination that the deeds were inadequate under the law to convey valid title and create a valid debt.

decided the issue when it directed verdicts on plaintiffs' claims for fraud, civil conspiracy, constructive fraud, and unfair or deceptive trade practices. We find this was error for two reasons. First, FMV argued for a directed verdict on the fraud claims based on the statute of limitations and lack of reasonable reliance. It is unclear from the record on which basis the trial court entered the directed verdicts. Second, for a finding of unclean hands, "[t]he inequitable action need not rise to the level of fraud[.]" *S.T. Wooten Corp. v. Front Street Const., LLC*, _ N.C. App. _, _, 719 S.E.2d 249, 252 (2011) (citing *Stelling v. Wachovia Bank and Trust Co.*, 213 N.C. 324, 327, 197 S.E. 754, 756 (1938)). Thus, fraud is not required to preclude equitable relief on the basis of unclean hands.

Upon review of the evidence, even without considering the transcript of Gonzales' testimony in the Virginia State Bar proceedings, we hold there was sufficient evidence to present the jury with the issue of whether FMV acted with unclean hands. As a result, we hold the trial court erred in granting FMV's motion for a JNOV following the jury's impasse.

III. Conclusion

Based on the forgoing discussion, we hold the trial court did not err in directing verdicts on plaintiffs' fraud, misrepresentation, and constructive fraud claims. Nor did the trial court improperly exclude evidence relating to punitive damages. The trial court did, however, err in failing to consider the admission of the transcript of Gonzales' testimony in the Virginia State Bar proceedings under all the hearsay exceptions argued by plaintiffs and by granting FMV's motion for a JNOV on the issue of unclean hands. Therefore, the judgment is reversed and the case is remanded on the issue of unclean hands.

No error in part and reversed in part.

Judges ELMORE and DAVIS concur.

BROWN v. TOWN OF CHAPEL HILL

[233 N.C. App. 257 (2014)]

CHARLES D. BROWN, PLAINTIFF
v.
TOWN OF CHAPEL HILL, CHAPEL HILL POLICE OFFICER D. FUNK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND OTHER CHAPEL HILL POLICE OFFICERS, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, TO BE NAMED WHEN THEIR IDENTITIES AND LEVEL OF PARTICIPATION BECOMES KNOWN, DEFENDANTS

No. COA13-323

Filed 1 April 2014

1. Appeal and Error—interlocutory orders and appeals—public official immunity

A public official's right to be immune from suit is a substantial right justifying an interlocutory appeal and the appeal of a police officer from the denial of his motion for summary judgment based on public official immunity was properly before the Court of Appeals. However, the Court of Appeals declined to exercise its discretion to consider non-immunity issues in the interests of judicial economy.

2. Immunity—public official immunity—malice exception—evidence not sufficient

In a civil action that arose from a police officer's stop of plaintiff after a mistaken identification, plaintiff argued on appeal only the malice exception to public official immunity. But plaintiff did not forecast any evidence that the officer acted contrary to his duty and did not forecast any evidence that the officer did not use due diligence in ascertaining plaintiff's true identity. The trial court erred by denying the officer's motion to dismiss.

Judge GEER dissenting.

Appeal by defendants from order entered 18 September 2012 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 28 August 2013.

McSurely and Turner, PLLC, by Alan McSurely, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Dan M. Hartzog, Jr., for defendants-appellants.

HUNTER, Robert C., Judge.

Officer D. Funk ("defendant" or "Officer Funk") and the Town of Chapel Hill ("the Town") (collectively "defendants") appeal from an order denying in part their motion for summary judgment as to the claim of plaintiff Charles D. Brown for false imprisonment. Only Officer Funk's appeal from the trial court's denial of his motion for summary judgment based on public official immunity is properly before us. Because plaintiff failed to forecast evidence that Officer Funk acted with malice, we reverse.

Background

This lawsuit arises out of the stop and detention of plaintiff by Officer Funk and other officers of the Chapel Hill Police Department ("CHPD") on the night of 1 June 2009. Plaintiff, a black male, is the owner of Precise Cuts & Styles Barber Shop located at 136 E. Rosemary Street in Chapel Hill, North Carolina.

According to plaintiff's verified complaint and deposition, on 1 June 2009, after closing his shop at 10:00 p.m., plaintiff stayed late to do some cleaning and remodeling. When plaintiff was finished, around 11:25 p.m., he locked the shop's front door and walked west on Rosemary Street towards his fiancé's house in Carrboro.

At around 11:35 p.m., plaintiff was walking along the north side of West Rosemary Street when he saw two officers in police cars parked in the convenience store lot on the south side of the street across from Breadman's Restaurant. One of the officers pulled out on Rosemary Street and into an empty lot on the south side of the street. As he walked past the officer, plaintiff raised his right arm across his face, scratching the left side of his face with his right hand. Plaintiff continued walking on the north side of the street past the Breadman's parking lot, and heard someone say, "Stop." Not realizing that the person was talking to him, plaintiff continued walking.

Plaintiff then heard the same voice again, this time directly behind him, saying, "I said stop!" Plaintiff turned and saw Officer Funk with his hand on his weapon about five feet away. Plaintiff asked, "Stop for what? What did I do?" Officer Funk responded, "[Y]ou are under arrest, Mr. Farrington [sic]" as he grabbed plaintiff's hand, spun him around, pushed him against the back of a second police car that had just pulled in front of plaintiff. Officer Funk pulled plaintiff's other arm behind his back and tightly fastened the handcuffs on plaintiff's wrists, inflicting pain.

Plaintiff informed the officers that he was not Cuman Fearrington ("Mr. Fearrington") and that his actual name was Charles Brown. When

plaintiff did not receive any response from the officers, he asked, "[A]re you sure you want to do this? My name is not Mr. Farrington [sic]." Again, the officers did not respond. Instead, Officer Funk pushed plaintiff against the trunk of the police car and patted plaintiff down, checking for weapons. Plaintiff told Officer Funk to look in his pants pocket for his ID cards. Defendant pulled out a set of cards held together with a rubber band, flipped through them, and threw them on the trunk of the police car.

When Officer Funk asked plaintiff from where he was walking, plaintiff told him that he had just left work. Officer Funk questioned plaintiff: "From work at this time of night?" Plaintiff explained that he owned a barber shop on Rosemary Street. Officer Funk replied in a sarcastic and incredulous tone: "Oh? You own a business?" Plaintiff responded, "If I was white, this would not be happening." Officer Funk then asked whether plaintiff would "feel better" if he called a black officer. Because plaintiff again thought Officer Funk was being sarcastic, he replied, "No."

In the meantime, five police cars gathered, and several cars and pedestrians slowed or stopped to observe what was happening. A black police officer, Officer D. Williams, asked plaintiff, "If I had pulled you, would you feel better?" Plaintiff then heard Officer Williams say to the other officers, "I hate the ones like him."

At 12:14 a.m., Officer Funk's partner, Officer Castro, called Orange County Communications to verify the information on plaintiff's identification card. When the operator confirmed plaintiff's identification, Officer Castro asked, "[D]oes he have anything on the NCIC? Or anything on other surrounding indices?" The operator replied, "I don't show anything in NCIC but I'm going to check surrounding . . . I'll have to send a message . . . it will take a few . . . ." Eventually the operator responded that there was "no positive response," and the 16-minute call ended at 12:30 a.m. A few minutes later, Officer Funk removed plaintiff's handcuffs, and he and the other officers drove off without apologizing or saying anything else to plaintiff.

The following day, plaintiff and his fiancé drove to the CHPD to file a complaint and ask for a photograph and description of Mr. Fearrington. They met with Lieutenant Bradley who told them he did not have time to look up the requested information and that Officer Funk was in training and could not meet with them either. Because of what plaintiff and his fiancé perceived as a discriminatory and disrespectful attitude from Lt. Bradley, they did not file a complaint that day, fearing it would be dismissed with the same attitude.

Instead, on 16 June 2009, plaintiff reported the incident to the local NAACP, who asked the CHPD for the incident report of plaintiff's arrest. Plaintiff was provided the incident report on 24 June 2009. Defendants admitted that the report was not created until requested by the NAACP, two weeks after the incident. The report is unsigned by Officer Funk and states that at 12:17 a.m. on 2 June 2009 the "State of North Carolina" was the victim of a "Suspicious Person" on the 300 Block of West Rosemary Street.

The report lists Officers Castro and Sabanosh as "others involved" in the incident. Officer Sabanosh does not, however, appear anywhere on the radio log from that night. Although the radio log indicates that Officer Taylor was present at the scene of the incident, the incident report does not mention him. Officer Williams, the black officer, is not mentioned in either the radio log or on the incident report.

On 2 June 2011, plaintiff filed suit against the Town and Officer Funk in his official and individual capacity for assault, false imprisonment, and violation of plaintiff's constitutional rights under Article I, Section 20, and Article I, Section 19, of the North Carolina Constitution. Plaintiff pled that the Town had waived sovereign immunity by the purchase of liability insurance. In its response, the Town admitted that it "participates in a local government risk pool, which provides certain coverage to the Town with respect to Plaintiff's claims."

On 13 August 2012, defendants filed a motion for summary judgment, arguing that (1) plaintiff had not and could not establish facts to support any of his causes of action, (2) Officer Funk was entitled to public official immunity in his individual capacity, (3) the claims against Officer Funk in his official capacity are duplicative of the claims against the Town, and (4) the claims directly under the North Carolina Constitution should be dismissed because plaintiff had adequate state remedies available. In support of the motion for summary judgment, defendants submitted an affidavit from Officer Funk.

According to Officer Funk's affidavit, he did not see plaintiff until 12:14 a.m.—he drove to the Keys Food Mart, where plaintiff first saw the two officers parked, after responding to a loud music complaint on Church Street at 12:04 a.m. Officer Funk first saw plaintiff walking west on the *south* side of the road as defendant was turning right onto Rosemary. As he made his turn, Officer Funk saw plaintiff look up in his direction and immediately put his right hand in front of his face. Plaintiff continued to cover his face with his hand, moving his hand slowly across his face as Officer Funk drove by to keep his face from view. After plaintiff passed Officer Funk, plaintiff crossed from the south side

to the north side of the street just before reaching Officer Castro's patrol car in the Keys Food Mart lot. As he crossed the street, he switched from using his right hand to cover his face to using his left hand so that Officer Castro could not see his face. Officer Funk claimed that plaintiff hid his face continuously.

Based on Officer Funk's belief that plaintiff was intentionally hiding his face and it being after midnight in a high call volume area of town, Officer Funk decided to investigate further. He turned his vehicle around to get a closer look at plaintiff, and, when he got close enough, "the individual resembled a subject [he] knew had active local arrest warrants—Cuman Fearrington." In addition to the arrest warrants, Officer Funk noted that Mr. Fearrington had evaded arrest in the "Central Business District" of Chapel Hill earlier that day. Officer Funk, believing that plaintiff was Mr. Fearrington, thought that plaintiff was intentionally covering his face based on those outstanding arrest warrants.

According to Officer Funk, he got out of his police car and asked plaintiff if he could speak to him, but plaintiff ignored him and increased his pace. Officer Funk denied placing his hand on his weapon or threatening force. Officer Funk then told plaintiff to stop, repeating his order several times before plaintiff turned around and asked, "Why do I have to stop, just because you say so?" At that point, Officer Castro had pulled his vehicle in front of plaintiff, and it appeared to Officer Funk that plaintiff was attempting to walk around Officer Castro's vehicle. Defendant also claimed that he believed that plaintiff might run away into an open alley nearby. Concerned that plaintiff may attempt to run, Officer Funk placed his hands on plaintiff's left arm, and plaintiff jerked his arm away. Officer Funk placed plaintiff in handcuffs with the assistance of another officer; he claimed plaintiff continued to struggle during the encounter.

Officer Funk's account of what happened after he handcuffed plaintiff also differs from plaintiff's account. Officer Funk stated that while he was patting plaintiff down for weapons, he asked plaintiff for his identification, and plaintiff told him he did not have any. Officer Funk claims that he asked plaintiff more than three times for his identification and that each time plaintiff gave the correct name but the wrong date of birth, all while denying that he had identification on his person. Officer Funk also denies that any of the comments he made to plaintiff regarding plaintiff working late and owning a business were intended to express skepticism or to disparage plaintiff.

Officer Funk attributes the delay in the verification of plaintiff's identification to the fact that communications originally ran an incorrect birth date into the database. As soon as communications ran the correct

date of birth, they were able to confirm plaintiff's identity. Officer Funk claims that plaintiff was only in investigative detention for 16 minutes, from 12:14 a.m. to 12:30 a.m.

Attached to Officer Funk's affidavit was the radio log for that night, which shows the self-reported status of the CHPD officers. The log stated that Officer Funk was dispatched to 500 Umstead Road at 11:32 p.m., and he arrived there at 11:42 p.m. At 11:50 p.m., Officer Funk radioed dispatch that he was available. At 11:54, he was dispatched to a loud noise complaint at Church Street and radioed that he was again available at 12:04 a.m. The log does not show that Officer Funk ever radioed that he had arrived on the scene at Church street, as it shows for the other locations to which he was dispatched that night. Finally, the log shows that Officer Funk arrived at Breadman's at 12:15 a.m. and radioed that he was available at 12:32 a.m. Defendants also provided documentation of the call between Officer Castro and Orange County Communications, which shows that the call began at 12:14 a.m. and ended at 12:30 a.m.

Judge Carl Fox heard defendants' motion for summary judgment and, on 18 September 2012, Judge Fox entered an order allowing defendants' motion as to plaintiff's constitutional claims and his claim for assault. Judge Fox denied the motion as to plaintiff's claim for false imprisonment as to all defendants. Defendants appealed to this Court.

Grounds for Appeal

[1] Preliminarily, we note that Judge Fox's order is interlocutory and, generally, an order denying a motion for summary judgment is not immediately appealable. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). "An interlocutory appeal is ordinarily permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review." *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 464, 621 S.E.2d 1, 4 (2005).

Officer Funk contends that the trial court erred in denying his motion for summary judgment based on public official immunity. This Court has held that a public official's right to be immune from suit is a substantial right justifying an interlocutory appeal. *See Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Therefore, defendant's appeal of the denial of the motion for summary judgment based on public official immunity is properly before us.

Additionally, both defendant and the Town have sought immediate review of the denial of their motion for summary judgment on several

non-immunity related grounds. Defendants argue that "it is well established that this Court will, in the interests of judicial economy, entertain the entirety of an appeal involving an issue which affects a substantial right, though the remaining issues on appeal do not, in and of themselves, affect such a right."

Defendants cite *Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (addressing the defendants' argument that the complaint was insufficient to sue the defendants in their individual capacity); *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998) (addressing "in our discretion" the defendant's non-immunity related arguments "where it would be in the interests of judicial economy to do so"); *Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994) (holding that "in the interest of judicial economy, we exercise our discretionary power to suspend the rules pertaining to interlocutory appeals and address the remainder of [the] defendants' appeal").

However, this Court has noted that in cases where we have exercised our discretion to also review non-immunity issues, the Court has neither held "that non-immunity-related issues would always be considered on the merits in the course of deciding an immunity-related interlocutory appeal" nor "recognize[d] the existence of a substantial right to have multiple issues addressed in the course of an immunity-related appeal. On the contrary, in most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *See Bynum v. Wilson Cnty.*, ___ N.C. App. ___, ___, 746 S.E.2d 296, 300, *disc. review dismissed*, ___ N.C. ___, 748 S.E.2d 559 (2013). In this case, after considering all of the circumstances, we decline to exercise our discretion to consider the merits of defendants' non-immunity issues on appeal and dismiss defendants' appeal with respect to those issues as interlocutory.

Arguments

[2] The sole issue properly before us is whether Judge Fox erred by denying Officer Funk's motion for summary judgment based on public official immunity.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56 (2013). When deciding the motion, " 'the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d

572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). Additionally, " '[a]ll facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party.' " *Woods v. Mangum*, 200 N.C. App. 1, 5, 682 S.E.2d 435, 438 (2009) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)), *aff'd per curiam*, 363 N.C. 827, 689 S.E.2d 858 (2010). This Court reviews an appeal from summary judgment *de novo*. *Id.* In applying Rule 56, this Court has held that "[s]ummary judgment is appropriate . . . if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Free Spirit Aviation*, 191 N.C. App. at 583, 664 S.E.2d at 10 (quoting *Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007)).

I. Public Official Immunity – Malice Exception

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. Thus, a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt.

Wilcox v. City of Asheville, __ N.C. App. __, __, 730 S.E.2d 226, 230 (2012) (internal citations omitted), *disc. review denied*, 366 N.C. 574, 738 S.E.2d 363 (2013). Here, the only exception to public official immunity plaintiff argued on appeal is the malice exception. Specifically, plaintiff has not cited any authority separately addressing the corruption exception to the public official immunity doctrine or provided any analysis as to this in his brief. Therefore, we will only address the malice exception. *See Wilkerson v. Duke Univ.*, __ N.C. App. __, __, 748 S.E.2d 154, 161 (2013) (noting that arguments not raised on appeal are "deemed abandoned").

This Court has noted, with regard to the malice exception, that:

> As for the first question, the most commonly-cited definition of malice in this context is from our Supreme Court's decision in *In re Grad v. Kaasa*, which states that "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). Thus, elementally, a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.

Wilcox, __ N.C. App. at __, 730 S.E.2d at 230. Thus, the only issue is whether plaintiff sufficiently forecasted evidence for each element of malice. *See Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) ("[T]o survive [a] police officer['s] motion for summary judgment on the issue of their individual liability, [plaintiff] must have alleged and forecasted evidence demonstrating the officers acted corruptly or with malice."). If so, there is a genuine issue of material fact as to whether Officer Funk is entitled to the defense of public official immunity, and the trial court did not err in denying summary judgment. However, if not, then Officer Funk would be immune from civil liability.

A. Contrary to Duty

The first element of malice is whether Officer Funk acted contrary to his duty when he detained plaintiff. To determine this issue, we must decide whether plaintiff's seizure constituted an investigatory stop or an arrest. *See State v. Carrouthers*, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009) ("Generally, a person can be 'seized' in two ways for the purposes of a Fourth Amendment analysis: by arrest or by investigatory stop."). Although police officers are authorized during an investigatory stop to take measures to protect their personal safety and maintain status quo, *State v. Campbell*, 188 N.C. App. 701, 708-709, 656 S.E.2d 721, 727 (2008), this Court has noted that "[w]here the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure may evolve into a *de facto* arrest . . . even in the absence of a formal arrest," *State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001).

Here, it is undisputed that Officer Funk immediately handcuffed plaintiff once he reached him without asking plaintiff to identify himself or providing any explanation for why plaintiff was being stopped. Furthermore, plaintiff claimed that Officer Funk immediately told him that he was under arrest. While Officer Funk claims that he handcuffed plaintiff during an investigatory stop to keep him from fleeing, Officer Funk admitted that he mistakenly believed that plaintiff was Mr. Fearrington, a person whom arrest warrants had been issued against. However, once plaintiff's true identity was established, Officer Funk released plaintiff. For purposes of this appeal, because "[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[,]" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (internal quotation marks omitted), we conclude that plaintiff's seizure constituted a *de facto* arrest and not, as defendants contend, an investigatory stop. Thus, Officer Funk must have had probable cause; otherwise,

he would be acting contrary to duty. *See Milien*, 144 N.C. App. at 339, 548 S.E.2d at 771 (noting that "a *de facto* arrest . . . must be justified by probable cause").

In the present case, it is undisputed that Officer Funk had probable cause to arrest Mr. Fearrington. "[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802, 28 L. Ed. 2d 484, 489 (1971). Thus, the issue is whether Officer Funk's mistake was reasonable based on the totality of the circumstances. Subjective good-faith belief is not sufficient on its own; instead, the Supreme Court noted that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Id.* at 804, 28 L. Ed. 2d at 490. Along these lines, this Court, in *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 406-07, 238 S.E.2d 628, 631 (1977), noted that with regard to civil claims for false imprisonment against police officers who arrest the wrong person: "liability for false imprisonment will be imposed only when the arresting officer has failed to use reasonable diligence to determine that the party arrested was actually the person described in the warrant." This concept was reinforced by this Court in *State v. Lynch*, 94 N.C. App. 330, 333, 380 S.E.2d 397, 399 (1989), which noted, relying on *Robinson*, that: even though a police officer reasonably mistakenly arrests the wrong person, the officer must still take "reasonable steps to confirm the identity of the individual under suspicion."

With regard to the reasonableness analysis required by *Hill*, the Fourth Circuit has noted that

> the qualified immunity reasonableness determination is based on evidence reasonably available to the police officer and in light of any exigencies present. And importantly, this inquiry must not result in a second-guessing of the officer's actions with the benefit of 20/20 hindsight. This is so because officers executing a warrant are not required to investigate independently every claim of innocence, or to be absolutely certain that the person arrested is the person identified in the warrant. Instead, sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. Mistaken identity errors, of course, will inevitably occur from time to time, but the law sensibly recognizes that not every mix-up in the issuance of an arrest warrant, even though it leads to the arrest of the wrong person . . . automatically constitutes

> a constitutional violation for which a remedy may be sought under . . . [section] 1983. In sum officers who mistakenly arrest the wrong person are immune from § 1983 liability unless they act in an objectively unreasonable manner in the circumstances, as for example, in failing to investigate readily available exculpatory evidence.

Brown v. Wiita, 7 F. App'x 275, 278-79 (4th Cir. 2001) (alteration in original) (internal quotation marks and citations omitted).

Here, under *Hill* and *Robinson*, the evidence taken in a light most favorable to plaintiff establishes that Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was reasonable and that Officer Funk used reasonable diligence to determine whether plaintiff was who he claimed to be. With regard to Officer Funk's mistaken belief, the undisputed evidence, as established by Officer Funk's affidavit attached to the motion for summary judgment, shows that Officer Funk knew Mr. Fearrington had active local arrest warrants out on him and that Mr. Fearrington had evaded arrest earlier that day in Chapel Hill. After telling plaintiff to stop, plaintiff continued to walk away from Officer Funk. Once plaintiff stopped, according to his own complaint, Officer Funk stated: "You are under arrest, Mr. Fearrington." Photos of both Mr. Fearrington and plaintiff were attached to the affidavit, and the individuals appear similar.

Under the totality of the circumstances, Officer Funk's mistaken belief was reasonable. Plaintiff admitted in his complaint that he did not stop the first time Officer Funk told him to. Once he did, Officer Funk approached him and called him "Mr. Fearrington"; thus, even though Officer Funk was only a few feet away, he still held on to his mistaken belief that plaintiff was Mr. Fearrington. Furthermore, even though there are some differences in the appearance of plaintiff and Mr. Fearrington, the encounter took place late at night. Thus, under the totality of the circumstances, plaintiff has failed to forecast evidence that Officer Funk's mistake was unreasonable. Finally, although plaintiff immediately told Officer Funk that he was not Mr. Fearrington, "aliases and false identifications are not uncommon," *Hill*, 401 U.S. at 803, 28 L. Ed. 2d at 489. Accordingly, it was reasonable for Officer Funk to not believe plaintiff's claim until he saw plaintiff's identification and was able to verify it through NCIC.

We find *Lynch* provides guidance. In *Lynch*, a police officer mistakenly stopped the defendant, believing the defendant was someone for whom arrest warrants had been issued. *Id.* at 333, 380 S.E.2d at 399.

Relying on *Hill*, this Court held that because "[p]ictures of [the] defendant and the other individual show that they are sufficiently similar in appearance that the officer's mistake was not unreasonable," the officer had "a reasonable basis to stop [the] defendant and require him to identify himself." *Id.* Then, after the defendant attempted to flee, officers were then authorized to arrest the defendant in order to "ascertain his identity." *Id.*

Initially, we note that since *Lynch* involved an investigatory stop that transformed into a formal arrest and in the present case plaintiff's seizure constituted a *de facto* arrest, *Lynch*'s guidance is limited to showing how the Court determines the "reasonableness" of a mistaken belief. Like *Lynch*, pictures introduced at summary judgment show that plaintiff and Mr. Fearrington are sufficiently similar in appearance. Based on the circumstances noted above in addition to the similar photographs, Officer Funk's misidentification was understandable and reasonable.

Furthermore, plaintiff has failed to forecast any evidence that Officer Funk did not use due diligence in ascertaining plaintiff's true identity. While it is undeniable that there was some delay given the mix-up in plaintiff's birthdate, the call log indicates that Officer Funk was dispatched to the location at 12:14 a.m. and that he was available at approximately 12:32 a.m. Thus, from the time Officer Funk noticed plaintiff until the time he was released was approximately 18 minutes. Given the mix-up in plaintiff's birthdate, the evidence shows that Officer Funk used reasonable diligence to ascertain plaintiff's identity. Plaintiff has offered no evidence to the contrary as to the length of this detention nor any evidence that Officer Funk did not act diligently. Accordingly, under *Robinson*, plaintiff has failed to forecast evidence to refute Officer Funk's claim that he diligently attempted to verify plaintiff's identity.

While the dissent contends that the rule of law in *Robinson* requires that an officer use reasonable diligence to ascertain the person's identity before arresting him, given the differences between how the plaintiff in *Robinson* and how plaintiff in the present case were arrested, we do not believe that the rule of law in *Robinson* would not be satisfied in the present case. In *Robinson*, the police officers went to a house to serve a warrant on the plaintiff. *Id.* at 403, 238 S.E.2d at 630. Here, Officer Funk was not specifically dispatched to arrest plaintiff; instead, he saw plaintiff walking on the street and believed him to be Mr. Fearrington, a man whom Officer Funk "knew" and who had evaded arrest earlier that same day. Thus, Officer Funk thought that plaintiff was on the verge of running. Consequently, he did not have the same type of time prior to arresting plaintiff to exercise due diligence as the officers did

in *Robinson*. However, in totality, Officer Funk exercised due diligence by asking plaintiff to stop, which plaintiff refused to do, and immediately running plaintiff's name through NCIC to see if he was, in fact, who he claimed to be. Consequently, Officer Funk "use[d] reasonable diligence[,]" *Robinson*, 34 N.C. App. at 406-407, 238 S.E.2d at 631, to determine whether plaintiff was Mr. Fearrington under these circumstances.

In summary, under *Hill* and *Robinson*, plaintiff has failed to forecast any evidence, besides mere unsupported allegations, that Officer Funk acted contrary to his duty; specifically, plaintiff offered no evidence showing that Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was unreasonable, as set out in *Lynch*, or that Officer Funk did not act diligently in determining plaintiff's true identity.

B. Wantonness and Intent to Injure

"An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001). In order to establish that Officer Funk acted with intent to injure, this Court has noted that:

> a plaintiff may not satisfy her burden of proving that an official's acts were malicious through allegations and evidence of mere reckless indifference. Rather, as discussed supra, the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences . . . as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent

Wilcox, __ N.C. App. at __, 730 S.E.2d at 232 (internal citations and quotation marks omitted).

According to plaintiff's complaint, Officer Funk "roughly pulled" plaintiff's arm behind his back in an attempt to "inflict great pain" while he was handcuffing plaintiff. After plaintiff claimed that he was not Mr. Fearrington, Officer Funk kept plaintiff in handcuffs while his fellow officers checked plaintiff's identification card. At one point, Officer Funk sarcastically asked plaintiff: "Oh? You own a business?" When plaintiff told Officer Funk that this would not be happening if he were white, Officer Funk asked plaintiff if it would make him feel better if he called a black officer. After NCIC verified plaintiff's identity, Officer Funk released plaintiff without apologizing. At the hearing, plaintiff's counsel attempted to cast the situation as a result of "race discrimination" based on the history and "general situation" of how black people are treated by Chapel Hill police.

Viewing these allegations in a light most favorable to plaintiff, the evidence tends to show that Officer Funk may have acted disrespectfully and unprofessionally while attempting to verify plaintiff's identity or even refusing to apologize after the incident. However, once plaintiff's identity was confirmed through NCIC, Officer Funk released plaintiff. Furthermore, there is nothing that establishes a reckless indifference to plaintiff's rights during the encounter. As discussed, Officer Funk's *de facto* arrest of plaintiff was based on his mistaken, yet reasonable, belief that he was Mr. Fearrington; accordingly, under *Hill*, his *de facto* arrest was "valid." In order to verify plaintiff's claim that he was not Mr. Fearrington, Officer Funk, along with other Chapel Hill police officers, ran plaintiff's name through central command. As with routine traffic stops, an officer "may request a driver's license and vehicle registration, run a computer check, and issue a citation." *United States v. Green*, 740 F.3d 275, 280 (4th Cir. 2014); *see also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions."). Here, since the basis for the initial *de facto* arrest of plaintiff was valid and it was not unreasonable to continue detaining plaintiff under the circumstances after his identity was verified, Officer Funk was entitled to run plaintiff's name to determine whether he had any outstanding warrants.

Moreover, although plaintiff alleges that Officer Funk "roughly" put him in handcuffs and tried to inflict great pain, plaintiff has failed to allege any facts that Officer Funk's conduct was wanton or done with a reckless indifference to plaintiff's rights as compared to what a reasonable police officer would do in Officer Funk's position. Believing plaintiff was someone else who had arrest warrants issued against him and had evaded police earlier that day, Officer Funk seized plaintiff while confirming his belief. It is undeniable that the act of being handcuffed could hardly be characterized as anything but uncomfortable and, likely, painful. However, plaintiff has failed to plead any facts to suggest that Officer Funk took additional steps while handcuffing plaintiff to make the experience any more painful, besides unsupported allegations that Officer Funk "intended" to inflict pain. Without more, plaintiff's bare contention that the handcuffs were painful is not enough to rise to the level of wanton or show an intent to injure.

Consequently, plaintiff has failed to produce any evidence showing that Officer Funk acted with a reckless indifference to plaintiff's rights. Besides vague allegations that Officer Funk spoke to plaintiff sarcastically and treated him disrespectfully—what plaintiff's counsel classified

as "arrogant and chauvinist talk" at the motion hearing—and unsupported claims that Officer Funk handcuffed him in such a way as to cause him "great pain," plaintiff has failed to forecast any evidence that Officer Funk acted wantonly or with an intent to injure.

In summary, while the initial burden was on Officer Funk to show the absence of any genuine issue of material fact that he did not act with malice, we believe that he met this burden, and he was entitled to the affirmative defense of public official immunity. Specifically, the foregoing evidence, taken in the light most favorable to plaintiff, is insufficient to raise a genuine issue of fact as to the existence of the elements of malice, i.e., that Officer Funk's actions were contrary to his duty, wanton, and so reckless as to justify a finding of intent to injure. While we do not disagree that the evidence may show that Officer Funk acted with reckless indifference prior to arresting plaintiff and during his interactions with him, plaintiff has failed to establish Officer Funk acted with malice, even with all discrepancies resolved in his favor, which is a required showing to overcome the public official immunity doctrine. *See Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) ("Summary judgment is appropriate if . . . the non-moving party is unable to overcome an affirmative defense offered by the moving party."). Therefore, the trial court erred in denying his motion for summary judgment on this basis.

Conclusion

Based on the foregoing reasons, taking the evidence in a light most favorable to plaintiff, plaintiff has failed to forecast evidence that Officer Funk acted with malice. Therefore, Officer Funk was entitled to the affirmative defense of public official immunity, and the trial court erred in denying his motion for summary judgment on this basis.

REVERSED.

Judge McCULLOUGH concurs.

GEER, Judge dissenting.

The sole issue on appeal is whether there exists a genuine issue of material fact regarding whether Officer Funk acted with malice and, therefore, is not entitled to public official immunity. I believe that the majority opinion has shown only that no issue of genuine fact exists regarding whether Officer Funk had reasonable suspicion to stop plaintiff. Yet, because Officer Funk arrested plaintiff, he was required to have

more than a suspicion; he could not arrest plaintiff without probable cause. The majority -- which concludes that Officer Funk in fact arrested plaintiff -- bases its holding that Officer Funk did not act improperly in arresting plaintiff almost entirely on an investigatory stop case, *State v. Lynch*, 94 N.C. App. 330, 380 S.E.2d 397 (1989), that concluded only that the officer had reasonable suspicion. The majority holds that it is permissible, when an officer suspects that an individual is another person, to *arrest* that person and then seek identification. That holding is an extraordinary undermining of the protections of the Fourth Amendment.

In addition, I believe that the majority improperly applies the applicable standard of review by (1) failing to require defendant Officer Funk to meet his initial burden of showing an absence of any genuine issue of material fact and (2) failing to view the evidence, including that presented by Officer Funk, in the light most favorable to plaintiff, the non-moving party. Because the majority failed to properly apply the standard of review and, at most, merely determined that Officer Funk had a reasonable suspicion sufficient to stop plaintiff, I respectfully dissent.

Discussion

It is well established that:

> [r]egardless of who has the burden of proof at trial, upon a motion for summary judgment the burden is on the moving party to establish that there is no genuine issue of fact remaining for trial and that he is entitled to judgment as a matter of law. Thus, a defendant moving for summary judgment assumes the burden of producing evidence of the necessary certitude which negatives the plaintiff's claim. *Until the moving party makes a conclusive showing*, the non-moving party has no burden to produce evidence.

Marlowe v. Piner, 119 N.C. App. 125, 127-28, 458 S.E.2d 220, 222 (1995) (emphasis added) (internal citations omitted). Generally, "summary judgment is not appropriate when there are conflicting versions of the events giving rise to the action, or when there is no conflict about the events that occurred, but the legal significance of those events is determined by a reasonable person test." *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007).

With respect to malice, the exception to public official immunity at issue in this case, our Supreme Court has held: "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be

prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). This Court has recently interpreted this definition to mean that "a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, ___ N.C. App. ___, ___, 730 S.E.2d 226, 230 (2012), *appeal dismissed and disc. review denied*, ___ N.C. ___, 738 S.E.2d 363, 401 (2013).

Regarding whether Officer Funk acted contrary to his duty, the majority concludes that under the totality of the circumstances, Officer Funk's mistaken belief that plaintiff was Mr. Fearrington was reasonable and, therefore, plaintiff's arrest was not contrary to Officer Funk's duty. I disagree.

Whether a police officer has acted contrary to his duty when arresting an individual is determined by whether the officer has complied with N.C. Gen. Stat. § 15A-401 (2013) and the Fourth Amendment. *See Bailey v. Kennedy*, 349 F.3d 731, 746 (4th Cir. 2003) (holding officer not entitled to public official immunity for false arrest claim when arrest not in accordance with N.C. Gen. Stat. § 15A-401 and "contrary to [officer's] duty"); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 615, 538 S.E.2d 601, 609 (2000) (" 'The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause.' " (quoting *Rogers v. Powell*, 120 F.3d 446, 452 (3d Cir. 1997))); N.C. Gen. Stat. § 15A-401(b)(2) (providing in pertinent part that officer may make warrantless arrest if he has probable cause to believe individual has committed felony or committed misdemeanor and will not be apprehended or may cause physical injury to self or others or property damage if not immediately arrested). As this Court explained in *Glenn-Robinson*, " '[a] false arrest is an arrest without legal authority and is one means of committing a false imprisonment.' " 140 N.C. App. at 624, 538 S.E.2d at 615 (quoting *Marlowe*, 119 N.C. App. at 129, 458 S.E.2d at 223).

As this Court has explained, "there are generally two ways in which a person can be 'seized' for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity." *State v. Carrouthers*, 213 N.C. App. 384, 388, 714 S.E.2d 460, 463 (2011).

In this case, the parties disagreed on whether Officer Funk arrested plaintiff or whether Officer Funk merely conducted an investigatory stop. I agree with the majority that the evidence is sufficient to allow a jury to find that Officer Funk arrested plaintiff and that plaintiff's seizure was

not just an investigatory stop. Nevertheless, I believe that the majority, despite holding that Officer Funk arrested plaintiff, essentially applies the standards for an investigatory stop in deciding that Officer Funk did not act contrary to his duty. Because of its failure to recognize the differences between the two types of seizures, the majority erroneously concludes that the evidence necessary to support a stop based on mistaken identity is sufficient to support an arrest based on mistaken identity.

"An investigatory stop is a 'brief stop of a suspicious individual[] in order to determine his identity or to maintain the status quo momentarily while obtaining more information.' " *State v. White*, 214 N.C. App. 471, 476, 712 S.E.2d 921, 925 (2011) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1923 (1972)). When, however, "the duration or nature of the intrusion exceeds the permissible scope [of an investigatory stop], a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause, even in the absence of a formal arrest." *State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001). The distinction between an investigatory stop and an arrest reveals that an officer cannot justify an arrest by the need to obtain more information -- probable cause necessarily must mean more than a need to obtain additional information to confirm or dispel an officer's belief or concern.

With respect to the issue whether plaintiff presented sufficient evidence to raise an issue of fact regarding whether Officer Funk had probable cause to arrest him, this Court has noted:

> "The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury."

Glenn-Robinson, 140 N.C. App. at 619, 538 S.E.2d at 612 (quoting *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)). Where the parties present substantially different versions of the facts relating to probable cause, as is true in this case, summary judgment is inappropriate and instead the issue must go to the jury who, as "[t]he trier of fact[,] must determine exactly what transpired and, based on those facts, determine if probable cause existed." *Id.* at 621, 538 S.E.2d at 612.

" 'The test for whether probable cause exists is an objective one -- whether the facts and circumstances, *known at the time*, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another.' " *Thomas v. Sellers*, 142 N.C. App. 310, 315, 542 S.E.2d 283,

287 (2001) (emphasis added) (quoting *Moore v. Evans*, 124 N.C. App. 35, 43, 476 S.E.2d 415, 422 (1996)). The majority, however, fails to consider the facts and circumstances *as known to Officer Funk at the time of the detention*. Instead, the majority, in effect, determines *post hoc* what Officer Funk could have concluded given the information before this Court. Furthermore, contrary to the approach adopted by the majority, we must, on a motion for summary judgment, determine what Officer Funk knew by viewing the evidence in a light most favorable to plaintiff. We do not take Officer Funk's assertions at face value when the record contains evidence drawing those assertions into doubt.

Officer Funk justifies his arrest of plaintiff on his claim that he mistakenly believed plaintiff was a man named Mr. Fearrington. In cases of an arrest based upon mistaken identity, if " 'the police have probable cause to arrest one party, and [if] they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' " *Hill v. California*, 401 U.S. 797, 802, 28 L. Ed. 2d 484, 489, 91 S. Ct. 1106, 1110 (1971) (quoting *Hill v. California*, 96 Cal. 2d 550, 553, 72 Cal. Rptr. 641, 643, 446 P.2d 521, 523 (1968)). Under the reasonable mistake test, an officer's "subjective good-faith belief alone is insufficient to validate the arrest." *United States v. Glover*, 725 F.2d 120, 122 (D.C. Cir. 1984). Rather, the Court must determine whether the arrest was objectively reasonable in light of the totality of the circumstances. *Id.*

Here, the majority relies almost exclusively on the photographs of plaintiff and Mr. Fearrington in the record which establish, in the majority's opinion, that the two men are similar in appearance. Based on the photographs, the majority concludes that it would be objectively reasonable for Officer Funk to confuse one for the other. By relying on these photographs, the majority has not required that Officer Funk meet his initial burden as the moving party. Officer Funk did not, in arguing that he mistakenly believed plaintiff was Mr. Fearrington, come forward with evidence that no issue of fact existed as to his opportunity to see plaintiff's face and that he had a reasonable basis for believing plaintiff was, in fact, Mr. Fearrington.

In considering the totality of the circumstances, a variety of factors may be relevant. For example, in *Hill*, *Glover*, and *State v. Frazier*, 318 N.W.2d 42 (Minn. 1982) (relied upon by the court in *Glover*), the courts looked at (1) the basis and specificity of the officer's knowledge of the suspect's appearance, (2) how clearly the officer was able to observe the individual, (3) the discrepancies between the description of the suspect and the individual the officer observed, (4) the officer's reasons for believing the subject would be present in the location arrested, including

proximity in time and distance of suspect's last known location, and (5) the individual's behavior.

Here, Officer Funk presented no evidence regarding the basis for his knowledge of Mr. Fearrington's appearance. While the majority asserts that Officer Funk "knew" Mr. Fearrington, nothing in Officer Funk's affidavit supports the majority's claim. Officer Funk stated only that he knew that Mr. Fearrington had outstanding warrants and that he had evaded arrest earlier in the day. Officer Funk provides no explanation of how he knew what Mr. Fearrington looked like.

Moreover, Officer Funk provided no specific explanation of what about plaintiff resembled Mr. Fearrington. He merely asserted that plaintiff and Mr. Fearrington both "have similar facial features," citing photographs attached to his affidavit, without expressly indicating whether he had that knowledge at the time of the arrest or what facial features he considered similar. Significantly, the photographs did not come into existence until several months after the arrest. As indicated by the URLs at the bottom of the photographs of both plaintiff and Mr. Fearrington, these photographs came from an article published in the periodical *The Independent Weekly*. In other words, the only basis presented by Officer Funk in support of his claim that plaintiff and Mr. Fearrington resembled each other was a newspaper article published three months after the arrest. Because Officer Funk bore the initial burden of establishing a lack of any issue of fact and because, in any event, we must view the evidence in a light most favorable to plaintiff, we may not infer, as the majority implicitly does, that Officer Funk was familiar with Mr. Fearrington's appearance or knew of the similarities at the time of the arrest.

As for Officer Funk's opportunity to observe plaintiff's facial features, the evidence, when viewed in the light most favorable to plaintiff, gives rise to a genuine issue of fact to be resolved by the jury. Officer Funk's own evidence indicates that plaintiff's hand obscured plaintiff's face and that Officer Funk decided to follow plaintiff from his patrol car because "[w]ithout seeing his face I could not be certain that this subject was not the same individual who had been avoiding arrest all day." According to Officer Funk, after stepping out of his patrol car and approaching plaintiff *from behind*, he "had still not been able to verify if this was in fact Cuman Fearrington."

Indeed, the majority specifically notes that Officer Funk claimed that plaintiff concealed his face continuously and that Officer Funk acknowledged that without seeing plaintiff's face, he could not be certain that

plaintiff was Mr. Fearrington. I believe a jury could infer from this evidence that Officer Funk did not get a clear view of plaintiff's face until after he had proceeded with the arrest. A jury could find Officer Funk's claim that he reasonably mistook plaintiff for Mr. Fearrington not credible when Officer Funk claimed both that he could not see plaintiff's face and that the two men had similar facial features.

Also pertinent in this case is whether Officer Funk had reason to believe that Mr. Fearrington would be present in the location where plaintiff was arrested, including the proximity in time and distance of Mr. Fearrington's last known location to the time and place of plaintiff's arrest. Here, Officer Funk indicated only that Mr. Fearrington had evaded arrest in the "Central Business District" of Chapel Hill earlier that day. The jury could decide that the fact that Mr. Fearrington was trying to avoid being arrested somewhere in downtown Chapel Hill during the day did not make it reasonably likely that he was the African-American male walking down a main street in front of a convenience store and restaurant that night.

In addition, if an officer has any doubt as to whether the individual is the suspect in the arrest warrant, "the officer must make immediate reasonable efforts to confirm the suspect's identity." *Glover*, 725 F.2d at 123. *See also Lynch*, 94 N.C. App. at 333, 380 S.E.2d at 399 ("When an officer is unsure of the identity of a suspect, he must take reasonable steps to confirm the identity of the individual under suspicion.").

Here, while Officer Funk admitted to uncertainty as to plaintiff's identity, he proceeded with the arrest before making any efforts to confirm plaintiff's identity. He did not ask plaintiff to identify himself until after he had placed him in handcuffs, and when plaintiff told him that he was not Mr. Fearrington and Officer Funk viewed his identification, he disregarded it. A reasonable juror could find that it was unreasonable to disregard the identification and that the "verification" of plaintiff's identity -- and the subsequent search of NCIC for outstanding warrants -- was really an attempt to cover up the officers' mistake in hopes of manufacturing probable cause to detain plaintiff.

While the majority opinion states that "it was not unreasonable for Officer Funk to not believe plaintiff's claim [that he was not Mr. Fearrington] until he saw identification," that fact at most might justify Officer Funk's stopping plaintiff and asking for identification. The majority cites no authority -- and I have found none -- that authorizes an officer, with doubts about the identity of a suspect, to arrest the individual and ask questions later.

I believe that the totality of the circumstances in this case -- based on the evidence viewed in the light most favorable to plaintiff -- would permit a jury to find that Officer Funk had not acted reasonably when mistakenly arresting plaintiff. Defendant, however, contends that the United States Supreme Court's decision in *Hill* requires a different result.

In *Hill*, the United States Supreme Court held that a mistaken arrest was valid when the officers went to *the address of the suspect* and, in that apartment, which had a locked door, found a person matching the description of the suspect. 401 U.S. at 803, 28 L. Ed. 2d at 489, 91 S. Ct. at 1110. Although the person claimed to be someone else, the Supreme Court noted that "aliases and false identifications are not uncommon" and that the person in the apartment did not have a convincing explanation regarding how he entered the apartment if he was not the suspect. *Id.* Further, the person denied knowing about any firearms being in the house, although a pistol was sitting in plain view. *Id.* Based on this evidence -- a man matching the suspect's description at the suspect's known address -- the Court concluded that "the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804, 28 L. Ed. 2d at 490, 91 S. Ct. at 1111.

Here, in contrast, the arrest did not take place at a location where Mr. Fearrington was known to be, the evidence is not specific regarding the degree to which plaintiff matched Mr. Fearrington's description as known to Officer Funk, and plaintiff's explanation for why he was walking up Rosemary Street at that particular time was not lacking in credibility. Moreover, plaintiff's evidence indicated that he did not act suspiciously.

I find this case more analogous to *Frazier*, 318 N.W.2d at 44, in which the Minnesota Supreme Court concluded that a mistaken arrest was unreasonable. In *Frazier*, the officers saw the defendant at night outside a bar where the actual suspect had been seen within the previous three days. The officers viewed her from 500 feet away in a dimly lit area, decided that it was the suspect, and arrested her. The Minnesota Supreme Court concluded that "[g]iven the hastiness of the deputies in concluding that defendant was [the intended arrestee], given the evidence of the defendant's differing appearance, and given the fact that the arrest did not occur at [the intended arrestee's] residence or even at a place which police reliably knew she frequented, we conclude that the deputies acted unreasonably in believing that defendant was [the intended arrestee]." *Id.*

The Minnesota Supreme Court, therefore, concluded "the arrest was illegal." *Id.* I find *Frazier* persuasive and supportive of a conclusion that

plaintiff, in this case, has presented sufficient evidence to raise an issue of fact regarding whether his arrest was valid.

While I have not found -- and the parties have not cited -- any North Carolina case specifically addressing the issue in this case, this Court's decision in *State v. Cooper*, 186 N.C. App. 100, 649 S.E.2d 664 (2007), supports my conclusion that plaintiff's evidence shows that Officer Funk lacked probable cause to arrest plaintiff. The issue in *Cooper* was whether a police officer had reasonable suspicion to stop an individual he suspected of robbing a convenience store.

In *Cooper*, the officer heard a report that there was a convenience store robbery committed by a black male. *Id.* at 101, 649 S.E.2d at 665. The officer knew that there was a path running from the convenience store to Lake Ridge Drive, and five to 10 minutes after the robbery, the officer found the defendant, a black male, walking down Lake Ridge Drive near the path. *Id.* at 102, 649 S.E.2d at 665-66. The officer stopped and frisked the defendant. *Id.*, 649 S.E.2d at 666.

This Court found that due to the vague description of the suspect as a "black male," lack of information that the robber had fled in the direction of the path, and the fact that the defendant did not engage in suspicious behavior and fully cooperated with the officer, the officer did not have reasonable suspicion to believe that the individual he saw was the robber. *Id.* at 107, 649 S.E.2d at 669. The Court explained that to hold otherwise would be to hold that "police, in the time frame immediately following a robbery committed by a black male, could stop any black male found within a quarter of a mile of the robbery." *Id.*

Similarly, here, a jury could reasonably infer from the lack of evidence presented by Officer Funk regarding his knowledge of Mr. Fearrington's appearance that Officer Funk suspected plaintiff could be Mr. Fearrington merely because he was a black man walking in the vicinity of the general area where Mr. Fearrington had evaded arrest earlier in the day. As established by *Cooper*, these facts would be insufficient to show reasonable suspicion to justify an investigatory stop, much less an arrest. *Id. See State v. Peele*, 196 N.C. App. 668, 670, 675 S.E.2d 682, 685 (2009) ("Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008))).

Officer Funk and the majority, however, claim that plaintiff was intentionally hiding his face, ignored Officer Funk's repeated requests to stop, increased his pace of walking, and had unspecified similar facial

features to Mr. Fearrington. In making this argument, the majority and defendant are viewing the evidence in the light most favorable to Officer Funk, contrary to the proper standard of review for summary judgment. We are required to accept as true plaintiff's account that he did not hide his face, but merely scratched his head; that he never increased his walking pace; and that he stopped as soon as he realized that Officer Funk was talking to him.

The majority, nonetheless, points to *Lynch* as establishing that photographs suggesting that two men looked similar is sufficient for a mistaken arrest, especially if the officer then attempts to verify the arrestee's identity after the arrest. This Court, however, specifically noted in *Lynch* that it was *not* providing any guidance as to how the Court should determine the reasonableness of a mistaken identity *arrest*: "Under the facts of this case, we need not decide whether the officer's initial mistake justified an arrest; it was at least sufficient to establish a reasonable basis to stop defendant and require him to identify himself." 94 N.C. App. at 333, 380 S.E.2d at 399. The Court proceeded to say, with respect to an investigatory stop, that "[w]hen an officer is unsure of the identity of a suspect, he must take reasonable steps to confirm the identity of the individual under suspicion." *Id.*

Contrary to the majority opinion's assertion, nothing in *Lynch* suggests that a mistaken identity arrest is reasonable so long as the officers use diligence to confirm the identity of the individual after initiating the arrest. The majority misreads *Lynch* when it states that "after the defendant attempted to flee, officers were then authorized to arrest the defendant in order to 'ascertain his identity.' " (Quoting *Lynch*, 94 N.C. App. at 333, 380 S.E.2d at 399.) In *Lynch*, after upholding the stop of the defendant as constitutional, the Court then concluded that the arrest was permitted -- not to discover the defendant's identity -- but because the defendant actually fled: "Because defendant had not identified himself [when stopped], the officers had no choice but to apprehend him in order to ascertain his identity." *Lynch*, 94 N.C. at 333, 380 S.E.2d at 399. Nothing in *Lynch* suggests that it is appropriate to arrest someone who has not fled and who has not yet been asked to identify himself.

The majority's holding, in effect, allows police officers to proceed with an arrest based upon less than probable cause and arrest first, investigate later. I believe that this is an improper interpretation of the rule adopted by this Court in *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Robinson addressed the question "whether in an action for false arrest or false imprisonment the officer who arrests the wrong person

is strictly liable or is liable only in the absence of reasonable diligence." *Id.* at 406, 238 S.E.2d at 631. The Court in *Robinson* acknowledged that the rule adopted by the majority of courts is that "the officer will not be liable for false imprisonment for mistaking the identity of the person named in a warrant if he exercises reasonable diligence to ascertain the identity correctly *before he serves the warrant.*" *Id.* (emphasis added). Noting that the alternative strict liability approach "imposes an unreasonable burden upon the officer who is both careful and diligent," *Robinson* adopted the majority rule. *Id.*

The majority in this case asserts that "*when* the officer must use reasonable diligence is not specifically enunciated in *Robinson*." (Emphasis added.) In support of this assertion, the majority opinion plucks an isolated quotation from *Robinson*, disregarding the Court's primary articulation of the majority rule quoted above and disregarding the cases relied upon by the Court as support for the rule. The majority rule as initially articulated in *Robinson*, expressly and unambiguously states that an officer must exercise reasonable diligence "before he serves the warrant." *Id.*

The Court then, "[f]or examples of cases following this rule" refers to three decisions from other jurisdictions. Each of those decisions expressly holds that the officer must exercise due diligence *prior* to effecting the arrest. *See Miller v. Fano*, 134 Cal. 103, 109, 66 P. 183, 185 (1901) (noting an officer "owes a duty to the public and to the *party about to be arrested*" and "should use prudence and diligence to find out if the party arrested is the party described in [the] warrant" (emphasis added)), *disapproved of by Hagberg v. California Fed. Bank FSB*, 32 Cal. 4th 350, 81 P.3d 244 (2004); *Wallner v. Fid. & Deposit Co. of Maryland*, 253 Wis. 66, 70, 33 N.W.2d 215, 217 (1948) ("The officer is liable if he fails to take proper precaution to ascertain the right person, or if he refuses information offered that would have disclosed his mistake, or if he detains the person an undue length of time without taking proper steps to establish his identity."); *State ex rel. Anderson v. Evatt*, 63 Tenn. App. 322, 328, 471 S.W.2d 949, 952 (1971) (finding evidence sufficient to support jury's finding officers guilty of "gross negligence in failing to make an additional investigation or inquiry as to the true identity of plaintiff *before placing him under arrest*" (emphasis added)).

In concluding that issues of fact precluded summary judgment regarding whether the defendant police officers had exercised due care in arresting the plaintiff, the Court specifically pointed to evidence -- including contradictions in the defendants' evidence and omissions on key factors in the defendants' affidavits -- regarding the lack of efforts to determine whether the plaintiff was the individual named in the warrant

prior to arresting the plaintiff. *Robinson*, 34 N.C. App. at 407-08, 238 S.E.2d at 632. The Court did not discuss what the officers could have done post-arrest. Instead, the Court noted as additional evidence of liability that "even after the officers knew that they had arrested the wrong person, plaintiff was still held in jail overnight before he was allowed to go free." *Id.* at 408, 238 S.E.2d at 632. In other words, the defendants could be held liable for further detaining the plaintiff after they knew of the mistaken arrest.

Nothing in *Robinson* suggests that an officer may -- as occurred here -- arrest and then conduct the due diligence after the fact. The Court's purpose in adopting the due diligence rule in *Robinson* was to ensure that officers who are both "careful and diligent" will not be held civilly liable for an unlawful arrest. *Id.* at 406, 238 S.E.2d at 631. The majority's interpretation of *Robinson* would allow an officer who was not "careful and diligent" in ascertaining the arrestee's identity prior to initiating an arrest to avoid liability so long as he later uses "due diligence" to confirm the identity afterwards. *See id.* I do not believe that the majority opinion is consistent with either the express holding in *Robinson* or its reasoning.

Here, while Officer Funk admitted to uncertainty as to plaintiff's identity, he proceeded with the arrest before making any efforts to confirm plaintiff's identity. He did not ask plaintiff to identify himself until after he had placed him in handcuffs and declared plaintiff was under arrest, and when plaintiff told him that he was not Mr. Fearrington and Officer Funk viewed his identification, he disregarded it. While Officer Funk may have had reasonable suspicion to stop plaintiff and ask him to identify himself based on what he knew and should have then conducted due diligence before arresting plaintiff, *Lynch* and *Robinson* do not support the majority's assumption that the same level of knowledge -- without any due diligence in verifying plaintiff's identity -- is sufficient to support both an arrest and an investigatory stop.

The majority claims that *Robinson* is distinguishable on the facts. The "facts" on which the majority relies are, however, either unsupported by the record or represent Officer Funk's version of what occurred. Contrary to the majority opinion's assertion, there is no evidence that Officer Funk "knew" Mr. Fearrington, plaintiff's evidence indicated that he was not about to flee, and according to plaintiff, Officer Funk did not have to order him to stop "several times," as the majority states, but rather he stopped immediately after he realized Officer Funk was talking to him. Further, the majority's purported distinction of *Robinson* does not explain why Officer Funk, in this case, could not have stopped plaintiff and asked for his identification prior to arresting him.

Moreover, the majority's reasoning cannot be reconciled with this State's choice not to enact a "stop and identify" statute. The United States Supreme Court in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 187, 159 L. Ed. 2d 292, 303, 124 S. Ct. 2451, 2459 (2004), recognized that under the Fourth Amendment, an individual is not required to answer an officer's questions or identify himself during an investigative stop. Nevertheless, a State "stop and identify" statute "requiring a suspect to disclose his name in the course of a valid Terry stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." *Id.* at 188, 159 L. Ed. 2d. at 304, 124 S. Ct. at 2459.

North Carolina, however, does not have a "stop and identify" statute. Therefore, although Officer Funk could have *asked* plaintiff to identify himself, he could not have compelled plaintiff to do so. *See In re D.B.*, 214 N.C. App. 489, 495-96, 714 S.E.2d 522, 526-527 (2011) (noting North Carolina does not have a "stop and identify" statute and holding that during a *Terry* stop, an officer is not permitted to search for a person's identification in order to protect himself or to seize an identification card, but may *ask* for identification). The majority, however, holds that it is within the scope of an officer's duty to arrest a person and then demand identification.

Further, Officer Funk should not have been allowed to extend a mistaken arrest to investigate plaintiff, without reasonable suspicion of any criminal activity, to see if he could justify the arrest after the fact. As the United States Supreme Court has explained:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319, 1325-26 (1983). Certainly, if an investigative stop must end as soon as its purpose is completed, then an arrest should cease as soon as the officers learn that it was mistaken. Since I know of no authority that would allow a mistakenly arrested person, not subject to a traffic stop, to be detained to conduct a database search for other charges, Officer Funk should have released plaintiff as soon as he knew he had made a mistake.

In sum, I would hold that the evidence is sufficient to support the conclusion that defendant acted contrary to his duty by arresting plaintiff without probable cause. Plaintiff must also show, however, that defendant acted wantonly and with intent to injure. "[E]vidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, ___ N.C. App. at ___, 730 S.E.2d at 232. "[A] showing of mere reckless indifference is insufficient, and a plaintiff seeking to prove malice based on constructive intent to injure must show that the level of recklessness of the officer's action was so great as to warrant a finding equivalent in spirit to actual intent." *Id.* Such a showing would necessarily also satisfy the first requirement that the defendant act wantonly. *See In re Grad*, 312 N.C. App. at 313, 321 S.E.2d at 890-91 (" 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " (quoting *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968))).

With regard to the intent to injure prong of malice, the Fourth Circuit has noted that "North Carolina courts have found summary judgment inappropriate where there is a genuine issue of fact as to an officer's state of mind when engaging in allegedly tortious conduct." *Russ v. Causey*, 468 F. App'x 267, 276 (4th Cir. 2012) (finding that officer's conduct in executing an arrest warrant at funeral demonstrates an intent to injure). Additionally, in the context of a civil suit for malicious prosecution, our Supreme Court has noted that it is "well settled that malice may be inferred from want of probable cause, *e.g.*, as where there was a reckless disregard of the rights of others in proceeding without probable cause." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966).

I would find that there are further questions of fact regarding whether defendant acted wantonly and with intent to injure plaintiff. The injury in this case is an injury to plaintiff's Fourth Amendment right to be free from unreasonable search and seizure. I believe that the evidence is sufficient to allow a jury to find that Officer Funk acted with an actual intent to unlawfully detain plaintiff while Officer Funk attempted to manufacture after-the-fact justification for the arrest.

The majority dismisses any claim of an intent to injure, reasoning: "Believing plaintiff was someone else who had arrest warrants issued against him and had evaded police earlier that day, Officer Funk seized plaintiff while confirming his belief." This assertion underscores the majority's merging of investigatory stops and arrests. Controlling authority required Officer Funk to attempt to "confirm[] his belief" that plaintiff was Mr. Fearrington prior to arresting him.

In addition, according to plaintiff's verified complaint and deposition, Officer Funk spoke to plaintiff sarcastically and disrespectfully in response to plaintiff's assertion that he was a business owner. The evidence also shows that after plaintiff told Officer Funk that he was not Mr. Fearrington and Officer Funk viewed plaintiff's identification, Officer Funk continued to keep plaintiff in handcuffs while his partner contacted communications to "verify" his identification and gather further information that might justify an arrest. When communications verified plaintiff's identification and could not find any outstanding warrants that would justify the stop, Officer Funk removed the handcuffs and left without apologizing to plaintiff.

Under these circumstances, a reasonable juror could infer that Officer Funk acted with a level of recklessness toward plaintiff's rights equivalent in spirit to an actual intent to injure, as required by *Wilcox*. *See Walker v. Briley*, 140 F. Supp.2d 1249, 1263 (N.D. Ala. 2001) (plaintiff made sufficient showing of malice to survive motion for summary judgment on immunity grounds where "[t]he evidence, viewed most favorably to [plaintiff], suggest[ed] that [police officer] had no grounds to believe [plaintiff] had committed any offense whatsoever but rather simply did not like [plaintiff] questioning his authority or suggesting racist motivations").

Unlike the doctrine of qualified immunity in federal cases, which requires the court to examine the objective reasonableness of an official's action, "[i]mmunity of public officials to state law claims . . . involves a determination of the subjective state of mind of the governmental actor, *i.e.*, whether his actions were corrupt or malicious." *Andrews v. Crump*, 144 N.C. App. 68, 76, 547 S.E.2d 117, 123 (2001). We must "determine the defendants' actual knowledge or intentions regarding the violation of plaintiffs' rights." *Id.* at 77, 547 S.E.2d at 123. In *Andrews*, plaintiff's allegation that the defendants acted with the knowledge that the act was unlawful and in violation of plaintiff's rights was sufficient to create an issue of fact regarding whether the official acted with malice. *Id.* (observing that "defendants knew [plaintiff] had no involvement in criminal activity, yet proceeded to file the liens against him anyway").

There are discrepancies in Officer Funk's affidavit, the radio log from that night, and the incident report prepared two weeks later, only after an inquiry by the NAACP, and unsigned by Officer Funk. These discrepancies, among other things, attempt to shorten the time period that plaintiff was detained. If the jury chooses to believe plaintiff's testimony regarding the length of the detention, it could find that Officer Funk's attempt to hide how long the detention lasted was evidence

that the continued detention was without legitimate justification and in bad faith.

Further, the African-American officer who arrived at the scene of plaintiff's arrest after plaintiff questioned whether he was stopped because of his race does not appear on either the radio log or in the incident report as being present. Plaintiff has also presented evidence of comments suggestive of racial bias.

This evidence could lead a reasonable juror to conclude that Officer Funk did not act in good faith and acted for improper motives when he continued to detain plaintiff in handcuffs after seeing plaintiff's identification. I would hold that because the evidence supports a finding that Officer Funk not only acted without probable cause, but additionally that he did so knowingly, this creates a genuine issue of fact as to whether he acted with intent to injure plaintiff. *See also Glenn-Robinson*, 140 N.C. App. at 626, 538 S.E.2d at 616 (evidence that officer arrested plaintiff without probable cause, appeared angry, and grabbed plaintiff's arm sufficient evidence that officer acted with malice and was not entitled to summary judgment on the basis of public official immunity).

I, therefore, would affirm the trial court's denial of Officer Funk's motion for summary judgment based on public official immunity. Accordingly, I respectfully dissent.

VINCENT BURLEY, Employee, Plaintiff
v.
U.S. FOODS, INC., EMPLOYER, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier and GALLAGHER BASSETT SERVICES, INC., Third Party Administrator, Defendants

No. COA13-860

Filed 1 April 2014

Workers' Compensation—subject matter jurisdiction—contract modification—last act analysis

The Industrial Commission erred in a workers' compensation case by concluding that it did not have subject matter jurisdiction. A modification to plaintiff employee's contract was approved by defendant U.S. Foods Inc. in Charlotte. N.C.G.S. § 97–36 extended subject matter jurisdiction to plaintiff's claim since the final binding act occurred in North Carolina.

Judge DILLON dissenting.

Appeal by plaintiff from opinion and award entered 28 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2013.

The Sumwalt Law Firm, by Vernon Sumwalt, Mark T. Sumwalt, and Lauren Hester, for Plaintiff-Appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Raymond J. Williams, III, for Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Vincent Burley ("Plaintiff") appeals from the 28 June 2013 opinion and award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), which concluded that the Commission did not have subject matter jurisdiction to hear Plaintiff's claim. Plaintiff argues the Commission had subject matter jurisdiction because a modification to his contract was approved by defendant U.S. Foods Inc. ("U.S. Foods") in Charlotte. We agree and reverse the Commission's opinion and award.

I. Facts & Procedural History

On 8 July 2011, Plaintiff filed a claim for benefits with the Commission seeking compensation for a back injury suffered while working for U.S. Foods as a truck driver. U.S. Foods denied that North Carolina has jurisdiction over Plaintiff's claim, but admitted liability under the Georgia Workers' Compensation Act and is currently paying Plaintiff disability compensation under Georgia law. The matter came on for a hearing before Deputy Commissioner Philip A. Baddour, III ("Dep. Comm. Baddour") on 17 April 2012 and a written order was filed on 13 December 2012. The evidence presented at the hearing tended to show the following facts.

Plaintiff is a resident of Augusta, Georgia and was a 39-year-old truck driver at the time of his 13 December 2012 hearing before the Commission. In 1993, Plaintiff graduated from truck driving school in Charleston, South Carolina, and obtained his commercial driving license from this course of study. Plaintiff has been a truck driver since graduating from this program.

U.S. Foods supplies and delivers food to restaurants, schools, sports venues, hotels, and many other types of businesses. U.S. Foods operates many distribution centers nationwide to supply "hundreds of thousands of customers" with its food products.

Plaintiff testified that U.S. Foods hired him as a delivery truck driver in May 2000. Plaintiff completed his initial hiring paperwork, including a driver's application, medical exam, and written driving exam, in Fort Mill, South Carolina. Plaintiff completed additional pre-hiring paperwork, including a road-test in Columbia, South Carolina and a drug-screening in Georgia. After completing his initial paperwork, U.S. Foods offered Plaintiff employment, and Plaintiff accepted the written offer. Plaintiff signed this paperwork in Fort Mill, South Carolina and was employed at-will.

Plaintiff drove a planned route as part of his employment. The route was concentrated around the Augusta area, with stops in Georgia and South Carolina. Plaintiff's truck and trailer were stowed every day at a drop yard in Augusta. Plaintiff's route did not involve travel in North Carolina nor was his truck ever dropped in North Carolina.

U.S. Foods merged with another company, PYA Monarch, and the Columbia drop yard, where Plaintiff was assigned, was dissolved in 2002. Plaintiff testified that U.S. Foods offered to transfer supervision of his employment to either their Charlotte division or their Lexington, South Carolina division after the merger. Plaintiff chose to work for the Charlotte division because U.S. Foods arranged for his loaded delivery truck to be delivered near his Augusta home. Had Plaintiff chosen the Lexington division, he would have been required to drive his personal vehicle to retrieve his loaded truck in Lexington. Plaintiff's transfer to the Charlotte division was thereafter approved by U.S. Foods's human resources department in Charlotte.

Plaintiff's job title and responsibilities did not change after he was transferred to the Charlotte division from the Columbia division. Plaintiff stated that he was working the "same job, just a different division," although Plaintiff made deliveries to different customers and drove a different route. Plaintiff was also switched from an hourly weight-based pay system to a component pay system. As a result, Plaintiff saw his pay increase from $400 to $500 a week under the weight-based system to between $900 and $1,400 per week under the component system. Plaintiff worked continuously for U.S. Foods for nine years, was never terminated or laid off, and never completed re-hiring paperwork during this period.

Plaintiff injured his back on 23 September 2009 while lifting a case of liquid milk during a delivery to a Sonic Drive-In in Evans, Georgia. U.S. Foods terminated Plaintiff's employment on 1 October 2009.

U.S. Foods's Charlotte division Transportation Manager Alton Abernathy ("Mr. Abernathy") also testified at the 17 April 2012 hearing. Mr. Abernathy stated that upon the merger of U.S. Foods and PYA Monarch, U.S. Foods "went to all the drivers [in the Columbia drop yard] that were being displaced . . . and offered them jobs" if they transferred branches. If Plaintiff rejected the transfer, he would have received a severance package. Mr. Abernathy further described the different pay systems between the Charlotte and Columbia divisions: Plaintiff's component pay system paid his commission on "pieces and stops and miles with a base and safety pay" rather than Plaintiff's prior pay system, which was based on weight carried. Mr. Abernathy also described the Charlotte division's accommodations for its drivers, noting that the branch delivered drivers' loads to fifteen different sites, including Plaintiff's drop site in Augusta.

Plaintiff's transfer was approved and signed by three individuals: Doug Jolly, U.S. Foods's Transportation Manager at its Fort Mill division; Kim Dahl, a human resources officer at U.S. Foods; and Mel Smith, who provided final approval from the human resources department. U.S. Food's human resources department has been located in Charlotte since 4 December 2000, and both Kim Dahl and Mel Smith worked in the Charlotte office.

Lastly, U.S. Foods's Human Resources Coordinator, Rebecca Reed ("Ms. Reed"), testified at the hearing. Ms. Reed discussed the terms of Plaintiff's initial hiring contract, noting that U.S. Foods could modify the terms of Plaintiff's employment under the contract.

After hearing the foregoing evidence, Dep. Comm. Baddour concluded that the a modified contract does not constitute a contract "made" in North Carolina for purposes of the relevant jurisdiction granting statute, N.C. Gen. Stat. § 97-36 (2013). Dep. Comm. Baddour also concluded that the final act to create Plaintiff's employment contract did not occur in North Carolina. Accordingly, Dep. Comm. Baddour ordered that Plaintiff's claim be denied for lack of subject matter jurisdiction. Plaintiff appealed to the Commission on 13 December 2012. The Commission heard the case on 22 May 2013 and issued an opinion and order on 28 June 2013 affirming Dep. Comm. Baddour's order. Plaintiff timely filed written notice of appeal with this Court on 2 July 2013.

II. Jurisdiction & Standard of Review

Plaintiff's appeal from the Commission's opinion and award lies of right to this Court pursuant to N.C. Gen. Stat. § 7A–29(a) (2013). *Accord* N.C. Gen. Stat. § 97–86 (2013).

The only issue on appeal is whether the Industrial Commission had subject matter jurisdiction over Plaintiff's claim. At present, whether the Commission has subject matter jurisdiction over Plaintiff's case depends on whether a contract for employment was consummated in North Carolina pursuant to N.C. Gen. Stat. § 97–36. *See Parker v. Thompson–Arthur Paving Co.*, 100 N.C. App. 367, 369, 396 S.E.2d 626, 628 (1990) ("The jurisdiction of the Industrial Commission is limited by statute."). Plaintiff argues that (i) because U.S. Foods's Charlotte division approved Plaintiff's transfer to oversight by the Charlotte division from the Columbia division, Plaintiff's contract was modified and (ii) because the "last act" of approving the modification occurred in Charlotte, the contract of employment was made in North Carolina.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). "However, as to a jurisdictional question, this Court is not bound by the findings of fact of the lower tribunal. This Court has the duty to make its own independent facts as to jurisdiction." *Lentz v. Phil's Toy Store*, ___ N.C. App. ___, ___, 747 S.E.2d 127, 130 (2013); *see also Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976).

The Commission concluded as a matter of law that Plaintiff's contract was not modified and that the last act necessary to create Plaintiff's original contract was made out of state, depriving the Industrial Commission of subject matter jurisdiction to hear Plaintiff's case. "Conclusions of law by the Industrial Commission are reviewable *de novo* by this Court." *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

a. Contract Modification Under Section 97-36

A contract modification is not explicitly referenced in Section 97-36, which grants the Commission subject matter jurisdiction over certain accidents that occur out of state. N.C. Gen. § 97-36 provides

> [w]here an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State.[1]

Plaintiff argues that common law rules concerning modifications of contract apply. *See Lineberry v. Town of Mebane*, 219 N.C. 257, 258, 13 S.E.2d 429, 430 (1941) ("The common law, to the extent therein provided, is modified. Except as so modified it still prevails."); N.C. Gen. Stat. § 4-1 (2013) (declaring portions of the common law not in conflict with the general statutes remain in full force).

We agree with Plaintiff and have consistently applied common law rules of contract to claims filed under the Workers' Compensation Act. *See*, *e.g.*, *Hollowell v. N.C. Dep't of Conservation & Devel.*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934); *Hojnacki v. Last Rebel Trucking, Inc.*, 201 N.C. App. 726, 689 S.E.2d 601, 2010 WL 10963 at *3–4 (2010) (unpublished) (applying common law principles of contract law, such as offer and acceptance, to a claim filed under the Workers' Compensation Act).

This Court has held that a lapse in employment and subsequent rehiring via a "last act" made in North Carolina created a contract that was "made" in North Carolina for jurisdictional purposes under Section 97-36. *Baker v. Chizek Transp., Inc.*, 210 N.C. App. 490, 711 S.E.2d 207, 2011 WL 904271 at *4–5 (2011) (unpublished). Similarly, under the common law of contracts, a modification to the terms of a contract may create a new underlying contract that was "made" in North Carolina. *See*, *e.g.*, *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 457, 400 S.E.2d

1. Plaintiff does not raise the other two provisions of the jurisdiction-granting statute, namely that U.S. Foods's principal place of business is in North Carolina or that Plaintiff's principal place of employment is in North Carolina.

476, 480 (1991) (holding that an addendum letter was a new contract because it modified a prior lease agreement).

Section 97-36 also employs the phrase "employment contract," which encompasses a broader scope of employment than "contract of hire," a phrase that covers only the initial hiring of an individual. *Compare* N.C. Gen. Stat. § 97-36 *with* N.C. Gen. Stat. § 97-2(2) (2013) (using "contract of hire"). This broader expanse includes a contract modification, providing a basis for a contract being "made" in North Carolina under Section 97-36.

The dissent cites *Larson's Workers' Compensation Law* § 143.03(4) (2011) for the proposition that when "a contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state." While we acknowledge that *Larson's* is a learned treatise in this field, we must construe Section 97-36 using the long-standing canons of construction in this state which require a plain language approach to interpreting Section 97-36.

This Court's precedent identifies that a modified contract containing the required formation elements is a new contract. *See, e.g.*, *NRC Golf Course, LLC v. JMR Golf, LLC*, ___ N.C. App. ___, ___, 731 S.E.2d 474, 480 (2012) ("Parties to a contract may agree to change its terms; but the *new agreement*, to be effective, must contain the elements necessary to the formation of a contract." (emphasis added)). Like other newly formed contracts, a modified contract may be made in this state.

The General Assembly crafted Section 97-36 with a full view that the phrase "employment contract" contemplated both contracts of hire as well as modifications of existing contracts which, by long-standing precedent, are new agreements. *See id.; compare* N.C. Gen. Stat. § 97-36 *with* N.C. Gen. Stat. § 97-2(2) (using "contract of hire"). As such, we do not interject our own view of the legislature's intended meaning and instead apply existing precedent and the plain language of Section 97-36 to this question of first impression. *See Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("The legislative purpose of a statute is first ascertained by examining the statute's plain language.").

Further, while the *Larson's* passage cites other state court decisions for the notion that a situs is not changed by contract modification, other jurisdictions have recognized explicitly that a contract modified within state borders confers jurisdiction. *See, e.g.*, *Kilburn v. Grande Corp.*, 287 F.2d 371, 373–74 (5th Cir. 1961) (holding that Louisiana had jurisdiction over a modified contract of employment where the original employment contract was formed in Texas, but additional consideration for employment was negotiated in Louisiana); *Kuzel v. Aetna Ins. Co.*,

650 S.W.2d 193, 195–96 (Tex. App. 1983) (holding Maryland had jurisdiction where the original contract of hire was formed in Texas, but a later contract modification was agreed to in Maryland).

The Commission held that modification of an existing contract does not fall within the scope of a contract "made" in Section 97-36. The lack of a bar against such use, this Court's precedents recognizing common law contract principles, and use of the phrase "employment contract" in Section 97-36 require a different result. Accordingly, a modification of an employment contract may be a proper basis to find a contract is "made" within North Carolina under Section 97-36.

b. Whether Plaintiff's Contract was Modified

Our next inquiry is whether Plaintiff's contract was actually modified under common law contract principles. The same tests for formation of contract apply to whether a modified contract is enforceable. *NRC Golf Course*, ___ N.C. App. at ___, 731 S.E.2d at 480 ("Parties to a contract may agree to change its terms; but the new agreement, to be effective, must contain the elements necessary to the formation of a contract." (quotation marks and citation omitted)); *Corbin v. Langdon*, 23 N.C. App. 21, 26, 208 S.E.2d 251, 254 (1974). The three requisite elements to form an enforceable contract are offer, acceptance, and consideration. *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002). Consequently, we must consider whether each element exists to determine whether a modified employment contract was formed between Plaintiff and U.S. Foods.

"It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550, 613 S.E.2d 322, 327 (2005) (quotation marks and citation omitted); *see also Wooten v. S.R. Biggs Drug Co.*, 169 N.C. 64, 68, 85 S.E. 140, 142 (1915) (holding that "the one thing without which a contract cannot be made . . . is the assent of the parties to the agreement, the meeting of the minds upon a definite proposition"). As such, a contract modification must also have an offer of modified terms and acceptance on those terms. *Corbin*, 23 N.C. App. at 26, 208 S.E.2d at 255. At-will contracts may also be modified by the parties to form a new contract. *Arndt v. First Union Nat. Bank*, 170 N.C. App. 518, 526, 613 S.E.2d 274, 280 (2005) ("The employer, in an at will relationship, can modify, unilaterally the future compensation to be paid to an employee. If the employer modifies the terms of an [employee] at will; and, the employee knows of

the change, the employee is deemed to have *acquiesced* to the modified terms, if he continues the employment relationship.").

Here, Mr. Abernathy testified that the company met with displaced drivers after its merger with PYA Monarch. Mr. Abernathy said the company offered its displaced drivers jobs with the subsuming branches. U.S. Foods extended its offer for its employees to transfer branches at a company safety meeting in Charlotte. The alternative to transferring branches was to receive a severance package from U.S. Foods. Thus, Plaintiff had a choice: he could accept a transfer or he could cease employment and receive a severance package. This fundamental choice qualifies as a new offer under the traditional definition of a contract.

Plaintiff accepted the offer. At the Charlotte meeting where his new terms of employment were proposed, Plaintiff negotiated the details of his transfer with his supervisor. Specifically, Plaintiff requested that his trailers be dropped near his home in Augusta. Plaintiff also completed paperwork at the Charlotte safety meeting to accept the transfer, although U.S. Foods's Charlotte human resources department had to approve the transfer before it was "official." From the foregoing, it is clear Plaintiff accepted a new offer modifying his existing at-will employment agreement.

Finally, there must also be consideration in support of the modified contract. *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 466, 323 S.E.2d 23, 27 (1984) ("It is established law that an agreement to modify the terms of a contract must be based on new consideration or on evidence that one party intentionally induced the other party's detrimental reliance." (citation and quotation marks omitted)). "Consideration sufficient enough to support a contract consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 75, 715 S.E.2d 273, 282 (2011) (quotation marks and citation omitted). This Court does not typically consider the adequacy of consideration, as "inadequate consideration, as opposed to the lack of consideration, is not sufficient grounds to invalidate a contract. In order to defeat a contract for failure of consideration, the failure of consideration must be complete and total." *Harllee v. Harllee*, 151 N.C. App. 40, 49, 565 S.E.2d 678, 683 (2002) (citations omitted). Paying wages for labor constitutes consideration, and a change in the form of payment has been found to be sufficient consideration to form a contract. *Clyde Rudd & Associates, Inc. v. Taylor*, 29 N.C. App. 679, 682, 225 S.E.2d 602, 604 (1976) (holding that a change

in the method of compensation met the consideration requirement of contract formation).

Here, when Plaintiff transferred to the Charlotte division, he transferred from a weight-based compensation system to a component pay system. This was a change in the method of compensation and ultimately netted Plaintiff an increase in pay. After transferring, Plaintiff's earnings increased. As such, a valuable benefit was conferred between both sides: U.S. Foods retained Plaintiff as an employee, Plaintiff retained a position driving trucks for U.S. Foods, and Plaintiff received increased pay as a result of the transfer.

As all three elements existed, a valid contract was formed between the parties via the modification of their previous employment contract. As a result, we must now consider whether the contract was "made" in North Carolina for purposes of Section 97-36. For that inquiry, we turn to the "Last Act" analysis.

c. "Last Act" Analysis

Section 97-36 ultimately grants the Commission jurisdiction only if the contract was "made" in North Carolina. To determine where a contract for employment was made, the Commission and North Carolina courts apply the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). The "last act" test provides that "for a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Id.* (citation and quotation marks omitted).

In *Murray*, the plaintiff was initially hired at a plant in Tennessee, was laid off, and then was called at his North Carolina residence with an offer to work in Mississippi. *Id.* at 295, 506 S.E.2d at 725. Negotiations took place via telephone and the plaintiff accepted the offer while in North Carolina. *Id.* This Court held the last requisite act to form the binding employment contract occurred while the plaintiff was in North Carolina and that the Commission had jurisdiction to hear the plaintiff's workers' compensation claim. *Id.* at 297, 506 S.E.2d at 726.

Similar facts exist here. Plaintiff was offered and accepted a transfer with a different pay structure. Plaintiff filled out paperwork to that effect at a safety meeting in Charlotte. The transfer was explicitly described as not "final" or "official" unless approved by U.S. Foods's human resources department in Charlotte. Two signatures from human resources officers were provided in Charlotte to approve the transfer. As such, the last act to make the transfer binding occurred in Charlotte, where Plaintiff

completed his transfer paperwork and where final approval by U.S. Foods's human resources department was provided.

IV. Conclusion

Because we hold that Plaintiff and U.S. Foods modified Plaintiff's contract and that the final binding act occurred in North Carolina, we hold that Section 97–36 extends subject matter jurisdiction to Plaintiff's claim. As such, the opinion and award of the Industrial Commission is

Reversed and remanded for rehearing.

Judge STROUD concurs.

DILLON, Judge, dissenting.

In 2000, Plaintiff Vincent Burley ("Employee"), a Georgia resident, entered into a contract of employment in South Carolina with Defendant U.S. Foods, Inc., ("Employer"), an Illinois-based company, to work as a truck driver. Employee was injured as the result of a work-related accident which occurred in Georgia in 2009. Employee filed this action seeking workers' compensation benefits in North Carolina; however, the Commission denied the claim, determining that it lacked jurisdiction to make an award. The sole statutory basis which Employee argues on appeal gives the Commission jurisdiction over his claim is N.C. Gen. Stat. § 97-36(i), which provides jurisdiction for out-of-state accidents where "the contract of employment was made in this State[.]" Specifically, Employee argues he agreed to a modification to his contract of employment while attending a business meeting in Charlotte in 2002, and that this modification constituted a "contract of employment . . . made in this State[.]" *See id.* However, I disagree that this modification was sufficient to change the contract's situs from South Carolina to North Carolina; and, therefore, I would affirm the Commission's conclusion that it lacked jurisdiction in this matter. Accordingly, I respectfully dissent.

Employee was initially assigned to Employer's Columbia, South Carolina drop-yard. In 2002, Employer merged with another company, which resulted in the closing of Employer's Columbia drop-yard. However, Employee's employment was never severed. Rather, the parties came to an agreement during a meeting in Charlotte whereby oversight of his job was transferred to Employer's Charlotte division and his compensation was increased. As the majority points out, though, Employee's "job title and responsibilities did not change."

As the majority notes, whether an out-of-state employment contract modified in this State constitutes a "contract of employment . . . *made* in this State" for purposes of conferring jurisdiction in the Commission under N.C. Gen. Stat. § 97-36(i) for an out-of-state accident has never been directly addressed by a North Carolina appellate court. (Emphasis added.) I believe that, for purposes of conferring jurisdiction for an out-of-state accident based on where the contract of employment was "made[,]" the General Assembly intended that only one state be considered an employment contract's situs, namely, where the contract "was made[,]" and not also be every state where the contract might have been "modified" over the course of an employee's tenure.[1] I believe that if the General Assembly had intended to include states where contracts of employment were also modified, and not simply made, within the jurisdictional reach of the Commission, it could have so provided by including the phrase "or modified" in the language of N.C. Gen. Stat. § 97-36(i). "Once a contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state[.]" *Larson's Workers' Compensation Law* § 143.03[4] (2013) (citing *Crawford v. Trans World Airlin*e, 27 N.J. Super. 567, 99 A.2d 673 (1953); *Tobin v. Rouse*, 118 Vt. 40, 99 A.2d 617 (1953); *United Airlines v. Industrial Commission*, 96 Ill. 2d 126, 449 N.E.2d 119 (1983)).[2]

Following the majority's reasoning, the Commission gains jurisdiction over an out-of-state contract of employment if the modification of any contract term is agreed to by one of the parties while that party happens to be in North Carolina; and, further, the Commission *loses* jurisdiction over a contract of employment made in North Carolina if the

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1. The scope of my dissent is based on the facts of this case. I recognize that there could be situations where a modification may be so significant that it could be deemed that a new contract of employment was "made[,]" thereby changing the situs of the employment contract. For example, in this case had Employee accepted an offer to move to Employer's Illinois headquarters to manage one of its divisions, it might be said that – for purposes of conferring jurisdiction under N.C. Gen. Stat. § 97-36(i) - the parties "made" a new contract of employment. However, I do not believe the changes that were actually made at the Charlotte meeting to Employee's contract – where he remained employed and his role did not fundamentally change – rise to the level of making of new contract of employment.

2. Though an opinion stated in *Larson's* is not binding authority on this Court, this treatise has been cited with approval by our courts on a number of occasions, *see, e.g.*, *Shaw v. U.S. Airways*, 362 N.C. 457, 461, 665 S.E.2d 449, 452 (2008); *Gore v. Myrtle/Mueller*, 362 N.C. 27, 36, 683 S.E.2d 404, 406-07 (2007); *Taft v. Brinley's*, __ N.C. App. __, __, 738 S.E.2d 741, 744-45 (2013); and I find the above-quoted statement contained in *Larson's* concerning the issue in this case to be persuasive.

modification of any term of that North Carolina contract is agreed to by one of the parties while that party happens to be in another state. I disagree with this reasoning and do not believe that our General Assembly intended that — for purposes of conferring jurisdiction based on contracts of employment "made" — a contract of employment is deemed made, *not* where the employer-employee relationship is established, but rather where *any* term of the employment agreement is last modified. Accordingly, I would vote to affirm the decision of the Commission that it lacked jurisdiction to award benefits to Employee.

FEDERAL POINT YACHT CLUB ASSOCIATION, INC.,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
GREGORY MOORE, DEFENDANT

No. COA13-681

Filed 1 April 2014

1. Associations—standing—separate from individual claims

The trial court did not err by denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and (b)(6) for Federal Point Yacht Club's (FPYC's) lack of representational standing. FPYC had standing as its own corporate entity to bring suit, regardless of the claims by fourteen individual members.

2. Collateral Estoppel and Res Judicata—claims by yacht club—separate from claims of individual members

Claims by the Federal Point Yacht Club (FPYC) arising from use of the facilities were not barred by *res judicata* after fourteen individual members dismissed no-contact orders with prejudice. FPYC was neither the same party nor privy to the fourteen individual members of FPYC who filed no-contact orders against defendant.

3. Parties—necessary—joinder not timely

The trial court did not err by dismissing defendant's counterclaim with prejudice pursuant to N.C. R. Civ. P. 12(b)(7) where an earlier dismissal for failure to join necessary parties had not specified a time for refiling. Defendant therefore had the statutory period of one year to refile and his complaint was properly dismissed when he did not do so.

4. Injunctions—behavior of club member—specificity of prohibitions

The trial court correctly granted summary judgment for the Federal Point Yacht Club (FPYC) and an injunction against defendant where the trial court made findings of fact regarding defendant's behavior and conduct towards FPYC and its members and concluded that defendant's behavior and conduct was violative of FPYC's rules and regulations. However, some of the of the behavior was banned in vague or unspecified terms as to persons, times, and geographic scope.

5. Injunctions—behavior of club member—unclean hands

The trial court did not err by granting the Federal Point Yacht Club's (FPYC's) motion for summary judgment and an injunction in an action arising from the behavior of a member. The evidence showed there were no genuine issues of fact that defendant's behavior and conduct had continued unabated against FPYC. Although defendant further argued that summary judgment was inappropriate because FPYC acted with unclean hands, defendant's own behavior and conduct was equally inappropriate.

Appeal by defendant from orders entered 18 September and 18 October 2012 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 5 November 2013.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, and the Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiff-appellee.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz, for defendant-appellant.

BRYANT, Judge.

An association has representational standing to bring a lawsuit provided at least one of its members has suffered imminent harm. Where a defendant fails to join necessary parties to his action, a dismissal of his claim pursuant to N.C. R. Civ. P. 12(b)(7) is appropriate. Where a restrictive covenant must be enforced, a permanent injunction is the proper remedy. A trial court has discretion to award injunctive relief upon its weighing and balancing of the parties' equities. However, a permanent injunction that prohibits contact between defendant and others without

establishing specific boundaries as to when, where, and how the injunction applies is overly broad.

Plaintiff Federal Point Yacht Club Association ("FPYC") is a residential water-access community with appurtenant marina facilities located in Carolina Beach. FPYC has eighteen residential lots, a clubhouse, pool, and marina with 110 boat slips. FPYC is governed by a recorded Declaration of Covenants, which is enforced by a board comprised of community members. Defendant Gregory Moore owns a residence and two boat slips within FPYC.

On 12 August 2010, Moore filed a complaint against FPYC, members of FPYC's board, and FPYC's dockmaster Randy Simon ("Simon"). Moore's complaint alleged that FPYC fined him excessively, FPYC and Simon engaged in unfair and deceptive trade practices, Simon abused legal process, and FPYC and its board were negligent in hiring Simon as dockmaster. Moore sought compensatory, treble, and punitive damages. FPYC filed a motion to dismiss for failure to join all necessary parties pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(7). On 11 October 2010, this motion was granted by Judge W. Allen Cobb, Jr., dismissing Moore's complaint without prejudice.

On 4 March 2011, FPYC's board conducted a hearing regarding Moore's violations of FPYC's rules. In a final decision issued 22 April 2011, FPYC's board found that Moore had damaged water faucets on one of FPYC's docks; damaged the bathrooms in the clubhouse; allowed his dog to run without a leash on FPYC property; committed acts of harassment and intimidation against FPYC board members, residents, and guests; impermissibly moved a concrete parking bumper; and did not follow FPYC's rules when parking and storing a boat trailer. Moore was assessed a fine of $496.80 which was paid.

On 5 November 2011, FPYC's board conducted a second hearing regarding Moore's continued violation of FPYC rules. In the second hearing, the FPYC board found that Moore continued to violate association rules despite having agreed to comply with the board's decision of 22 April. Specifically, the FPYC board found that Moore violated FPYC's rules regarding threatening and/or offensive conduct, signage, property damage, dockage, parking, bike riding on docks, and keeping his dog on a leash. Moore was assessed total fines of $550.00 and his FPYC membership rights were suspended for a period of sixty days.

On 17 January 2012, FPYC filed an action against Moore (hereafter "defendant") seeking a temporary restraining order, a preliminary injunction and a permanent injunction restraining him from continuing

to violate FPYC's rules.[1] On 25 January, defendant filed an answer and counterclaims for unfair and deceptive trade practices; abuse of process; negligent hiring, retention, and supervision of dockmaster; negligent infliction of emotional distress; intentional infliction of emotional distress; and punitive damages. On 26 March 2012, FPYC filed a response to defendant's counterclaims, including a motion to dismiss for failure to join all necessary parties pursuant to N.C. R. Civ. P. 12(b)(7), as well as for *res judicata* and collateral estoppel. Defendant filed a motion to dismiss FPYC's claims pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7), and 12(c) on 25 July 2012.

On 18 September 2012, Judge Cobb granted FPYC's motion and dismissed defendant's counterclaim with prejudice based on defendant's failure to join necessary parties. That same day, Judge Cobb entered a second order denying defendant's motions to dismiss FPYC's complaint pursuant to N.C. R. Civ. P. 12(b)(1), (6), (7), and 12(c), and for FPYC's lack of standing to sue on behalf of its members.

On 28 September 2012, defendant filed a new motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) on grounds that FPYC already had an adequate remedy at law and thus, an injunction was unnecessary. On 5 October 2012, FPYC filed motions for summary judgment and for permanent injunction against defendant. On 15 October 2012, Judge Cobb heard FPYC's motions for summary judgment and permanent injunction and defendant's second motion to dismiss. On 18 October 2012, Judge Cobb issued an order granting FPYC's motions for summary judgment and permanent injunction and denying defendant's motion to dismiss. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred (I) in its first 18 September 2012 order denying defendant's motion to dismiss; (II) in its second 18 September 2012 order dismissing defendant's counterclaim; (III) in its 18 October 2012 order denying defendant's motion to dismiss and granting FPYC's motions for summary judgment and permanent injunction; (IV) in its 18 October 2012 order granting FPYC's motions for summary judgment and permanent

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1. FPYC alleged that defendant violated FPYC's rules by spraying ketchup on the fence and home of the FPYC board president, shining a spotlight into the home of the board president, repeatedly using profane language towards members of the FPYC board, and sending threatening messages to board members. Other allegations of rule violations against defendant included defendant riding his bike along the marina's docks, defendant's dog running loose without a leash, and defendant defacing the FPYC clubhouse bathrooms with feces.

injunction where the permanent injunction applied to undefined persons and places; and (V) in its 18 October 2012 order granting FPYC's motion for summary judgment.

I.

Defendant argues the trial court erred in its 18 September 2012 order denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1), (b)(6) and (b)(7). We disagree.

A motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is reviewed by this Court *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). "For a motion to dismiss based upon Rule 12(b)(6), the standard of review is whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007) (citation and quotation omitted).

In its first 18 September 2012 order, the trial court observed that defendant filed the following motions:

> 1. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rules 12(b)(1) and 12(c) of the North Carolina Rules of Civil Procedure because [FPYC] . . . lacked standing to bring the claim(s) set forth in its Complaint because (a) the FPYC does not have standing to seek permanent injunctions on behalf of an individual, (b) even if the FPYC, as a non-profit corporation, has standing to bring an action as set forth and described in its Complaint, each and every member on whose behalf such relief is sought must also have standing to seek the same relief and that those individual members had previously given up their rights to seek the remedies set forth in the Complaint, and (c) the relief sought by [FPYC] in its Complaint has been, at least in part, rendered moot.
>
> 2. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the basis that [FPYC] (a) did not affirmatively plead conditions precedent to the filing of its Complaint and (b) [FPYC] lacked standing to bring the claims set forth in its Complaint.

3. A Motion to Dismiss [FPYC]'s Complaint filed pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure because [FPYC] failed to join necessary and indispensable parties to the action.

The trial court then held "that Defendant's Motions to Dismiss the remaining claims set forth in [FPYC's] Complaint filed pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7) and 12(c) are hereby DENIED."

[1] Defendant contends that the trial court erred in denying his motions to dismiss under Rules 12(b)(1) and (b)(6) because FPYC lacked standing to represent its members. "A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citation omitted). "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626—27, 574 S.E.2d 55, 57 (2002) (citations omitted). To have standing, a party must be a "real party in interest." *Energy Investors Fund*, 351 N.C. at 337, 525 S.E.2d at 445.

Defendant specifically argues that FPYC lacked standing because fourteen members of FPYC dismissed their no-contact claims against him with prejudice. An association like FPYC has representational standing for its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citation omitted). "The clear language of *River Birch* . . . does not require a threat of immediate injury to each and every individual member of the association in order for the association to have standing." *State Emps. Ass'n of N.C. v. State*, 154 N.C. App. 207, 219, 573 S.E.2d 525, 533 (2002) (Tyson, J., dissenting), *overruled on other grounds by State Emps. Ass'n of N.C. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003).

Here, defendant contends that FPYC lacked representational standing because by voluntarily dismissing their no-contact orders with prejudice, fourteen of FPYC's members forfeited their individual standing because they no longer suffered from an immediate harm caused by defendant. Defendant's argument lacks merit for, as previously discussed, FPYC had standing as its own corporate entity to bring suit,

regardless of the claims brought by its fourteen individual members. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."). Furthermore, our Supreme Court has held that not every member of an association must have suffered an immediate harm in order for the association to have standing to seek relief from such harm. *See River Birch*, 326 N.C. at 130, 388 S.E.2d at 555. Accordingly, the trial court did not err in its first 18 September 2012 order denying defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and (b)(6) for FPYC's lack of representational standing.

[2] Defendant further argues that FPYC lacked standing because the dismissal with prejudice of fourteen no-contact orders by FPYC members against him served as *res judicata* to bar any claims by FPYC against him. On 13 January 2012, fourteen individual members of FPYC, including FPYC's board of directors and their respective spouses as well as FPYC's dockmaster and his wife, filed no-contact orders for stalking or nonconsensual sexual conduct against defendant. These no-contact complaints stated that:

> Defendant has repeatedly tormented, terrorized, or terrified the Plaintiff, a member of the Board of Directors ("Board") of [FPYC] or a spouse thereof, with the intent of placing the Plaintiff in reasonable fear for the Plaintiff's safety or the safety of the Plaintiff's immediate family or close personal associates by engaging in hostile, threatening behavior directed toward the Board, FPYC's Dockmaster, and/or the spouses of the same. By way of example and not limitation, Defendant has (i) trespassed upon the land of . . . the president of the Board, and sprayed a blood-like substance all over the fence, gate, and steps of his home (1/2/12); (ii) used a weapon or other dangerous instrument to slash the tires of the spouse of FPYC's Dockmaster (12/31/11); (iii) threatened physical violence and/or bodily injury against FPYC's Dockmaster (10/18/11); and, (iv) threatened to kill FPYC's Dockmaster (7/10/10). There are many more examples. All of Defendant's conduct, regardless of to whom it was immediately directed, was intended to place and did place the Board's members and their spouses in reasonable fear for their safety and/or the safety of their family and/or close personal associates, as it was in apparent retaliation for the Board's

> censuring and fining Defendant for his repeated violations of the Rules and Regulations and Declarations of FPYC. Defendant's acts of aggression are escalating, and, given Defendant's frequent apparent intoxication and/or inability to control himself, Plaintiff fears for the Plaintiff's safety and the safety of the Plaintiff's immediate family and close personal associates.

All fourteen no-contact orders were voluntarily dismissed with prejudice on 23 July 2012.

Meanwhile, on 17 January 2012, five days after fourteen FPYC members filed no-contact orders against defendant, FPYC filed as a corporation a complaint against defendant alleging that:

> 14. [Defendant], while a member of [FPYC], has repeatedly violated various provisions of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC].
>
> 15. [Defendant] has been notified of his potential violations of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC] and has on two occasions in the past year had hearings before the Board of Directors of [FPYC] to review and consider those potential violations.
>
> 16. Most recently, the Board of Directors of [FPYC], in a decision dated 1 December 2011, determined [defendant] had violated the Declaration, By-Laws, and/or Rules and Regulations of [FPYC] through, *inter alia*, (a) his intimidating, threatening, harassing, profanity-laden, and nuisance-creating actions, and his disorderly conduct directed at the Board of Directors and [FPYC]'s Dockmaster, including but not limited to his offensive, verbal assault on [FPYC]'s Dockmaster which was captured on videotape on 18 October 2011; (b) his destruction of property by, on information and belief, urinating, defecating, and/or placing soiled toilet paper on signs hung by [FPYC] in the men's bathroom of the FPYC clubhouse; and, (c) continuing to violate [FPYC]'s Declaration, By-Laws, and/or Rules and Regulations.
>
> 17. Pursuant to the Board of Directors' hearing decision dated 1 December 2011 ("Hearing Decision"), [defendant] and his wife were assessed fines, and [defendant's] membership rights in [FPYC] were suspended for sixty (60) days beginning 4 December 2011 and ending 3 February 2012.

> 18. During the period of [defendant's] suspension of his membership rights in [FPYC], he has no right to access or use the common areas of [FPYC].
>
> 19. Since 4 December 2011, [defendant] has repeatedly violated the terms of the suspension of his membership rights by, *inter alia*, (a) purposefully accessing the common areas by the docks and clubhouse of [FPYC]; (b) on information and belief, entering the parking lot of the clubhouse on 31 December 2011 and using a weapon or other dangerous instrument to slash the tires of the wife of [FPYC's] Dockmaster (she and her husband, the Dockmaster, both members of [FPYC]), which event was captured on videotape; and, (c) on 2 January 2012, accessing the common areas by the docks and smearing, placing, and applying a dark red substance, which had the appearance of blood but which turned out to be ketchup, on the fencing, gate and steps of the home of [FPYC's] President, with, on information and belief, the intent and purpose to further intimidate, threaten, stalk, annoy, harass and terrorize [FPYC's] President, the President's spouse, all of the other members of [FPYC's] Board of Directors and their respective spouses, and all other members of [FPYC], which event, too, was captured on videotape.
>
> 20. [Defendant's] past behavior and present violent outbursts are in retaliation against the Board of Directors for their enforcement of the Declaration, By-Laws, and/or Rules and Regulations of [FPYC].
>
> 21. [FPYC] fears for the safety of its Board of Directors, its Dockmaster, its other members, and its property due to the violent, unpredictable, and uncontrollable behavior of [defendant].

Defendant contends that because the allegations in the no-contact orders differ from those in FPYC's complaint only to the extent that the no-contact orders were brought by individual members of FPYC while FPYC's complaint was brought by the corporation itself, *res judicata* should act as a bar against FPYC's complaint.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880

(2004) (citations omitted). "A dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Assocs., I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (citations omitted).

FPYC's complaint was brought by FPYC acting as "a corporation organized and existing under the laws of the State of North Carolina doing business in New Hanover County, North Carolina." As such, FPYC was not the same party or privy to the fourteen individual members of FPYC who filed no-contact orders against defendant. *See Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 135 (1960) (holding that although a person may be a shareholder or an officer of a corporation, that is not sufficient to establish privity for purposes of *res judicata* between the shareholder or officer and the corporation).

Defendant further contends that FPYC is barred by *res judicata* under this Court's reasoning in *Caswell Realty*. In *Caswell Realty*, the plaintiff filed an initial lawsuit which was settled and dismissed with prejudice. The plaintiff then filed two additional lawsuits based upon the same allegations as alleged in the first lawsuit. The defendants moved for summary judgment, which was granted by the trial court. The trial court held that because the allegations and parties were the same in all three claims raised by the plaintiff, the second and third claims were barred by *res judicata*. *Caswell Realty*, 128 N.C. App. 716, 496 S.E.2d 607.

Here, as already discussed, the no-contact orders did not involve the same parties or privies as FPYC's complaint. As such, *Caswell Realty* is not applicable to the instant case. *See also Smoky Mountain Enters., Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973) (*res judicata* barred a new action by a corporation's president against the defendant where the corporation's president had brought a prior action against the same defendant for the same relief); *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957) (holding that a person who is not a party to an action can be bound by the adjudication of a litigated matter only when that person controls an action, individually or in cooperation with others).

II.

[3] Defendant next argues that the trial court erred in its second 18 September 2012 order dismissing defendant's counterclaim with prejudice pursuant to N.C. R. Civ. P. 12(b)(7). We disagree.

North Carolina General Statutes, section 1A-1, Rule 12(b)(7), holds that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim [or] counterclaim . . . may at the option of the pleader be

made by motion [for] [f]ailure to join a necessary party." N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) (2013).

> When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. . . . A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice.

Crosrol Carding Dev., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 453—54, 183 S.E.2d 834, 838 (1971) (citation omitted).

On 12 August 2010, defendant filed a complaint against FPYC. On 11 October 2010, the trial court issued an order dismissing defendant's complaint without prejudice pursuant to N.C. R. Civ. P. 12(b)(7) for failure to join necessary parties. Defendant did not appeal from this order.

On 25 January 2012, defendant filed a counterclaim against FPYC; on 29 March 2012, FPYC moved to dismiss the counterclaim pursuant to Rule 12(b)(7) for failure join necessary parties. A hearing was held on 9 August 2012, and in an order dated 18 September 2012, the trial court granted FPYC's motion to dismiss dismissing defendant's counterclaims with prejudice. In its order, the trial court noted that:

> 5. The allegations of the Counterclaim filed by [defendant] in this action are based upon the same factual allegations that formed the basis of the Complaint filed by [defendant] in Civil Action Number 10 CVS 3796.[2] In addition, all of the claims that are now set forth in [defendant's] Counterclaim were included as part of the claims set forth in the Complaint [defendant] filed in Civil Action Number 10 CVS 3796. The claims as set forth in [defendant's] Counterclaim are a restatement of the same claims he asserted against FPYC in his Complaint. In addition, [defendant] makes the same request for damages against the FPYC in his Counterclaim that he made in his "original" Complaint.

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2. Defendant's complaint, filed 12 August 2010, was docketed under 10 CVS 3796. This complaint was dismissed by the trial court on 11 October 2010 without prejudice.

The trial court concluded that:

> BASED UPON THE FOREGOING, and as with the Motion to Dismiss filed by the FPYC to the Complaint filed by [defendant] in Civil Action Number 10 CVS 3796, this Court determines as a matter of law that Plaintiff FPYC's Motion to Dismiss [defendant's] Counterclaim for failure to join necessary and indispensable parties should be and is hereby ALLOWED.

Here, defendant's first complaint was dismissed without prejudice by the trial court under Rule 12(b)(7) for failure to join necessary parties. Under Rule 41(b),

> [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. . . . *Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits.* If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013) (emphasis added).

In its 11 October 2010 order dismissing defendant's complaint, the trial court did not specify a period of time for defendant to refile his complaint; as such, defendant had a statutory period of one year from the date of that order to refile his complaint. When defendant failed to refile his complaint or appeal the trial court's order of 11 October 2010, defendant's counterclaim filed 25 January 2012 was properly dismissed. *See id.*; *see also id.* §1A-1, Rule 41(c) ("The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.").

III. & IV.

[4] In his third and fourth arguments on appeal, defendant contends that the trial court erred in its 18 October 2012 order denying defendant's motion to dismiss and granting FPYC's motions for summary judgment and permanent injunction where there were adequate remedies at law and the injunction was overly broad.

"A mandatory injunction is the proper remedy to enforce a restrictive covenant [] and to restore the status quo." *Wrightsville Winds Townhouses Homeowners' Ass'n. v. Miller*, 100 N.C. App. 531, 536, 397 S.E.2d 345, 347 (1990) (citations omitted). "Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216 (1995) (citation omitted).

North Carolina Rules of Civil Procedure, Rule 65 requires that "[e]very order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2013). This Court has characterized the specificity inquiry to be conducted under Rule 65 as a determination of "whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do." *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 642, 190 S.E.2d 729, 734 (1972).

Defendant argues that the trial court erred in granting FPYC's motion for permanent injunction because FPYC had an adequate remedy at law. Specifically, defendant contends that because individual members of FPYC could seek no-contact orders against him, FPYC had adequate remedies at law. As already discussed in *Issue I*, FPYC had standing to pursue a claim against defendant, independent of any claims FPYC's members could bring against defendant. Moreover, as a corporate entity FPYC had representational standing to bring a claim against defendant on behalf of FPYC's full membership. *See Warth*, 422 U.S. at 511; *Troy Lumber*, 251 N.C. at 627, 112 S.E.2d at 135.

Here, FPYC's complaint indicated that defendant continued to violate FPYC's rules and regulations repeatedly, even after defendant agreed to no-contact orders issued for fourteen individual members of FPYC:

> 23. Based upon the allegations contained in this Verified Complaint, [FPYC] is entitled to an adjudication that [defendant] has violated the Declaration, By-Laws, and/or Rules and Regulations of the [FPYC]; has violated [FPYC]'s suspension of his membership rights; and, should be permanently enjoined from further violations of [FPYC]'s 1 December 2011 Hearing Decision.

24. [FPYC] has demonstrated a likelihood of success on the merits of this action against [defendant] for the issuance of a temporary restraining order and preliminary injunction against [defendant] during the pendency of this action from taking any action to violate the Declaration, By-Laws, Rules and Regulations, and decisions of the Board of Directors and to have no contact with any of [FPYC]'s Board members and their spouses except through his legal counsel during the pendency of this Court's temporary, preliminary and permanent injunction against him and all such terms and conditions as the Court may place on [defendant] to control his menacing, offensive and abusive behavior.

25. Further, based upon the allegations of this Verified Complaint, [FPYC] has demonstrated it will sustain irreparable damage, namely bodily injury or death of its Board of Directors, Dockmaster, or other members and/or property damage for which no reasonable redress is afforded by law and to which [FPYC] in equity and good conscience should not be required to submit.

26. For the foregoing reasons, [FPYC] moves the Court for a permanent injunction against [defendant], restraining him from taking any action to violate his suspension and other provisions contained in [FPYC]'s 1 December 2011 Hearing Decision, including a permanent order enjoining [defendant] from engaging in any further menacing, offensive, threatening and abusive conduct towards [FPYC]'s Board members, their respective spouses, the Dockmaster and his spouse, employees and other representatives of [FPYC], and all other members of [FPYC].

In its 15 October 2012 order, the trial court held that:

[b]y virtue of this Order, and for so long as [defendant] remains and/or is a member in [FPYC], [defendant] (including those acting through [defendant]) shall be and is hereby PERMANENTLY RESTRAINED AND ENJOINED from engaging in the same or substantially similar violative conduct, behavior and actions as described and set forth in [FPYC]'s Hearing Decisions of April and December 2011 . . . .

The trial court then listed seventeen "prohibited actions" which mirrored defendant's alleged violations stated in FPYC's complaint. As the trial court made findings of fact in the 18 September and 15 October 2012 orders regarding defendant's behavior and conduct towards FPYC and its members and concluded that defendant's behavior and conduct was violative of FPYC's rules and regulations, the trial court acted within its sound discretion in granting FPYC's motion for summary judgment and a permanent injunction against defendant.

Defendant also contends that the 18 October 2012 order is overly broad because the language of the order's "prohibitive actions" extends to persons, locations, and dates that are currently unknown to defendant. Specifically, defendant contends that he "has absolutely no discernible standard as to the persons, places and times to which the restraints apply." Defendant further argues that the language of the order is overly broad because FPYC failed to present evidence that defendant had issues with any members of FPYC other than the FPYC board president and dockmaster.

Defendant's only citations of authority for this argument concern the proposed standard of review. Defendant urges this Court to review this issue *de novo*, to "review and weigh the evidence and find facts for ourselves." We decline defendant's request and apply the standard of review we set out earlier in this opinion: "[w]hether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." *Buie*, 119 N.C. App. at 161, 458 S.E.2d at 216.

In its order granting a permanent injunction against defendant, the trial court noted that "[defendant] shall be and is hereby PERMANENTLY RESTRAINED AND ENJOINED from engaging in the same or substantially similar violative conduct, behavior and actions as described and set forth in [FPYC]'s Hearing Decisions of April and December 2011, both of which are . . . fully incorporated herein by reference." FPYC's motion to the trial court specifically requested "a permanent injunction against Defendant restraining and precluding him from engaging in recurring and similar violations of [FPYC]'s rules, regulations, restrictive covenants, bylaws and hearing decisions." The trial court's order stated that "Defendant's Prohibited Actions shall include, without limitation, the following:"

> (1) screaming profanities at, towards, or in the general direction of any [FPYC] member, their family members

or guests, [FPYC]'s Board of Director members ("BOD"), and/or [FPYC]'s employees and independent contractors whether in public, in private, in person, and/or through the telephone or voicemail;

(2) trespassing and/or entering upon the personal property or real property of [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(3) having a violent outburst of any kind whether verbal, physical, or insinuative toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(4) "flipping off" or "giving the finger to" [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(5) shining bright lights (including flashlights and/or high-intensity spotlights) into or onto the home or property of [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(6) driving any vehicle toward, in the direction of, or in such a way or in such proximity to [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors that it puts the person in fear of his/her personal safety and/or blocks the person's right of way;

(7) "cussing out" any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors in public, through email, through voicemail, through internet postings, text message, or other form of written or oral communication;

(8) calling any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors an "a******," "dickhead," "pervert," or other derogatory name in public or in any email, text message, voicemail, telephone call or other interaction with any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(9) threatening any kind of violence, retribution, or "pay-back" toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(10) taking any violent or destructive action toward [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors and/or toward any such person's personal or real property;

(11) destroying, vandalizing, defacing, marking, or damaging (including by urinating on, spraying ketchup on, slashing the tires of, dropping electrical cords into the water, etc.) the real or personal property of [FPYC] and any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(12) moving or removing any structure, barriers, signs, equipment or safety device found on or within the common areas or roadways of [FPYC];

(13) docking or causing to be docked any unauthorized boat or vessel in any slip or dock at [FPYC] or within the common area of [FPYC];

(14) "mooning," exposing himself, grabbing his crotch, sticking hoses between his legs, or making any profane and/or obscene gesture toward any [FPYC] members, their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors, whether in person or on any kind or type of video or recording device located on a member's property;

(15) depositing dock carts, garbage or refuse, including but not limited to empty beer cans and broken chairs or the like, upon the property of any [FPYC] member or their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors;

(16) defacing, marking, vandalizing, or damaging the common areas of [FPYC]; and,

(17) engaging in any type or kind of intimidating, harassing, and terrorizing conduct toward any [FPYC] members,

> their family members or guests, [FPYC]'s BOD, and/or [FPYC]'s employees and independent contractors.

Defendant contends that the language of the permanent injunction is overly broad, arguing that "[u]nder the language of the Order as written, the restraints could apply: to persons whom [d]efendant does not even know . . . at locations which [defendant] does not know apply . . . and at times/circumstances that [defendant] does not know applies." We agree. While the specific types of behaviors which are prohibited are themselves fairly clear, categories 1, 3–4, 7–10, 14, and 17 ban behavior in vague or unspecified terms as to persons, times, and geographic scope. Although some of the prohibited behavioral categories are limited to the geographic boundaries of FPYC, such as categories 12 ("moving or removing any structure, barriers, signs, equipment or safety device found on or within the common areas or roadways of [FPYC]"), 13 ("docking or causing to be docked any unauthorized boat or vessel in any slip or dock at [FPYC] or within the common area of [FPYC]"), and 16 ("defacing, marking, vandalizing, or damaging the common areas of [FPYC]"), the majority of the categories lack any specified boundaries, thus implying an unlimited applicability. *See Norfleet v. Baker*, 131 N.C. 99, 102, 42 S.E. 544, 545 (1902) ("Expressio unius est exclusio alterius. The presumption is that, having expressed some, they have expressed all, the conditions by which they intend to be bound under the instrument.").

This Court has previously upheld permanent injunctions where the prohibited behavior is clearly limited in terms of geographic scope. *See Matthieu v. Miller*, No. COA11-1287, 2012 N.C. App. LEXIS 886 (July 17, 2012) (finding that the trial court did not abuse its discretion in upholding injunctive relief where the injunction only affected one lot within a subdivision); *Schwartz v. Banbury Woods Homeowners Ass'n, Inc.*, 196 N.C. App. 584, 675 S.E.2d 382 (2009) (the trial court did not abuse its discretion in granting injunctive relief where the injunction was specifically limited to prohibiting the homeowners from permanently storing their RV camper on their property). However, as this Court has not previously addressed the appropriateness of injunctive relief which is seemingly unlimited in scope, we find *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex. App. 2009), to be enlightening.

In *Webb*, the defendants sued the plaintiffs for breach of their declaration of covenants and sought injunctive relief. The Texas Court of Appeals found the defendants' permanent injunction against the plaintiffs to be vague and overly broad as the injunction granted relief that went beyond the boundaries of the defendants' community. In finding

that the trial court abused its discretion in issuing the permanent injunction, the Texas Court of Appeals noted that where the injunction's prohibited behaviors "requires reference to records outside the injunction to determine all 'members, wherever located[,]' " the trial court clearly abused its discretion because "the injunction grants relief beyond that supported by the evidence by extending outside the physical boundaries of the Glenbrook community." *Id.* at 386.

We find that the instant matter is akin to that of *Webb*, as here, FPYC has obtained a permanent injunction against defendant that prohibits seventeen categories of behavior. Although some of these categories are clearly limited in terms of scope, the majority of these categories are not. Moreover, the injunction grants relief that extends beyond the boundaries of the FPYC community or immediately identifiable members of the FPYC community. We agree with defendant that the language used in categories 1, 3–4, 7–10, 14, and 17 is overly broad, as we find nothing that clearly limits these prohibited behaviors to any particular geographic area, durational period or immediately identifiable persons even though the evidence presented concerned only defendant's violations of FPYC's rules while within the FPYC community. As such, we must hold that the trial court abused its discretion in granting a permanent injunction with unlimited scope. Accordingly, we remand to the trial court solely to limit the scope of the injunction to actions directed at certain, identified individuals anywhere, such as the FPYC Board and community residents, or actions directed toward anyone in certain places, such as within the physical boundaries of the FPYC community.

Defendant further argues that the language of the order is overly broad because FPYC failed to present evidence that defendant had issues with any members of FPYC other than the FPYC Board's president and dockmaster. Defendant's argument is without merit, as his behavior and conduct was directed towards and affected more members of FPYC than just FPYC's president and dockmaster. A review of the emails sent by defendant indicates that defendant contacted numerous members of FPYC. Defendant also verbally communicated, both in person and over the telephone, with various FPYC members and their families. As defendant's actions and behaviors affected both individual members of FPYC as well as the entire FPYC community, FPYC's motion for permanent injunction was meant to prevent defendant from committing further harm against FPYC, its members and their guests. *See id.* However, as discussed above, we must remand to the trial court to have the order's "prohibited actions" limited to certain, identifiable individuals, and to the physical boundaries of the FPYC community.

V.

[5] Defendant's final argument on appeal is that the trial court erred in its 18 October 2012 order granting FPYC's motion for summary judgment where there were questions of fact, and therefore, the trial court should not have granted a permanent injunction. We disagree.

> Summary judgment is proper when "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 [pursuant to] N.C.G.S. § 1A-1, Rule 56(c) (20[13]). The trial court must consider the evidence in the light most favorable to the non-moving party.

Crocker v. Roethling, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted). This Court reviews a trial court's order granting or denying summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr.*, Ltd., 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted).

In its 18 October 2012 order, the trial court noted that it reviewed all of the evidence presented by both parties, including the evidence defendant now claims was not properly considered, as well as the trial court's own record of previous litigation between defendant and FPYC. The trial court then determined that defendant continued to violate FPYC's rules and regulations, even after FPYC met with defendant to discuss the violations and after fourteen individual members of FPYC obtained no-contact orders against defendant. Defendant does not specifically contest these facts. He does not argue that they did not occur, nor does he contest that these actions violate the restrictive covenants. He only argues that his conduct was justified by FPYC's own unclean hands, an argument we address below. Therefore, because the evidence showed there were no genuine issues of fact that defendant's behavior and conduct had continued unabated against FPYC, the trial court did not err in granting FPYC's motion for summary judgment as FPYC is entitled to judgment as a matter of law.

Defendant further argues that summary judgment was inappropriate because FPYC acted with unclean hands towards him. Specifically, defendant argues that FPYC deliberately sought to drive him out of FPYC's community by provoking and targeting him with excessive fines and, therefore, FPYC cannot seek injunctive relief.

> When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public and of third persons.

Roberts v. Madison Cnty. Realtors Ass'n, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (citation omitted). Further,

> [o]ne who seeks equity must do equity. . . . The conduct of both parties must be weighed in the balance of equity, and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue.

Creech v. Melnik, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) (citations omitted).

> The issuance of such an injunction depends upon the equities of the parties and such balancing is clearly within the province of the trial court. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused.

Buie, 119 N.C. App. at 161, 458 S.E.2d at 216 (citations and quotation omitted).

Although defendant presented evidence that FPYC's Board president and dockmaster acted inappropriately towards him, defendant's own behavior and conduct towards FPYC was equally inappropriate.[3] The trial court, in considering FPYC's request for injunctive relief, weighed and balanced the competing equities of both parties and concluded that defendant's conduct was egregious enough to warrant the issuance of a permanent injunction. As the trial court acted within its

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3. Again we note FPYC's allegations that defendant violated FPYC's rules and retaliated by spraying ketchup on the fence and home of the FPYC board president, shining a spotlight into the home of the board president, repeatedly using profane language towards members of the FPYC board, and sending threatening messages to board members. Other allegations of rule violations against defendant included defendant riding his bike along the marina's docks, defendant's dog running loose without a leash, and defendant defacing the FPYC clubhouse bathrooms with feces.

discretion in balancing "the equities of the parties," the trial court did not err in granting a permanent injunction in favor of FPYC. We affirm summary judgment but remand to the trial court to limit the scope of the permanent injunction.

Affirmed in part; remanded in part.

Judges McGEE and STROUD concur.

IN RE ACCUTANE LITIGATION

No. 13-754

Filed 8 April 2014

Appeal and Error—interlocutory orders and appeals—protective order—no substantial right—hypothetical subpoena

A North Carolina witness's appeal from an interlocutory protective order was dismissed in an action where the defendant in a New Jersey mass tort litigation subpoenaed him for a deposition. The witness failed to identify any substantial right that would be jeopardized by delay of an appeal. Further, the issues raised by the witness all pertained to possible ramifications of a hypothetical subpoena that might or might not ever be issued, and thus did not present issues that were ripe for review.

Appeal by Dr. Michael D. Kappelman from order entered 16 April 2013 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 8 January 2014.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, Joseph S. Dowdy, and T. Carlton Younger, III, for Hoffman-LaRoche Inc., and Roche Laboratories, Inc.-appellees.

Ashmead P. Pipkin for Dr. Michael D. Kappelman-appellant.

STEELMAN, Judge.

Where the defendant in a New Jersey mass tort litigation subpoenas a North Carolina witness for a deposition, the North Carolina trial court's protective order was an interlocutory order. Where the witness

failed to allege any substantial right that would be jeopardized absent immediate review, but instead speculates that if certain fact scenarios occur in the future his rights might be implicated, his appeal must be dismissed.

I. Factual and Procedural Background

In the early 1980s Hoffmann-LaRoche, Inc., began marketing Accutane, the brand name for the drug isotretinoin, which is used to treat severe acne. Beginning in 2003, lawsuits were filed alleging that the use of Accutane had caused inflammatory bowel disease. In May 2005, the New Jersey Supreme Court ordered that the litigation pertaining to Accutane be administered as a mass tort, and as of "July 2012, there [were] nearly 8000 cases listed on New Jersey's Accutane mass tort list." *Sager v. Hoffman-La Roche, Inc.*, 2012 N.J. Super. Unpub. LEXIS 1885 *9 fn2, *petition for certification denied*, 213 N.J. 568, 65 A.3d 835 (2013).

Dr. Kappelman is an Assistant Professor on the faculty of the Medical School of the University of North Carolina at Chapel Hill, whose duties include treating patients, conducting research studies, and publishing the results of his studies. This is primarily in the field of pediatric gastroenterology. He is not a party in the Accutane litigation and has not consulted with any of the parties. However, Dr. Kappelman was a co-author of "A [Causal] Association between Isotretinoin and Inflammatory Bowel Disease Has Yet to Be Established," an article published in 2009 in The American Journal of Gastroenterology (TAJG). Dr. Kappelman discussed the article in a March 2010 interview published in the Gastroenterology & Hepatology journal. He was also a co-author of "Isotretinoin Use and Risk of Inflammatory Bowel Disease: A Case Control Study," an article published in September of 2010 in TAJG. This article resulted in a letter to the editor by Hoffmann-LaRoche employees, published in TAJG in May 2011, which criticized the methodology described in the September 2010 article. This issue also contains a letter by Dr. Kappelman responding to the criticisms. Plaintiffs in the Accutane litigation have cited some of Dr. Kappelman's work in support of a causal link between Accutane and inflammatory bowel disease. When Hoffmann-LaRoche sought to introduce other writings by Dr. Kappelman to rebut plaintiffs' evidence, New Jersey trial judge Carol E. Higbee ruled that Hoffmann-LaRoche could not introduce this evidence in documentary form but would have to depose Dr. Kappelman.

Based upon a *subpoena ad testificandum* filed 15 February 2013 by the Superior Court of Atlantic County, New Jersey, the Clerk of the Superior Court of Orange County, North Carolina, issued a subpoena on

15 February 2013, for Dr. Kappelman to be deposed on 14 March 2013 in Chapel Hill. On 5 March 2013 Dr. Kappelman filed a motion to quash the subpoena and for a protective order. The motion was heard on 8 April 2013, and on 16 April 2013 the trial court entered a protective order barring Hoffmann-LaRoche from deposing Dr. Kappelman as an "involuntary non-fact" witness, but stating that he could be deposed as an expert witness without violating the protective order. The order states in relevant part:[1]

> Applying a balancing test set forth in *Anker v. G.D. Searle & Co.*, 126 F.R.D. 515, 518 (M.D.N.C. 1989), the Court finds that Dr. Kappelman is not a party to this litigation; he is an independent researcher and has demonstrated that he is [an] involuntary non-fact witness who has substantially demonstrated that his deposition would result in undue hardship and would be substantially burdensome to him as an involuntary non-fact witness in the context of the defendants' mass tort litigation in New Jersey involving 7,700 pending claims; and, no party in that litigation has retained Dr. Kappelman as an expert. Therefore, Dr. Kappelman's motion for a protective order is granted with respect to future subpoenas to Dr. Kappelman as an involuntary non-fact witness.
>
> Notwithstanding this ruling, defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective order, and Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert.

The parties agreed during the hearing that defendant had subpoenaed Dr. Kappelman as a fact witness; however, the order does not address whether Dr. Kappelman may be deposed as a fact witness, but only bars defendants from deposing Dr. Kappelman as "an involuntary non-fact witness." And, although the most common type of "non-fact

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1. As Dr. Kappelman notes, the trial court did not rule on his motion to quash the subpoena. At the time of the hearing on Dr. Kappelman's motion, the date set for his deposition had passed. Furthermore, a North Carolina trial court lacks authority to quash a subpoena issued by a New Jersey court. *See Capital Resources, LLC v. Chelda, Inc.*, __ N.C. App. __, __, 735 S.E.2d 203, 209 (2012) ("a superior court judge in this State does not have any authority over the courts of other states, and thus could not quash subpoenas issued by such courts") (citing *Irby v. Wilson*, 21 N.C. 568, 580 (1837)), *cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

witness" is an expert witness,[2] the order also states that the protective order would not bar Hoffmann-LaRoche from issuing a subpoena for Dr. Kappelman as an expert witness. As a result, the only legal effect of the protective order is to prevent defendants from deposing Dr. Kappelman as an involuntary non-fact lay witness. Dr. Kappelman argues in his response to Hoffmann-LaRoche's dismissal motion that the trial court's order is "muddled" and "self-contradictory." However, Dr. Kappelman did not file a motion seeking clarification of the order. *See Alston v. Fed. Express Corp.*, 200 N.C. App. 420, 423-24, 684 S.E.2d 705, 707 (2009) ("Pursuant to Rule 60(b)(6)'s 'grand reservoir of equitable power,' the trial court had jurisdiction to revisit its order so that its intentions could be made clear.") (quoting *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985)).

Dr. Kappelman appeals.

II. Hoffmann-LaRoche's Motion to Dismiss Appeal

On 23 July 2013 Hoffmann-LaRoche filed a motion seeking dismissal of Dr. Kappelman's appeal, arguing that Dr. Kappelman had appealed from an interlocutory order that did not affect a substantial right. We agree.

A. Interlocutory Nature of Appeal

According to N.C. Gen. Stat. § 1A-1, Rule 54(a), a "judgment is either interlocutory or the final determination of the rights of the parties." " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Hill v. StubHub, Inc.*, __ N.C. App. __, __, 727 S.E.2d 550, 553-54 (2012) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)), *disc. review denied*, 366 N.C. 424, 736 S.E.2d 757 (2013).

On appeal, Dr. Kappelman argues that we should treat the trial court's order as final based on his interpretation of the statement in the

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2. The order does not explain what this term means. There appear to be no cases in North Carolina defining this term. A "non-fact" witness may be an expert, *see*, *Express One Int'l, Inc. v. Sochata*, No. 3-97 CV3121-M, 2001 U.S. Dist. LEXIS 25281, at *2 (N.D. Tex. 2 March 2001) (noting that the "five non-fact witnesses are traditional experts whose involvement is solely for litigation to give opinions in their specific areas of expertise"). However, in particular circumstances a person may testify as a non-fact lay witness, *see*, *e.g.*, *Jones v Williams*, 557 So. 2d 262, 263, 266 (La. App. 4 Cir. 1990) (parking manager for defendant City of New Orleans and "plaintiff's only non-fact witness" testified regarding the City's customary practice regarding enforcement of parking regulations), *cert. denied*, 558 So. 2d 607, 1990 La. LEXIS 726 (La. 1990).

trial court's order that, notwithstanding the court's entry of a protective order, "defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective order, and Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert." Dr. Kappelman interprets this as a ruling in which the trial court "unjustly compelled Dr. Kappelman to testify as an expert without compensation or limitations on the scope of the deposition." He contends that if Hoffmann-LaRoche issues a subpoena seeking to depose him as an expert witness, that he will not be permitted to raise any objections to the subpoena or the deposition and that the trial court's order "forecloses" his ability to challenge or seek a protective order, regardless of the scope of the deposition or his circumstances at the time. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 26(c) provides in part that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense[.] . . .

In order to determine whether a party or deponent has shown "good cause" for an order protecting him "from unreasonable annoyance, embarrassment, oppression, or undue burden or expense," the trial court must consider the specific discovery sought and the factual circumstances of the party from whom discovery is sought. *See*, *e.g.*, *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2013 U.S. Dist. LEXIS 71636, *9-10 (M.D.N.C., May 21, 2013) ("Rule 26(c)'s requirement of a showing of 'good cause' to support the issuance of a protective order . . . contemplates a particular and specific demonstration of fact") (quoting *Jones v. Circle K Stores*, 185 F.R.D. 223, 224 (M.D.N.C. 1999) (internal quotation omitted)), *partial summary judgment granted in part and denied in part on other grounds*, 2013 U.S. Dist. LEXIS 150070 (M.D.N.C. Oct. 18, 2013). Given that the trial court's order addressed only the type of testimony for which Dr. Kappelman might be deposed, and given that the trial court could not know in advance what specific circumstances might exist at the time of a future subpoena or what information Hoffmann-LaRoche might be seeking, we conclude that the order's statement that "Dr. Kappelman will be required to appear for a deposition if he is subpoenaed as an expert" is simply a reiteration of the first part of the same sentence which states that "defendants may have subpoenas issued to Dr. Kappelman as an expert witness without violating this protective

order." In other words, the trial court was merely emphasizing that if Hoffmann-LaRoche subpoenaed Dr. Kappelman as an expert witness, he could not argue that this violated the protective order. We hold, however, that in the event that Hoffmann-LaRoche seeks to depose Dr. Kappelman as an expert witness, he may seek a protective order under Rule 26(c), if appropriate.

We also reject Dr. Kappelman's contention that we should apply the reasoning of certain federal cases as a basis for treating this as an appeal from a final order. Dr. Kappelman cites several federal cases holding that, if a judge from a different district than the location of the trial enters an order denying discovery, the party seeking discovery may appeal, given that the party will not be able to raise the issue as part of an appeal from judgment in the case. Dr. Kappelman asserts, without citation to authority, that "[t]his rationale should apply equally to the appellant who is opposing discovery." However:

> The nonappealability of orders requiring the production of evidence from witnesses has long been established. In *Alexander v. United States*, 201 U.S. 117, 50 L. Ed. 686, 26 S. Ct. 356 (1906) . . . The Supreme Court held that the order directing the witnesses to testify and produce documents was interlocutory and could be challenged by the witnesses only upon an appeal from an adjudication of contempt. . . . [T]he Supreme Court has repeatedly held that an order denying a motion to quash, or an order compelling testimony or production of documents, is not final and, hence, is not appealable regardless of how the matter is raised.

Micro Motion, Inc. v. Exac Corp., 876 F.2d 1574, 1576-77 (Fed. Cir. 1989), *appeal dismissed*, 899 F.2d 1227 (Fed. Cir. 1990). The *Micro Motion* court explained further:

> We are mindful of the harshness inherent in requiring a witness to place themself in contempt to create a final appealable decision. . . . However, it is all too certain that the consequences of recognizing a *right* to appeal all orders refusing to quash a subpoena, even where such an order 'ends' ancillary proceedings against a non-party, would be to "constitute the courts of appeals as second-stage motion courts reviewing pretrial applications of all non-party witnesses alleging some damage because of the litigation." Thus, the courts, with rare exceptions, have opted to require that the contempt route be followed.

Micro Motion, 876 F.2d at 1577-78 (quoting *Borden Co. v. Sylk*, 410 F.2d 843, 846 (3d Cir. 1969)). Dr. Kappelman does not distinguish cases such as this or cite any authority to the contrary, and we conclude that "this issue would no more be immediately appealable as a 'collateral matter' under the federal test for interlocutory appeals than it is under the substantial rights doctrine." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 195 fn2, 540 S.E.2d 324, 328-29 fn2 (2000) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-72, 40 L. Ed. 2d 732, 744-45, 94 S. Ct. 2140 (1974) (internal quotation omitted).

Dr. Kappelman also argues that the court's order was final, because it was "a final judgment as to [his] motion." However, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381 (citation omitted) (emphasis added). The trial court's order addressed only the ancillary issue of Dr. Kappelman's entitlement to a protective order limiting the scope of deposition, and clearly did not resolve the case "as to all the parties" involved in the litigation pertaining to Accutane. In addition, all of Dr. Kappelman's appellate arguments are premised on the likelihood of future litigation in North Carolina. We conclude that Dr. Kappelman has attempted to appeal from an interlocutory order.

B. Substantial Right

"As a general rule, interlocutory discovery orders are not immediately appealable." *K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 718-19, 708 S.E.2d 106, 108 (2011) (citing *Dworsky v. Insurance Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980) ("orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment."). However, N.C. Gen. Stat. § 7A-27(b)(3)(a) permits immediate appeal from an interlocutory order that "[a]ffects a substantial right." *See also* § N.C. Gen. Stat. § 1-277(a) ("An appeal may be taken from every judicial order or determination of a judge . . . which affects a substantial right[.]").

" 'Essentially a two-part test has developed — the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.' " *Braun v. Trust Dev. Group, LLC*, 213 N.C. App. 606, 609, 713 S.E.2d 528, 530 (2011) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not

reviewable before final judgment.' . . . Our courts generally have taken a restrictive view of the substantial right exception. . . . The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 165-66, 545 S.E.2d 259, 262 (2001) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (internal quotation omitted), and citing *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983), and *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 444 S.E.2d 252 (1994)).

Dr. Kappelman identifies two "substantial rights" that he contends are implicated by the trial court's order: his alleged right under the federal and state constitutions to be paid for expert testimony, and a right, based on Dr. Kappelman's contention that he qualifies as a "journalist," to refuse to divulge information that is protected by journalistic privilege. Dr. Kappelman speculates that Hoffmann-LaRoche may subpoena him as an expert witness in the future; that if this occurs, Hoffmann-LaRoche may be unwilling to pay him for his time,[3] or Hoffmann-LaRoche might seek information that Dr. Kappelman believes is privileged based on his assertion that he is a "journalist." It is undisputed that neither of these scenarios has yet occurred. Therefore, any opinion we might offer as to (1) Dr. Kappelman's right, if any, to a particular fee for his testimony; (2) whether Dr. Kappelman qualifies as a "journalist" or; (3) whether specific information is subject to a journalist's privilege would be entirely hypothetical and speculative. It is well-established that " 'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter rise, or give abstract opinions.' " *Baxter v. Jones*, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973) (quoting *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E. 2d 689, 700 (1960)).

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3. Dr. Kappelman does not discuss N.C. Gen. Stat. § 7A-305(d), which "sets out the costs that the trial court is 'required to assess.' Under . . . N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to assess costs for '[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.'" *Springs v. City of Charlotte*, 209 N.C. App. 271, 282, 704 S.E.2d 319, 327 (2011) (quoting *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004). "However, a trial court may tax expert witness fees as costs only when that witness is under subpoena." *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011) (citing *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010)).

We conclude that the trial court's order was interlocutory, that Dr. Kappelman has not identified any substantial right that would be jeopardized by delay of appeal, and that the issues raised by Dr. Kappelman all pertain to possible ramifications of a hypothetical subpoena that might or might not ever be issued, and thus do not present issues that are ripe for review. For these reasons, we conclude that Dr. Kappelman's appeal must be dismissed.

DISMISSED.

Judges STEPHENS and DAVIS concur.

JERRY M. MEDLIN, PLAINTIFF
v.
NORTH CAROLINA SPECIALTY HOSPITAL, LLC, TIMOTHY N. YOUNG, AND NORTH CAROLINA EYE, EAR, NOSE & THROAT, P.A., DEFENDANTS

No. COA13-818

Filed 1 April 2014

1. Appeal and Error—appealability—written order not entered

Plaintiff's motion to shorten time to notice hearing on plaintiff's motion to compel was not considered on appeal. No written order was ever entered; parties cannot appeal from and the Court of Appeals cannot consider an order which has not been entered.

2. Appeal and Error—interlocutory orders and appeals—privilege—substantial right

The Court of Appeals considered defendant hospital's appeal as to issues regarding privilege but did not consider the additional issues in an interlocutory order that did not affect a substantial right.

3. Discovery—written interrogatories—privilege—peer review documents

The trial court did not err in a medical malpractice case by requiring non-privileged questions to be answered regarding peer review documents. By requiring responses to written interrogatories instead of oral answers to deposition questions, the trial court gave defense counsel the opportunity to ensure that a witness did not inadvertently disclose information which went beyond the scope of the question asked.

4. Discovery—privileged documents—peer review—in camera inspection

The trial court did not err when it required defendant hospital to produce for *in camera* inspection alleged peer review privileged documents. The trial court had an interest in ensuring that the asserted information was indeed privileged and did not need to rely on the word of the interested party or its counsel.

5. Constitutional Law—ex parte hearings—notice—meaningful opportunity to be heard—deliberate choice to not attend

The trial court did not err in a medical malpractice case by allegedly holding *ex parte* hearings without affording defendant hospital adequate notice and a meaningful opportunity to be heard. What defendant characterized as an *ex parte* hearing without adequate notice to all parties was actually a properly noticed hearing that defendant made a deliberate choice not to attend.

6. Appeal and Error—interlocutory orders and appeals—no substantial right

Although defendant hospital contended that the trial court erred in a medical malpractice case when it awarded attorney fees on plaintiff's motions to compel, the issue was dismissed. Defendant failed to argue a substantial right.

7. Appeal and Error—sanctions—frivolous appeal—reasonable attorney fees

The Court of Appeals taxed defendant hospital personally with the costs of this frivolous appeal and the attorney fees incurred in this appeal by plaintiff. Pursuant to N.C. R. App. P. 34(c), the case was remanded to the trial court for a determination of the reasonable amount of attorney fees incurred by plaintiff in responding to this appeal.

Appeal by defendant North Carolina Specialty Hospital, LLC from orders entered 11 March 2013 and 14 March 2013 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 12 December 2013.

Bill Faison, for plaintiff-appellee.

Brown Law LLP, by Gregory W. Brown and Amy H. Hopkins, for defendant-appellant North Carolina Specialty Hospital, LLC.

STROUD, Judge.

Defendant North Carolina Specialty Hospital, LLC appeals orders addressing various motions regarding pretrial matters. For the following reasons, we affirm and remand to the trial court for determination of the reasonable amount of attorney fees incurred by plaintiff in responding to this appeal.

I. Background

On 5 January 2011, plaintiff filed a verified complaint against defendants for medical malpractice arising from plaintiff's cataract surgery, which was performed by defendant Timothy N. Young, an employee of defendant North Carolina Eye, Ear, Nose & Throat, P.A. Plaintiff alleged that he suffered permanent damage to his eye and extreme pain as a result of the negligent use of Methylene Blue in his eye. Methylene Blue is known to be toxic to the eye, but it was mistakenly used instead of VisionBlue, a non-toxic stain intended for use in eye surgery. On or about 21 March 2011, defendant North Carolina Specialty Hospital, LLC ("defendant Hospital") answered plaintiff's complaint by denying liability and asserting three "affirmative defenses," stated as a non-specific failure "to state facts sufficient to constitute a cause of action[;]" "all applicable statutes of limitation and repose[;]" and "[p]laintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure." Various pretrial motions, many involving discovery, ensued, and we will discuss only those relevant for purposes of this appeal.

On or about 7 March 2013, the trial court signed an order ("Order 1") addressing pretrial motions made by the parties. The order provided that

> the Court allows the Plaintiff's Motion to Shorten Time for giving notice of this hearing so that the hearing may go forward. Moreover, the Court in its discretion and pursuant to Paragraph 13 of the Consent Amended Discovery Scheduling Order of 3 October 2012 extends the time set forth in Paragraph 6 of that Order through and including March 8, 2013. In its discretion the Court denies the Hospital's Motion For Protective Order regarding depositions noticed for March 8, 2013, and further in its discretion orders that the depositions of Joy Boyd and Cathy Pruitt and Randy Pisko, and the Civil Procedure Rule 30(b)(6) Deposition of the Hospital . . . [shall go forward

> prior to 15 March 2013] under the terms and conditions as noticed by the Plaintiff.
>
> Plaintiff's Motion to Compel Discovery is noticed for hearing March 11, 2013. To the extent Hospital's Motion For Protective Order is directed at the Notice of Hearing and/or the timing of the Notice of Hearing for March 11, 2013, in the Court's discretion the time for giving notice is shortened to the time when it was given, and Hospital's Motion is denied, and hearing on Plaintiff's Motion to Compel Discovery shall go forward on March 11, 2013 as noticed. The Court has not taken up the substantive issues raised by the Plaintiff's Motion to Compel or the Hospital's Motion for Protective Order relating to the Plaintiff's Motion to Compel, leaving those matters for hearing on March 11, 2013.

On 14 March 2013, the trial court entered an order ("Order 2") regarding further pretrial motions. After reviewing numerous documents including motions, answers to interrogatories, a response to a request for production of documents, deposition transcripts, exhibits, and authority, the trial court found

> as a Fact that in the course of the depositions of Joy Boyd and Cathy Pruitt Hospital's counsel instructed both not to answer questions regarding the process of the investigation undertaken as a result of events described in the Plaintiff's complaint. The Court, in its discretion orders that the questions Joy Boyd was instructed not to answer all be answered as if posed by written interrogatories and counsel for the Hospital shall serve answers on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax, (email if agreed to by the parties) or hand delivery as follows . . .

The trial court then recited portions of Joy Boyd's deposition and ordered

> the questions Cathy Pruitt was instructed not to answer as set out below be answered as if posed by written interrogatories and counsel for the Hospital shall serve answers on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax (email if agreed to by the parties) or hand delivery as follows . . . .

The trial court then recited portions of Cathy Pruitt's deposition. The trial court went on to order

> that the Hospital shall provide a "Privilege Log" with the specificity as requested in Paragraph 23 of the Plaintiff's First Set of Interrogatories to Hospital and shall serve the "Privilege Log" on counsel for Plaintiff by 4 o'clock p.m. March 15, 2013 by fax, (email if agreed to by the parties) or hand delivery.
>
> The Court has reviewed Defendant Hospital's Exhibit 1 In Camera and in its discretion concludes that those documents were prepared pursuant to NCGS § 131E-95(b) and are protected from production by the peer review statues.
>
> The Court having determined that eighteen of the twenty-one questions Joy Boyd and Cathy Pruitt were instructed not to answer are ordered answered, and that the privilege log sought by Plaintiff of the Hospital is ordered produced that Plaintiff is entitled to recover attorneys' fees and costs for bringing forward his Rule 37 Motion. The Court reserves ruling on the amount for further hearings into the time this matter required of Plaintiff's counsel including bringing forward both motions to compel, preparing for hearing, attending hearing and preparing this Order.

Defendant Hospital appeals Order 1, Order 2, and "the March 11, 2013 Oral Order [made between Order 1 and Order 2] requiring the production of peer-review privileged documents for in camera review by the trial judge and allowing the Plaintiff's Motion to Shorten Time to Notice Hearing on the Plaintiff's Motion to Compel" ("Ruling").

II. Ruling

[1] As to the Ruling on the plaintiff's Motion to Shorten Time to Notice Hearing on "the Plaintiff's Motion to Compel[,]" no written order was ever entered. This Court has previously determined that parties

> cannot appeal from and this Court cannot consider an order which has not been entered. *See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147–48, 189 S.E.2d 655, 657 (1972) ("The general rule is that, the mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal or writ of error. As to oral opinions it is said that, a mere oral order or decision which has never been expressed in a written

> order or judgment cannot, under most authorities, support an appeal or writ of error. There is case authority in North Carolina for this rule. In *Taylor v. Bostic*, 93 N.C. 415 (1885) the trial court entered a written statement of his opinion, but no order or judgment was entered. The North Carolina Supreme Court held that the appeal was premature, there being no judgment and therefore no question of law presented from which appeal could be taken." (citations, quotation marks, and brackets omitted)).

Dafford v. JP Steakhouse LLC, 210 N.C. App. 678, 683, 709 S.E.2d 402, 406 (2011). Accordingly, we will not consider any arguments on appeal regarding the trial court's oral Ruling. *See id.*

III. Interlocutory Order

[2] Defendant Hospital acknowledges that its appeal is interlocutory but contends that a substantial right regarding "the production of privileged materials and testimony" would be affected should this Court not hear its appeal. Plaintiff contends that defendant Hospital's appeal asserts that it is regarding privileged material but in actuality the material is not privileged. Plaintiff further argues that defendant Hospital attempts to appeal a decision the trial court made upon its own request and other issues which in no way affect a substantial right.

> Generally, orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. As this Court has explained: Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege.

Britt v. Cusick ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Jan. 7, 2014) (No. COA13-387) (citations and quotation marks omitted). Accordingly, we consider defendant Hospital's appeal as to issues regarding privilege and these issues alone; *see id.*, to the extent that plaintiff is correct, and defendant Hospital has invited its own "error" or raised issues which would not affect a substantial right, we will consider whether said issues are appropriate for our substantive review on appeal.

IV. Depositions Regarding Peer Review Privileged Matters

[3] Defendant Hospital first contends that "[t]he Trial Court erred when it ruled that Plaintiff's Counsel could secure deposition testimony on Peer Review Privileged matters." Defendant Hospital argues that the trial court erred in Order 2 when it

> ordered that the depositions of Randi Shults, Joy Boyd, and Cathy Pruitt proceed without placing appropriate limitations on their scope to ensure that questions regarding matters that were the subject of evaluation and review by The Hospital's Peer Review Committee were not posed, thereby jeopardizing The Hospital's Peer Review Privilege[,]

and when it "ordered that the handful of questions that undersigned counsel instructed witnesses Joy Boyd and Cathy Pruitt not to answer on the basis of the Peer Review Privilege be answered as if posed by written interrogatories."

As to the trial court's alleged failure to limit the scope of various depositions, defendant Hospital makes no real argument other than stating that the trial court erred nor does defendant Hospital cite any law supporting this assertion. In addition, the trial court did actually limit the scope of the depositions and did not permit all of the questions requested by plaintiff. Indeed, in this argument the only relief defendant Hospital requests is that this Court "vacate Judge Gessner's 14 March 2013 Order requiring The Hospital to provide additional testimony from Ms. Boyd and Nurse Pruitt." Accordingly, we address only the issue regarding the trial court's order requiring Joy Boyd and Cathy Pruitt to answer certain questions which had been asked at the depositions in the form of interrogatories. *See Holleman v. Aiken*, 193 N.C. App. 484, 508, 668 S.E.2d 579, 594 (2008) ("[P]laintiff has cited no legal authority in support of her argument, and pursuant to North Carolina Rule of Appellate Procedure 28(b)(6), it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).").

In order to determine if the trial court erred in requiring individuals to provide allegedly privileged information we must first determine if the information is indeed privileged. Defendant Hospital contends that the requested information is privileged pursuant to North Carolina General Statute § 131E-95(b). Questions as to what is privileged pursuant to North Carolina General Statute § 131E-95(b) are reviewed *de novo*. *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 535, 694

S.E.2d 416, 419 ("Thus, we review de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E–95(b)."), *disc. review denied*, 364 N.C. 602, 703 S.E.2d 158 (2010).

As to North Carolina General Statute § 131E–95, this Court has stated,

> By its plain language, N.C. Gen. Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee. Additionally, N.C.G.S. § 131E–95 states: However, information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.

Woods v. Moses Cone Health Sys., 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has further clarified though that the

> provisions [in North Carolina General Statute § 131E–95] mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee.
>
> The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 83-84, 347 S.E.2d 824, 829 (1986) (citation omitted).

Plaintiff contends that neither Joy Boyd nor Cathy Pruitt "are members of a peer review committee or ever met with a peer review committee related to this matter." While we do not have the entire deposition of either Joy Boyd or Cathy Pruitt, defendant Hospital's brief identifies Joy Boyd as the Hospital's Director of Surgical Services and Cathy Pruitt as a nurse who assisted another nurse in using the Pyxis machine that dispensed Methylene Blue. Defendant Hospital does not contend that Joy Boyd or Cathy Pruitt are members of the peer review committee or that they ever met with a peer review committee though it does contend that Joy Boyd prepared documents for review by the peer review committee. Defendant Hospital directs us to portions of the record which it contends show that Joy Boyd and Cathy Pruitt testified "that everything they did in terms of discussing and investigating the incident was done within the Peer Review Process[;]" however, the cited portion of the record includes statements made by defendant Hospital's attorney, not testimony from either Joy Boyd or Cathy Pruitt. Furthermore, even defendant Hospital's attorney stated in the cited portions,

> I asked each one of them, "was it your understanding when these conversations are going on that it was part of the peer-review process?" Ms. Boyd said *her role was to work with the risk manager to gather data at the direction of the peer-review committee*. That was what she says. '*I prepare things*' – page 25, line 2. '*I prepare things that go to the peer-review process*.' "

(Emphasis added.) But "prepar[ing] things" for a peer review committee does not necessarily mean that the information gathered is privileged:

> [t]he statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee.

Id.

Lastly, and most importantly, we have reviewed the questions which the trial court ordered Joy Boyd and Cathy Pruitt to answer in the form of responses to written interrogatories, and we disagree with defendant

Hospital's contentions that such questions are privileged pursuant to North Carolina General Statute § 131E–95. The questions are as follows:

- "Did you prepare a report as a result of your investigation?"
- "Tell me what you did. When you say you and she worked together what are you trying to describe to me?"
- "Well, tell me how it works. How did you work together, what did you do? You're – that's what I want to understand. If – If I were sitting there watching the two of you, tell me what I see you doing."
- "Tell me what I see the two of you doing."
- "Now when you say we prepare a document, who – who dictates it?"
- "Did you do that in this instance?"
- "What part of it did you prepare?"
- "In this instance did you make notes?"
- "Have you preserved those notes, the one made in this instance?"
- "Where do you keep those notes if you have preserved them in this instance?"
- "In this instance was the report that you prepared for this instance kept in risk management?"
- "[D]id you appear before a peer review committee to discuss this incident?"
- "Did you appear before the peer review committee in this instance?"
- "Did you investigate why Vision Blue was not in the Pyxis?"
- "So what mentoring did risk management do for you in this – in the interview process for this incident?"
- "Other than gathering factual information from the nurses did the report you generated do anything other than – anything else?"

- "Do you maintain a copy of the document you prepared in your offices or in the offices under your supervision and control?"
- "Did Joy Boyd interview you about this matter?"
- "Did you talk with Joy Boyd after this event occurred?"
- "At any time have you given a written statement to anyone regarding your interaction with Ms. Whitt relating to the removal of methylene blue from the Pyxis machine on May 19, 2008?"
- "Have you had an opportunity to review any statement that you might have – well, let [sic] see, have you had an opportunity to review any statements you might have given?"

The questions are not regarding the (1) proceedings of a medical review committee [or] (2) records and materials produced by a medical review committee[.]" *Woods*, 198 N.C. App. at 126, 678 S.E.2d at 792. While the questions may implicate "materials considered by a medical review committee[;]" *id.*, there is "an exception to materials which would otherwise be immune under the third category of items" for "information not generated by the committee itself but merely presented to it[.]" *Shelton*, 318 N.C. at 83-84, 347 S.E.2d at 829. To the extent that any questions Joy Boyd and Cathy Pruitt were ordered to answer were regarding information that is protected by North Carolina General Statute § 131E-95, the questions most certainly fall into the exception of the third category. *See id.* In addition, by requiring responses to written interrogatories instead of oral answers to deposition questions, the trial court gave defendant's counsel the opportunity to ensure that a witness does not inadvertently disclose information which may go beyond the scope of the question asked. Accordingly, the trial court did not err in requiring the non-privileged questions to be answered, and this argument is overruled.

V. *In Camera* Review

[4] Defendant Hospital next contends that "the trial court erred when it required the defendant [Hospital] . . . to produce for *in camera* inspection [of] peer review privileged documents." (Original in all caps.) Defendant Hospital argues that the trial court should have relied upon other evidence to determine that the documents were indeed privileged, as defendant Hospital claimed they were. Defendant Hospital cites no authority for its assertion that if a party claims that a document is

privileged, then the trial court must accept this claim without reviewing the document in camera to make an independent legal determination of privilege. Indeed, there is abundant authority otherwise. *See*, *e.g.*, *Bryson*, 204 N.C. App. at 535, 694 S.E.2d at 419 (noting that whether a document is privileged pursuant to North Carolina General Statute § 131E–95 is a question of law). Both the United States Supreme Court and our Supreme Court have approved *in camera* review of information which is subject to a claim of privilege:

> More than a century ago, this Court held that the responsibility of determining whether the attorney-client privilege applies belongs to the trial court, not to the attorney asserting the privilege. Thus, a trial court is not required to rely solely on an attorney's assertion that a particular communication falls within the scope of the attorney-client privilege. In cases where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an *in camera* inquiry of the substance of the communication. *See State v. Buckner*, 351 N.C. 401, 411–12, 527 S.E.2d 307, 314 (2000) (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); *State v. Taylor*, 327 N.C. at 155, 393 S.E.2d at 807 (same); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).
>
> We note that the United States Supreme Court has also placed its imprimatur on the need for *in camera* inspections in circumstances where application of the privilege is contested. *Zolin*, 491 U.S. 554, 105 L.Ed. 2d 469 (*in camera* review to determine whether the crime-fraud exception to attorney-client privilege applies); *United States v. Nixon*, 418 U.S. 683, 41 L.Ed. 2d 1039 (1974) (*in camera* review to determine whether communications are subject to the executive privilege). The necessity for an *in camera* review of attorney-client communications in some cases is also endorsed by the Restatement of the Law Governing Lawyers: In cases of doubt whether the

> privilege has been established, the presiding officer may examine the contested communication *in camera*.

In re Investigation of Death of Eric Miller, 357 N.C. 316, 336-37, 584 S.E.2d 772, 787 (2003) (citations and quotation marks omitted). Although *Miller* addressed attorney-client privilege, the general principles which apply here are the same: the determination of privilege is a question of law which the trial judge must decide and *in camera* review of the evidence in question is proper. *See generally id.* Thus, the case law supports that on the question of privilege, the trial court certainly has an interest in ensuring that the asserted information is indeed privileged and need not rely on the word of the interested party or its counsel. *See generally id.*

Defendant Hospital goes on to contend that the trial court's "*in camera* review has colored its reception to The Hospital's defenses in this case and, if left unchecked, will likely produce a damaging effect on Peer Review Investigations[.]"[1] Defendant Hospital cites to portions of the trial court's statements in court that "someone is not acting reasonably," claiming that the trial court's review of the evidence caused the court to be "unmistakabl[y]" "prejudice[d]" against it. But the trial court did not indicate *which* party may not be "acting reasonably," and even assuming *arguendo* the trial court was implying that defendant Hospital was being unreasonable there is absolutely no evidence that the trial court made such statements because of the documents it reviewed *in camera*. Defendant Hospital "doth protest too much, methinks." William Shakespeare, *Hamlet* act 3, sc. 2.

In addition, because of their duty to rule upon claims of privilege and admissibility of evidence, it is extremely common for trial judges to acquire knowledge of evidence which is privileged, irrelevant, unfairly prejudicial, illegally gathered, or otherwise incompetent, but they also are quite accustomed to ruling upon cases without consideration of the content of any privileged or incompetent evidence previously viewed. Were we to accept defendant Hospital's argument, a trial judge would need to be recused after any *in camera* consideration of seriously damaging evidence, even if the judge determines that the evidence is protected by privilege, upon the theory that the trial judge may then be prejudiced against the party who sought to protect the evidence. There

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1. We also note that the documents which defendant Hospital claims that the trial court should not have reviewed *in camera* were not included in the record on appeal so that we could also review them *in camera*. Presumably, defendant Hospital feared that we, like the trial court, would be unable to maintain our impartiality if we were to review these records.

is simply no legal basis for such a claim, nor any factual basis to think that such a thing happened in this case. This argument is overruled.

VI. Notice

[5] Defendant Hospital next contends that "the trial court erred in holding ex parte hearings without affording the defendant [Hospital] . . . adequate notice and a meaningful opportunity to be heard." (Original in all caps.) The hearing of which defendant complains here was the 6 March 2013 hearing as to defendant Hospital's Motion for Protective Order. Yet what defendant seeks to characterize as an *ex parte* hearing without adequate notice to all parties was actually a properly noticed hearing that defendant Hospital made a deliberate choice not to attend. Even according to defendant Hospital's brief, after being notified of the time of the hearing, "[t]he Hospital undertook great efforts to inform the Court that it could not attend the 6 March 2013 hearing on its Motion[.]" Indeed, the record contains a letter from defendant Hospital's counsel noting that though aware of the hearing "none of our team is available to be heard this week. . . . For our part, we simply have other long-standing obligations in other cases in order to be ready to try this case." Defendant Hospital's "long-standing obligations in other cases" was, according to defendant Hospital, a meeting with expert witnesses at counsel's office, and use of the word "team" seems to indicate that defendant Hospital's counsel's firm does have more than one attorney. Defendant's counsel made the decision that not even one member of the "team" could attend the hearing on 6 March 2013, and that is their prerogative, but it does not entitle them to relief. Defendant Hospital had both notice of the hearing and an opportunity to be heard; defendant Hospital just chose not to exercise the opportunity. The fact that defendant Hospital chose not to attend without filing any motion requesting a continuance or other relief, and according to its own letter instead chose to interview expert witnesses, in no way indicates a due process violation on the part of the trial court. *See generally State v. Poole*, ___ N.C. App. ___, ___, 745 S.E.2d 26, 34 (" 'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18, 32 (1976) (citation and quotation marks omitted)."), *disc. review denied and appeal dismissed*, ___ N.C. App. ___, 749 S.E.2d 885 (2013). Accordingly, this argument is overruled.

VII. Sanctions

[6] Lastly, defendant Hospital contends that "the trial court erred when it awarded attorney's fees on the plaintiff's motions to compel."

(Original in all caps.) In Order 2, the trial court stated, "Plaintiff is entitled to recover attorneys' fees and costs for bringing forward his Rule 37 Motion. The Court reserves ruling on the amount for further hearings into the time this matter required[.]"

> [A]n appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded. For this Court to have jurisdiction over an appeal brought prior to that point, the appellant would have to show that waiting for the final determination on the attorneys' fees issue would affect a substantial right.

Triad Women's Ctr., P.A. v. Rogers, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660-61 (2010). As defendant Hospital failed to argue a substantial right as to attorneys' fees, we dismiss this portion of defendant Hospital's appeal as interlocutory. *See id.*

[7] We further note that pursuant to North Carolina Rule of Appellate Procedure 34 plaintiff has also filed a motion requesting this Court to sanction defendant Hospital because defendant Hospital's appeal was frivolous. *See* N.C.R. App. P. 34. We agree that most of defendant Hospital's arguments lack legal or factual basis and believe it is appropriate to sanction defendant Hospital the cost of plaintiff's attorney's fees regarding this appeal.

> [W]e therefore tax [defendant Hospital] personally with the costs of this appeal and the attorney fees incurred in this appeal by [plaintiff]. Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by [plaintiff] in responding to this appeal.

Ritter v. Ritter, 176 N.C. App. 181, 185, 625 S.E.2d 886, 888-89, *disc. review denied and appeal dismissed*, 360 N.C. 483, 632 S.E.2d 490 (2006).

VIII. Conclusion

For the foregoing reasons, we affirm and remand in part.

AFFIRMED and REMANDED in part.

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

VICKIE MILLER, EMPLOYEE/PLAINTIFF
v.
CAROLINAS MEDICAL CENTER—NORTHEAST, SELF-INSURED EMPLOYER, DEFENDANT

No. COA13-1028

Filed 1 April 2014

1. Workers' Compensation—average weekly wage—Form 21 agreement—rescission—verification provision—reasonable time

The Industrial Commission erred in a workers' compensation case by reforming the amount of plaintiff employee's average weekly wage from the amount contained in the Form 21 agreement that had been approved by the Full Commission in 2007. The Full Commission lacked the authority to change plaintiff's average weekly wage since any mistake by the parties in its calculation was a mistake of law, not of fact and, therefore, not subject to rescission. However, a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a "reasonable time" has passed.

2. Workers' Compensation—temporary total disability modification—additional benefits claim—timeliness

The Industrial Commission did not err in a workers' compensation case by allowing plaintiff's claim for additional benefits relating to her 2006 injury even though defendants contended they were time-barred by either N.C.G.S. §§ 97-25.1 or 97-47. Plaintiff timely filed her claim for additional benefits. However, the amount of temporary total disability due to plaintiff for the periods of her disability from 2008-2010 was modified based on the Commission's improper modification of the Form 21 agreement.

Appeal by Defendant from opinion and award entered 30 May 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2014.

The Sumwalt Law Firm, by Vernon Sumwalt, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffrey A. Kadis, M. Duane Jones, and Melissa H. Grimes, for Defendant.

DILLON, Judge.

Defendant Carolinas Medical Center — Northeast appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission reforming a Form 21 agreement executed by Defendant and Plaintiff Vickie Miller and granting Plaintiff's claim for additional workers' compensation benefits relating to a previously determined compensable injury. For the following reasons, we affirm in part, vacate in part, and reverse and modify in part.

I. Factual & Procedural Background

Plaintiff was thirty-two years old and had been employed by Defendant as an emergency room nurse for more than eleven years at the time of her hearing before the Full Commission. The record evidence, as presented before the Full Commission, tends to show the following: On 21 August 2006, Plaintiff sustained an injury to her lower back while working within the scope of her employment with Defendant. Defendant did not contest the compensability of Plaintiff's injury and paid for Plaintiff's medical treatment through 26 December 2006, when Plaintiff's physician, Dr. Michael Meighen, determined that Plaintiff had reached maximum medical improvement and assigned her a five percent permanent partial disability (PPD).

The parties signed a Form 21 agreement entitling Plaintiff to five percent PPD as compensation for her 2006 injury consistent with Dr. Meighen's determination. The PPD award was calculated based on an average weekly salary of $689.21 and corresponding compensation of $459.50. The Form 21 agreement was approved by the Full Commission on 29 November 2007.

Plaintiff proceeded to perform her job duties and did not seek further treatment for her back until 9 September 2008, when she returned to Dr. Meighen reporting increased pain in her lower back. Ultimately, Dr. Meighen opined that Plaintiff's "issues [were] unrelated to any work-related injury[,]" speculating that Plaintiff might have contracted Lyme disease. As a result of Dr. Meighen's determination, Defendant filed a Form 61 on 26 September 2008 denying Plaintiff further coverage for medical treatment relating to her 2006 injury.

On 31 December 2008, Plaintiff presented for treatment with Dr. Brian Rose, an orthopedic surgeon who specializes in treating spinal injuries. Dr. Rose opined that Plaintiff's back issues "likely correspond[ed] to her original work injury."

On 17 July 2009, Plaintiff presented for treatment with Dr. Daniel Oberer, a board-certified neurosurgeon, who determined that Plaintiff's back injury required surgery. Dr. Oberer performed three surgical procedures on Plaintiff. Although the first two procedures failed to produce the desired results, the third procedure, which was performed on 1 November 2010, proved successful. Plaintiff thus returned to her full-time nursing position with Defendant on 31 December 2010 and has continued working in that capacity ever since.

In November 2010, Plaintiff filed a Form 18M with the Commission, seeking medical compensation for her 2006 injury in addition to the coverage already provided under the Form 21 agreement that had been approved by the Full Commission in 2007. On 29 August 2011, Plaintiff filed an Amended Form 18, alleging that there had been a "change of condition" since she entered into the Form 21 agreement. Plaintiff also requested that her claim be assigned for hearing, asserting that Defendant had underpaid her PPD benefits "based on [a] miscalculation of [her] average weekly wage" in the Form 21 agreement. In response, Defendant filed a Form 33R asserting that Plaintiff had "failed to make her claim regarding a change of condition within 2 years of the last payment of medical compensation" and that, accordingly, her claim was barred under the applicable statute of limitations.

On 17 November 2011, Plaintiff's claim came on for hearing before Deputy Commissioner James C. Gillen, who ultimately entered an opinion and award favorable to Plaintiff. Defendant appealed to the Full Commission, which, by opinion and award entered 30 May 2013, affirmed with modifications the Deputy Commissioner's decision. The substance of the Full Commission's opinion and award, in pertinent part, was as follows:

> (1) The Form 21 agreement was reformed by the Commission to reflect what it determined to be the correct average weekly wage, $691.11, instead of $689.21, to which the parties had agreed in the original Form 21 agreement;
>
> (2) Defendant was ordered to pay Plaintiff $18.90, representing the deficiency owed to Plaintiff as a result of the new computation of the average weekly wage;
>
> (3) Plaintiff's claims for additional benefits relating to the August 2006 accident were not time-barred;
>
> (4) Defendant was ordered to pay Plaintiff temporary total disability benefits in the amount of $460.76 – an amount

> based on the recalculated average weekly benefits – for the periods between 2008 and 2010 that Plaintiff missed work due to her injury; and
>
> (5) Defendant was ordered to pay Plaintiff's medical bills incurred subsequent to the Form 21 agreement relating to Plaintiff's back injury.

From this opinion and award, Defendant appeals.

II. Analysis

A. Standard of Review

Our standard of review is well-established:

> Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*.

Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 442–43, 640 S.E.2d 744, 748 (2007) (internal citations omitted).

B. Reformation of the Form 21 Agreement

[1] Defendant first contends that the Full Commission erred in reforming the amount of the average weekly wage from the amount contained in the Form 21 agreement that had been approved by the Full Commission in 2007. We agree.

With respect to Plaintiff's average weekly wage, the parties agreed in the Form 21 agreement that "[t]he average weekly wage of the employee at the time of the injury, including overtime and allowances, was $689.21, subject to verification[.]" It is unclear whether, in changing the average weekly wage figure from $689.21 to $691.11, the Full Commission was *rescinding* the "average weekly wage" provision in the Form 21 agreement pursuant to N.C. Gen. Stat. § 97-17, or whether the Full Commission was simply *enforcing* the "average weekly wage" provision, specifically, the phrase which provides that the calculation was "subject to verification." We believe, in either case, that the Full Commission erred in changing the agreed-upon figure for the reasons stated below.

To the extent that the Full Commission's "reformation" constituted a *rescission* of the Form 21 agreement, we believe that we are compelled under *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 484 S.E.2d 845 (1997), to conclude that the Full Commission lacked the authority to change the Plaintiff's average weekly wage since any mistake by the parties in its calculation was a mistake of law, not of fact and, therefore, not subject to rescission.

Rescission of a workers' compensation settlement agreement, such as a Form 21, is governed by N.C. Gen. Stat. § 97-17, which provides, in pertinent part, as follows:

> No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or *mutual mistake*, in which event the Commission may set aside the agreement. Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.

N.C. Gen. Stat. § 97-17(a) (2011) (emphasis added). The foregoing provision "provides the Commission with the authority to set aside a Form 21 Agreement entered into upon a mutual mistake of fact." *Foster v. Carolina Marble & Tile Co., Inc.*, 132 N.C. App. 505, 508-09, 513 S.E.2d 75, 78 (1999) (citing N.C. Gen. Stat. § 97-17) (emphasis added). "A mistake of law, however, unless accompanied by fraud, misrepresentation, undue influence, or abuse of a confidential relationship, 'does not affect the validity of a contract.' " *Id.* at 509, 513 S.E.2d at 78 (citation omitted). In *Swain*, we addressed the issue of whether the Commission should have set aside a Form 21 agreement on grounds of an "alleged error in the Agreement relat[ing] to the computation of the [claimant's] 'average weekly wages.' " *Swain*, 126 N.C. App. at 335, 484 S.E.2d at 848. We held the following:

> The determination of the plaintiff's "average weekly wages" requires application of the definition set forth in the Workers' Compensation Act, N.C.G.S. § 97-2(5) (1991), and the case law construing that statute and thus raises an issue of law, not fact. *See Lawrence v. Tise*, 107 N.C. App. 140, 145, 419 S.E.2d 176, 179 (1992) (legal issue presented where resolution of issue requires application of

> fixed rules of law); *Craft v. Bill Clark Construction Co.*, 123 N.C. App. 777, 780, 474 S.E.2d 808, 810-11 (not always appropriate to deduct expenses incurred in earning those wages in computing "average weekly wages"), *disc. rev. denied*, 345 N.C. 179, 479 S.E.2d 203 (1996). Because there is no evidence of fraud, misrepresentation, undue influence or abuse of a confidential relationship, any mistake made by either or both of the parties to the Agreement in the computation of the "average weekly wages" is not a basis for setting it aside.

Id. In *Foster*, we construed *Swain* as standing for the proposition that where "the parties needed to look to the Act, as well as the caselaw [sic] construing the Act, in order to determine the correct amount of the plaintiff's average weekly wages, . . . the issue [was] one of law, not fact." *Foster*, 132 N.C. App. at 509, 513 S.E.2d at 78.

Here, the Full Commission expressly found that the average weekly wage figure of $689.21 set forth in the original Form 21 agreement had been calculated by (1) dividing Plaintiff's earnings for the prior 52 weeks by 365 and then (2) multiplying the quotient by 7. The Commission further found that our General Statutes – specifically, N.C. Gen. Stat. § 97-2(5) – do not provide for the calculation of the average weekly wage to be made in the manner that had been employed in the original Form 21 agreement, but instead require that the calculation be made by dividing Plaintiff's earnings for the previous 52 weeks by 52, which, in this case, would yield a quotient of $691.11.

Applying *Swain*, we conclude that the alleged error in computing Plaintiff's average weekly wages on the parties' Form 21 agreement constituted an error of law, not of fact. As reflected in the Commission findings, the Commission's review of the purported computational error, as well as the propriety of the method which had produced that error, required reference to, and construction of, the provisions of our General Statutes. The nature of this inquiry clearly reveals the asserted error as one of law. Accordingly, we hold that based on the precedent of this Court, the Commission erred in setting aside the original Form 21 agreement. *Swain*, 126 N.C. App. at 335, 484 S.E.2d at 848; Foster, 132 N.C. App. at 509, 513 S.E.2d at 78.[1]

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1. We note that the Commission cites *Bond*, 139 N.C. App. 123, 532 S.E.2d 583 (2000), in its opinion and award as supportive of its decision to reform the Form 21 agreement. The procedural posture presented in *Bond*, however, renders that case inapplicable. In *Bond*, the plaintiff appealed to this Court, assigning error to the computational method

Plaintiff alternatively argues that the Full Commission was not actually *rescinding* the parties' agreement in Form 21 agreement concerning the average weekly wage figure, but rather *enforcing* a contractual provision therein that provides that the average weekly wage figure is "subject to verification." To the extent that the Full Commission was merely *enforcing* this verification provision, we believe that our analysis in *Swain* does not apply because, as we noted in *Pruett v. Pruett Floor Coverings*, 2004 WL 383281 (N.C. App. 2004) (unpublished), after *Swain* was decided, the verification provision was not made part of the standard Form 21 agreement until after *Swain*.[2] In other words, the standard Form 21 which was analyzed by this Court in *Swain* did not contain the verification provision.

In the present case, Defendant essentially argues that the parties do not have the right to seek verification of the average weekly wage under the verification provision of the Form 21 agreement once the agreement has been approved by the Full Commission.[3] The Form 21 agreement does not specify any time by which either party seeking verification of the average weekly wage figure must request such verification. Our Supreme Court has held that when a contract does not specify a time by which some duty or right therein is to be performed or exercised, "a reasonable time will be implied as a matter of law." *Colt v. Kimball*, 190 N.C. 169, 173, 129 S.E. 406, 409 (1925) (holding that under a contract to deliver goods, and no time of delivery is specified, delivery must be made within a "reasonable time"); *see also Trust Co. v. Ins. Co.*, 199 N.C. 465, 154 S.E. 743 (1930) (holding that where a policyholder had the right to seek reinstatement of his policy, "[i]f no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time"); *Lewis v. Allred*, 249 N.C. 486, 106 S.E.2d 689 (1959) (holding that where a contract to

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used by the Commission in its opinion and award from which the plaintiff was appealing. *Id.* at 127, 532 S.E.2d at 586. Here, Plaintiff is not appealing from an opinion and award in which the allegedly erroneous computation was made; rather, Plaintiff has raised the alleged error in order to invalidate the original Form 21 agreement.

2. The revised Form 21 also provides that the parties to an agreement may agree to waive the "subject to verification" language.

3. We note that in *Pruett* we held that the parties had the right to request the Full Commission to "verify" the average weekly wage figure contained in a Form 21 agreement. *Pruett*, 2004 WL 383281, at *5 (noting that "[t]he present printed Form 21 explicitly states that the listed wage is "subject to verification"). However, it does not appear that either party in that case raised the argument raised by Defendant in this case, as we did not address the argument.

sell land does not specify a closing date, "the law implies that it will be done within a reasonable time"). Following these principles, we hold that a party to a Form 21 agreement *which contains a verification provision but no provision regarding the time by which verification must be sought* cannot assert a right to seek verification once a "reasonable time" has passed.

In *Colt*, our Supreme Court stated that what constitutes a "reasonable time" is "generally a mixed question of law and fact, and, therefore, for the [fact-finder], but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law." 190 N.C. at 174, 129 S.E. at 409. The Court, further stated that "[w]here the delay is so great as to support only one inference in the minds of all reasonable persons, then it is clearly the duty of the [court] to declare it unreasonable as a matter of law." *Id.*

In the present case, the findings made by the Full Commission – the finder of fact in this case – and the record on appeal reveal that the parties entered into the Form 21 agreement; the Form 21 agreement was approved by the Full Commission in November 2007; Defendant tendered and Plaintiff accepted benefits based on the average weekly wage calculation in the Form 21 agreement; and Plaintiff did not file any request with the Full Commission seeking verification of the calculation of her average weekly wage until her attorney filed an Amended Form 18 in August 2011.

Generally, the determination as to what constitutes a reasonable time would be a question to be resolved by the Full Commission, as the finder of fact. However, in this case, we believe that Plaintiff waited an unreasonable amount of time to seek verification, as a matter of law. We believe that, under the facts of this case, by August 2011 – being more than three and one half years after the initial benefits had been tendered and accepted and the Form 21 agreement had been approved by the Full Commission - *neither party* had the right to seek verification. Accordingly, we hold that, with respect to any claim for benefits arising out of the August 2006 accident, Plaintiff's average weekly wage is deemed to be $689.21 as agreed upon by the parties in their Form 21 agreement.

C. Additional Medical Treatment

[2] Defendant further argues that the Commission erred in allowing Plaintiff's claim for additional benefits relating to her 2006 injury, contending that her claim for additional benefits was time-barred by either N.C. Gen. Stat. § 97-25.1 or N.C. Gen. Stat. § 97-47. We disagree.

N.C. Gen. Stat. § 97-25.1 imposes, in pertinent part, the following limitation upon a claimant's right to seek medical compensation:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, . . . the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission[.]

N.C. Gen. Stat. § 97-25.1 (2011).

Moreover, although N.C. Gen. Stat. § 97-47 authorizes the Commission to increase the amount of workers' compensation benefits previously awarded to a claimant where there is "a change in condition" – which "[o]ur case law defines . . . as a condition occurring after a final award of compensation that is 'different from those existent when the award was made' [and that] results in a substantial change in the physical capacity to earn wages," *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (quoting *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987)) – the Commission's authority to review an award for a change of condition is expressly limited by the statute's mandate that "no such review shall be made after two years from the date of the last payment of compensation pursuant to an award . . . ." N.C. Gen. Stat. § 97-47 (2011).

The issues thus are (1) the date on which Defendant made its last payment of medical or indemnity compensation on Plaintiff's behalf; and (2) whether Plaintiff filed her request for additional medical benefits within two years of that date.

1. Defendant's Last Medical or Indemnity Payment

The record reveals that Defendant made the last *indemnity* payment on 6 December 2007, which was more than two years prior to the date on which Plaintiff filed her claim for additional benefits, in November 2010, when she filed her Form 18M. With respect to Defendant's last medical payment, the Commission's opinion and award includes the following pertinent finding of fact and conclusion of law:

> [Finding of fact] 15. On January 20, 2009, Defendant last paid $556.80 to Armstrong & Armstrong, a rehabilitation company, for rehabilitative services in Plaintiff's claim.
>
> . . . .

> [Conclusion of law] 7. Rehabilitation services, including nurse case management services, are a form of "medical compensation" under the statutory definition of that term. *See* N.C. Gen. Stat. § 97-2(19).

Defendant does not dispute that it tendered a payment to Armstrong & Armstrong, Inc. (A&A) on 20 January 2009 on Plaintiff's behalf. Rather, Defendant contends that, given the nature of the services provided by A&A in connection with Plaintiff's claim, this payment did not constitute a payment of "medical compensation" within the meaning of the North Carolina Workers' Compensation Act, and that the last medical payment was in fact made on 11 November 2008, slightly more than two years before Plaintiff filed her Form 18M with the Commission. Defendant points to evidence presented before the Commission indicating that A&A merely provided medical case management services – as opposed to actual medical treatment or other services that could be properly characterized as "effecting a cure or giving relief" to Plaintiff's medical condition – and that, in the instant case, the "sole purpose" of A&A's involvement was to schedule a single medical appointment on Plaintiff's behalf.

The relevant provision of our General Statutes defines "medical compensation" as follows:

> The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2011). We note our General Assembly's employment of the language "but not limited to" as indicative of its intent to set out a *non-exhaustive* list of what might constitute "rehabilitative services" in this context while affording some room for judicial augmentation. We also note that a narrow construction of this provision would undermine the oft-stated and axiomatic principle mandating that the workers' compensation provisions of our General Statutes be construed liberally in the claimant's favor. *Hollin v. Johnston County Council on Aging*, 181 N.C. App. 77, 84, 639 S.E.2d 88, 93 (2007) ("It is well established in North Carolina that the Workers' Compensation Act

should be liberally construed and that [w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as arising out of employment."). Bearing these principles in mind, while every expense paid might not be considered "medical compensation" under N.C. Gen. Stat. § 97-2(19), we believe that the services provided by A&A in the present case do fall within the statute's ambit. While it is true that A&A did not provide "treatment" or "rehabilitative services" to Plaintiff in the conventional sense, its role as an administrative intermediary was necessary to ensure that Plaintiff received the treatment determined to be appropriate by the Commission in order to "effect a cure or give relief for" Plaintiff's compensable back injury. N.C. Gen. Stat. § 97-2(19). We, therefore, hold that Defendant last provided "medical compensation" for Plaintiff's 2006 injury when it tendered its payment to A&A on 20 January 2009.

2. Plaintiff's Request for Additional Benefits

The sole remaining issue is whether Plaintiff filed her request for additional benefits within two years of 20 January 2009. The Commission found that Plaintiff filed her Form 18M on 6 October 2010. However, Defendant states in its brief that Plaintiff filed her Form 18M on 16 November 2010 and that it was received by the Commission on 23 November 2010. In either case, given our conclusion that Defendant's 20 January 2009 payment to A&A constituted the last medical payment, we hold that Plaintiff timely filed her claim for additional benefits. In light of our resolution of the issue concerning the Commission's modification of the Form 21 agreement, however, we modify the amount of temporary total disability due to Plaintiff for the periods of her disability from 2008-2010 as set forth in our Conclusion below.

III. Conclusion

We vacate paragraph 1 of the Full Commission's 30 May 2013 opinion and award modifying the average weekly wage figure in the Form 21 agreement from $689.21 to $691.11; vacate paragraph 2 of the Full Commission's opinion and award directing Defendant to pay Plaintiff an additional $18.90 for her initial period of disability in 2006; and we reverse paragraph 4 of the Full Commission's opinion and award to the extent that it establishes the amount of Plaintiff's temporary total disability compensation award for her periods of disability between 2008 and 2010 at $460.76 per week, a figure based on the "modified" average weekly wage, and we modify this amount to $459.50 per week, the figure agreed upon by the parties in the original Form 21 agreement. We affirm the Full Commission's opinion and award in all other respects.

AFFIRMED IN PART; VACATED IN PART; REVERSED AND MODIFIED IN PART.

Judges STROUD and HUNTER, JR. concur.

PBK HOLDINGS, LLC, PLAINTIFF
v.
COUNTY OF ROCKINGHAM, DEFENDANT

NO. COA13-865

Filed 1 April 2014

1. Constitutional Law—Equal Protection Clause—enactment of zoning ordinance—legitimate governmental purposes—rational basis test

The trial court did not err in a zoning case by granting summary judgment in favor of defendant even though plaintiff contended the ordinance's distinction between local and regional landfills violated the Equal Protection Clauses of the North Carolina and United States Constitutions. Defendant's purposes in enacting the ordinance were legitimate governmental purposes and application of the rational basis test to the challenged ordinance led to the conclusion that defendant's distinction between regional and local landfills furthered that purpose.

2. Constitutional Law—Commerce Clause—zoning ordinance

The trial did not err in a zoning case by granting summary judgment in favor of defendant even though plaintiff contended that the zoning ordinance violated the Commerce Clause of the United States Constitution. The ordinance was not discriminatory in its practical effect since it affected both in-state and out-of-state municipal solid waste as applied to this plaintiff.

3. Zoning—landfills ordinance—misreading of ordinance

The trial court did not err in a zoning case by entering summary judgment in favor of defendant even though plaintiff contended that the airport radius, floodplain, truck entrance, and "catch-22" provisions of the ordinance, applicable to regional landfills, were preempted by State and Federal law. Plaintiff's arguments were based on a misreading of the challenged ordinance.

PBK HOLDINGS, LLC v. CNTY. OF ROCKINGHAM

[233 N.C. App. 353 (2014)]

Appeal by plaintiff from order entered 25 June 2013 by Judge Richard L. Doughton in Rockingham County Superior Court. Heard in the Court of Appeals 9 December 2013.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, S. Leigh Rodenbough IV, and Darrell A. Fruth, for plaintiff-appellant.

The Brough Law Firm, by G. Nicholas Herman, and Rockingham County by Robert V. Shaver, Jr., County Attorney, for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff PBK Holdings, LLC, appeals from an order of the trial court, granting summary judgment in favor of defendant County of Rockingham, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action. For the reasons stated herein, we affirm the decision of the trial court.

I. Background

On 13 March 2012, defendant Rockingham County, by and through the Rockingham County Board of Commissioners, adopted an ordinance entitled "An Ordinance of the County of Rockingham, State of North Carolina, Adopting Zoning Changes to the Rockingham County Unified Development Ordinance." ("the ordinance"). The stated purpose of the ordinance was to:

> define high impact uses, to allow certain high impact uses to be approved through conditional zoning, to delete special use requirements for those uses now identified as high impact uses and to delete and add text to the table of permitted uses and other zoning sections to effect these changes.

"High impact uses" were defined as:

> those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them.

The following uses were considered high impact uses, "[e]ach use . . . grouped into categories based on the projected impact to the surrounding area[:]"

CLASSIFICATION	USE
Class I	1. Airstrips 2. Concrete suppliers (ready-mix)
Class II	1. Chemical manufacturing and storage 2. Cement Manufacturers 3. Sawmills 4. Bulk Storage Facility of Flammables-Propane, Gasoline, Fuel Oil and Natural Gas 5. Scrap Metal Salvage Yards, Junkyards 6. Commercial Livestock Auction
Class III	1. Commercial Incinerators 2. *Local Solid Waste Management Facilities/Landfills* 3. Chip Mills 4. Airports
Class IV	1. Asphalt Plants 2. Hazardous Waste Facilities 3. Slaughtering and Processing Plants 4. Pulp and Paper Mills 5. Motor Sports Activities (i.e. racetracks and dragstrips)
Class V	1. Explosives Manufacturing, Storage and Wholesale 2. *Regional Solid Waste Management Facilities/Landfills-Privately Owned* 3. Mining, Extraction Operations and Quarries (including sand, gravel and clay pits)

(emphasis added).

On 12 March 2013, plaintiff PBK Holdings, LLC, filed a complaint against defendant. Plaintiff is a limited liability company, formed "for the purpose of acquiring, permitting, and developing a regional municipal solid waste ("MSW") landfill" in Rockingham County, North Carolina. Plaintiff alleged that it had a special use permit application pending in Rockingham County to develop a sanitary landfill and recycling facility that would accept more than 100,000 tons of MSW per year. Plaintiff stated that the proposed landfill would fall within the "Regional Solid Waste Management Facilities/Landfills-Privately Owned" category.

Therefore, plaintiff argued that it had a "specific and legal personal legal interest in the Rockingham County zoning ordinances that impact its plans to develop a landfill."

Plaintiff argued that it was directly and adversely affected by certain amendments adopted in the ordinance and challenged the following provisions: Chapter 2, Article VII, § 7-2.B (classifies "Local Solid Waste Management Facilities/Landfills" (hereinafter "local landfills") as a Class III high impact use and "Regional Solid Waste Management Facilities/Landfills-Privately Owned" (hereinafter "regional landfills") as a Class V high impact use); § 7-4.B (lists setback requirements from property line, rights-of-way, zoning districts and structures based on Class); and § 7-5.G (sets forth additional factors to be considered in approving Regional Municipal Solid Waste-Privately Owned Landfills). Plaintiff's complaint argued that defendant was preempted from adopting provisions in conflict with North Carolina law, that certain provisions exceeded the authority of the Board of Commissioners to adopt and defendant to enforce, that the ordinance violated the Equal Protection clauses of the United States and North Carolina Constitutions, and that the ordinance violated the Commerce Clause of the United States Constitution. Based on the foregoing contentions, plaintiff argued that the trial court should enter declaratory judgment in favor of plaintiff, stating that the challenged portions of the ordinance were invalid.

On 22 April 2013, defendant filed an answer to the complaint.

On 10 June 2013, defendant filed a motion for summary judgment. On 13 June 2013, plaintiff also filed a motion for summary judgment.

Following a hearing held at the 24 June 2013 term of Rockingham Superior Court, the trial court entered an order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action on 25 June 2013.

Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

> The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden,

> the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002) (internal citations and quotation marks omitted).

III. Discussion

On appeal, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where (A) the ordinance's distinction between "local" and "regional" landfills violates the Equal Protection Clauses of the North Carolina and United States Constitutions; (B) the ordinance violates the Commerce Clause of the United States Constitution; and (C) the airport radius, floodplain, truck entrance, and "catch-22" provisions are preempted by State and Federal law.

A. Equal Protection Clause

[1] First, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where the ordinance's distinction between local and regional landfills violates the Equal Protection Clauses of the North Carolina and United States Constitutions. Plaintiff asserts that although local and regional landfills are similarly situated, the ordinance imposes more stringent requirements on regional landfills than are imposed on local landfills. Furthermore, plaintiff argues that there is no legitimate purpose justifying the difference in landfill classifications and that distinctions between local and regional landfills are not rationally related to defendant's stated interests. We find plaintiff's arguments unpersuasive.

We note that

> [a] municipal ordinance is presumed to be valid . . . . [T]he burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.

Standley v. Town of Woodfin, 186 N.C. App. 134, 140, 650 S.E.2d 618, 623 (2007) (citations and quotation marks omitted).

"The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. This principle requires that all persons similarly situated be treated alike." *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000) (citations omitted).

> The United States Supreme Court has explained that the purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. . . . Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.

Yan-Min Wang v. UNC-CH Sch. of Med., 216 N.C. App. 185, 202-03, 716 S.E.2d 646, 657-58 (2011) (citations and quotation marks omitted).

"Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated." *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003). "Thus, [i]n addressing an equal protection challenge, we first identify the classes involved and determine whether they are similarly situated." *Yan-Min Wang*, 216 N.C. App. at 204, 716 S.E.2d at 658 (citation and quotation marks omitted).

In the present case, the two classes at issue are local and regional landfills. Plaintiff alleges that local and regional landfills are similarly situated because they are engaged in the same activity – namely, the business of MSW disposal. Relying on the plain language definition of the terms "local" and "regional," plaintiff states that the only difference between these two classes is that local landfills accept waste from a "limited district, often a community or minor political subdivision" while regional landfills accept waste from "a geographical region" or "peripheral parts of a district." Based on the foregoing, plaintiff argues that the ordinance violates the Equal Protection Clause since "characterizations of waste based on its geographic origin have repeatedly been found groundless by the United States Supreme Court."

On the other hand, defendant contends that there is no dispute about the definitions of local versus regional landfills, arguing that the distinctions are made based on the general nature of their uses. Defendant

asserts that it is common knowledge that regional landfills, which accept waste from areas within and outside of Rockingham County, are "typically larger, dispose of greater waste tonnage, and therefore may pose the risk of having greater adverse impacts upon the health, safety and welfare in contrast to purely local and less-intensive landfills that merely dispose of waste[] generated from within the local community."

Our review indicates that the ordinance defines high impact uses as "those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them." The categorization of high impact uses are based on the "projected impact to the surrounding area," resulting in five different classes. "Local Solid Waste Management Facilities/Landfills" are classified as a Class III high impact use, along with commercial incinerators, chip mills, and airports. "Regional Solid Waste Management Facilities/Landfills-Privately Owned" are classified as a Class V high impact use, along with explosives manufacturing, storage, and wholesale, as well as mining, extraction operations, and quarries. Although the ordinance distinguishes between local and regional landfills, it fails to provide a definition for "local" and "regional" landfills.

"When interpreting a municipal ordinance we apply the same principles of construction used to interpret statutes. Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance. . . . To ascertain the ordinary meaning of undefined and ambiguous terms, courts may appropriately consult dictionaries." *Morris Communs. Corp. v. City of Bessemer*, 365 N.C. 152, 157-58, 712 S.E.2d 868, 872 (2011) (citations omitted).

"Local" is defined as "1. relating to place 2. of, characteristic of, or confined to a particular place or district 3. not broad; restricted; narrow." Webster's New World College Dictionary 842 (4th edition 2006). "Regional" is defined as "1. of a whole region not just a locality 2. of some particular region, district, etc.; local; sectional." Webster's New World College Dictionary 1206 (4th edition 2006). Applying these definitions to the ordinance, the use of the terms "local" and "regional" in reference to landfills suggests that the distinction lies in the size and location of the areas that the landfills serve.

However, assuming without deciding that the two classes involved in the present appeal are similarly situated for equal protection purposes, the next step in our analysis would be a determination of whether "the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation."

A-S-P Associates v. Raleigh, 298 N.C. 207, 226, 258 S.E.2d 444, 456 (1979) (citation omitted).

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. Classifications are presumed valid; "under the lower tier, rational basis test, the party challenging the legislation has a tremendous burden in showing that the questioned legislation is unconstitutional."

Huntington Props. v. Currituck County, 153 N.C. App. 218, 230-31, 569 S.E.2d 695, 704 (2002) (citations omitted). Because the ordinance at issue here neither burdens a suspect class, nor affects a fundamental right, the ordinance need only to satisfy the rational basis level of scrutiny to withstand plaintiff's Equal Protection Clause challenges.

Defendant asserts, and we agree, that the objective of protecting the health, safety, and environment of the community by mitigating the adverse impacts of high impact uses is a conceivable and legitimate government interest. The differences in requirements set out in the ordinance between regional and local landfills, with regional landfills being subject to more stringent regulation based on their projected higher impact to the surrounding area, are clearly rationally related to further defendant's conceivable, legitimate interest.

The ordinance provided that the purpose of its enactment was to

> define high impact uses, to allow certain high impact uses to be approved through conditional zoning, to delete special use requirements for those uses now identified as high impact uses and to delete and add text to the table of permitted uses and other zoning sections to effect these changes.

"High impact uses" are "those which by their nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic and/or other impacts upon the lands adjacent to them." The ordinance

categorized regional landfills as a Class V high impact use along with "Explosive Manufacturing, Storage and Wholesale" and "Mining, Extraction Operations and Quarries (including sand, gravel and clay pits)" based on the higher impact of "objectionable levels of noise, odors, vibrations, fumes, light, smoke, traffic, and/or other impacts" to the surrounding area, as opposed to local landfills, which were categorized as a Class III high impact use. In addition, the affidavit of Kevan Combs, plaintiff's sole manager, member, and registered agent, indicated that plaintiff's proposed regional landfill would bring in more than 100,000 tons of MSW per year.

Because defendant's purposes in enacting the ordinance are undeniably legitimate governmental purposes and because application of the rational basis test to the challenged ordinance leads us to the conclusion that defendant's distinction between regional and local landfills furthers that purpose, we reject plaintiff's arguments that the ordinance violated the Equal Protection Clauses of the United States and North Carolina Constitutions. Accordingly, we hold that the trial court did not err by granting summary judgment in favor of defendant on this issue.

B. Commerce Clause

[2] Next, plaintiff argues that the trial erred by entering summary judgment in favor of defendant on the grounds that the ordinance violates the Commerce Clause of the United States Constitution. We are not persuaded by plaintiff's arguments.

> The United States Constitution expressly grants to Congress the power to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates[.] [T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well" in that " 'by its own force' [it] prohibits certain state actions that interfere with interstate commerce." The United States Supreme Court has explained that the "dormant" Commerce Clause means that "[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States."
>
> It is well established that a law is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. "Discrimination" for purposes of the dormant Commerce Clause is "differential treatment of in-state

> and out-of-state economic interests that benefits the former and burdens the latter."

DirecTV, Inc. v. State of North Carolina, 178 N.C. App. 659, 661-62, 632 S.E.2d 543, 546 (2006) (citations omitted).

> Commerce Clause claims are subject to a two-tiered analysis. The first tier, a virtually *per se* rule of invalidity, applies where a state law discriminates facially, in its practical effect, or in its purpose. The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are clearly excessive in relation to the putative local benefits.

Waste Indus. USA, Inc. v. State, __ N.C. App. __, __, 725 S.E.2d 875, 881 (2012) (citations omitted). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *North Carolina Ass'n of Elec. Tax Filers v. Graham*, 333 N.C. 555, 565-66, 429 S.E.2d 544, 550 (1993) (citation omitted).

i. Facial Discrimination

Plaintiff contends that the ordinance is facially discriminatory. Plaintiff's argument presumes that regional landfills collect MSW from surrounding counties within North Carolina as well as southern Virginia, while local landfills collect MSW from only Rockingham County. By applying more stringent requirements for regional landfills, plaintiff asserts that the ordinance discriminates against out-of-state use of North Carolina landfill space.

It is well established that

> [a] state tax law is facially discriminatory where it (1) explicitly refers to state boundaries or uses other terminology that inherently indicates the tax is based on the in-state or out-of-state location of an activity; and (2) applies to entities similarly situated for Commerce Clause purposes. A facial challenge to a legislative act is . . . the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which [the ordinance] would be valid. Moreover, the challenger must demonstrate there is an "explicit discriminatory design to the [ordinance]."

DirecTV, Inc., 178 N.C. App. at 663, 632 S.E.2d at 547 (citations omitted).

We note that the failure of the ordinance to define the terms "local" and "regional" compels us to apply the ordinary meanings of those words. Based on the plain language definition of those terms – "local" meaning "1. relating to place 2. of, characteristic of, or confined to a particular place or district 3. not broad; restricted; narrow" and "regional" meaning "1. of a whole region not just a locality 2. of some particular region, district, etc.; local; sectional" – we hold that although the terms make a geographical distinction, they do not explicitly refer to state boundaries or inherently indicate that the applicability of the ordinance is based on the in-state or out-of-state location of an activity. *See* Webster's New World College Dictionary 842 and 1206 (4th edition 2006). Facially, this ordinance does not explicitly put greater burdens on MSW solely because it is generated from out-of-state because, as plaintiff acknowledges, regional landfills accept MSW from counties within North Carolina as well as MSW from out-of-state. In addition, the category of regional landfills also includes privately-owned landfills without distinguishing whether the privately-owned landfills accept in-state or out-of-state MSW. Furthermore, plaintiff has failed to demonstrate an explicit discriminatory design in the ordinance. Based on the foregoing, we conclude that the ordinance is not facially discriminatory.

ii. Discrimination in its Practical Effect

In order to successfully argue that the ordinance is discriminatory in its practical effect,

> [p]laintiff[] bear[s] the initial burden of showing that a[n ordinance] has a discriminatory effect on interstate commerce. If Plaintiff[] meet[s] that burden, [defendant] bears the burden of establishing that the challenged [ordinance] "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

DirecTV, Inc., 178 N.C. App. at 665, 632 S.E.2d at 548 (citations omitted).

Plaintiff, relying on *Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, 128 L. Ed. 2d 13 (1994), argues that the "more numerous and rigorous zoning provisions [applicable] to regional landfills" are akin to heightened fees assessed on the disposal of out-of-state waste which have been held to violate the Commerce Clause. We disagree.

In *Oregon Waste*, the petitioners, who were solid waste disposers, challenged Or. Rev. Stat. § 459.297(1) which imposed a "surcharge" on "every person who disposes of solid waste generated out-of-state in a

disposal site or regional disposal site" at $2.25 per ton. *Id.* at 96, 128 L. Ed. 2d at 19. "In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon" at $0.85 per ton, "considerably lower than the fee imposed on waste from other States." *Id.* "Subsequently, the legislature conditionally extended the $0.85 per ton fee to out-of-state waste, in addition to the $2.25 per ton surcharge . . . with the proviso that if the surcharge survived judicial challenge, the $0.85 per ton fee would again be limited to in-state waste." *Id.* The United States Supreme Court held that the statute was *facially* discriminatory because the surcharge was based upon a geographic distinction, discriminating against interstate commerce. *Id.* at 100, 128 L. Ed. 2d at 22. Since the Oregon surcharge was held to be facially discriminatory, the *Oregon Waste* Court held that the "*per se* rule of invalidity" was the proper legal standard. "As a result, the surcharge must be invalidated unless respondents can sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 100-01, 128 L. Ed. 2d at 22 (citations and quotation marks omitted). Because respondents could not meet this burden, the surcharge was held to be in violation of the Commerce Clause.

Plaintiff's conclusory reliance on *Oregon Waste* is misplaced since we find the facts of the instant case distinguishable. First, we have previously held that the ordinance is not facially discriminatory like the surcharge in *Oregon Waste*. Second, whereas it was clear to the Supreme Court in *Oregon Waste* that "the differential charge favor[ed] shippers of Oregon waste over their counterparts handling waste generated in other States," here, the ordinance is not explicitly based on in-state or out-of-state location of an activity. *Id.*

Plaintiff also argues that there is a discriminatory practical effect because the "restrictions applied to regional landfills also make it more difficult for out-of-state waste to be disposed of in landfills located in Rockingham County." As examples, plaintiff states that the "increased landscape buffer, fencing requirement, and need for dust control would increase the capital and operating costs for a regional landfill, which would increase the fees for such waste disposal." Plaintiff relies on *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res. et al*, 504 U.S. 353, 119 L. Ed. 2d 139 (1992), and *Exxon Corp v. Governor of Maryland*, 437 U.S. 117, 57 L. Ed. 2d 91 (1978) for his contentions.

In *Fort Gratiot*, the petitioner challenged a Michigan law that "prohibits private landfill operators from accepting solid waste that originates outside the county in which their facilities are located" unless the

acceptance of solid waste not generated in the county was explicitly authorized in the approved county solid waste management plan. *Fort Gratiot*, 504 U.S. at 355-57, 119 L. Ed. 2d at 144-45. The United States Supreme Court provided that "[a] state statute that clearly discriminates against interstate commerce is therefore unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " *Id.* at 359, 119 L. Ed. 2d at 147 (citation omitted). Because "the statute afford[ed] local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas[,]" and because "Michigan [had] not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county," the Supreme Court held that the contested Michigan law violated the Commerce Clause. *Id.* at 361, 119 L. Ed. 2d at 148.

The circumstances of the present case, however, are distinguishable from those found in *Fort Gratiot*. Most importantly, in *Fort Gratiot*, there was an outright prohibition against in-state disposal of waste that was generated outside of the state. In the present case, the ordinance merely imposed more stringent requirements on regional landfills that accepted waste from both within the State of North Carolina and out-of-state. Defendant also identified reasons, apart from the origin of the waste to be disposed of and unrelated to economic protectionism, as to why there should be a distinction between local and regional landfills, including achieving the ordinance's objective to "mitigate[e] [the] traditional adverse impacts of a highly intensive use on water supplies, airport safety, access to public roads, noise, dust, distance from residences, and other health and safety concerns." Because the regional landfills are typically larger in size and dispose of greater amounts of waste, with this plaintiff accepting more than 100,000 tons of MSW per year, they pose a greater risk to the health, safety, and welfare of the community.

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 57 L. Ed. 2d 91 (1978), a Maryland statute provided that "a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all 'voluntary allowances' uniformly to all service stations it supplies." *Id.* at 119-20, 57 L. Ed. 2d at 96. The petitioners, who were producers of petroleum products, contended that the Maryland statute violated the Commerce Clause. The United States Supreme Court held that the statute did not violate the Commerce Clause because it did not discriminate against interstate goods or distinguish between in-state and out-of-state companies. Because "Maryland's entire gasoline supply flows in interstate commerce and since there

are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125, 57 L. Ed. 2d at 100.

Despite the holding, plaintiff cites to a footnote found in *Exxon Corp.* in support of the contention that "[if] the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce." *Id.* at 126, 57 L. Ed. 2d at 100 n.16. Here, however, the effect of the ordinance is not to reduce the flow of out-of-state MSW and increase the share of in-state MSW, but rather to place more stringent requirements on landfills that are considered a higher class of high impact uses which by their nature produce higher levels of noise, odors, vibrations, fumes, light, smoke, traffic, etc.

The ordinance does not impact the disposal of MSW more heavily based on the fact that it is crossing state lines. Moreover, because there is no evidence in the record that plaintiff's proposed landfill would have only accepted out-of-state MSW, the ordinance affected both in-state and out-of-state MSW as applied to this plaintiff.

Based on the aforementioned reasons, we hold that the ordinance is not discriminatory in its practical effect in violation of the Commerce Clause. Plaintiff's arguments are overruled.

C. Preemption

[3] In its third argument, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant where the airport radius, floodplain, truck entrance, and "catch-22" provisions of the ordinance, applicable to regional landfills, are preempted by State and Federal law.

> A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> . . . .
>
> (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;
>
> . . . .

> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]
>
> . . . .
>
> The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

N.C. Gen. Stat. § 160A-174(b)(2) and (5) (2013).

First, plaintiff challenges § 7-5.G.4.b (hereinafter "floodplain provision") and subsection c (hereinafter "airport radius provision") of the ordinance, which provides as follows:

> 4. A landfill shall not be located:
>
> . . . .
>
> b. within the 100 year floodplain.
>
> c. within five statute miles of the Rockingham County (Shiloh) Airport.

Specifically, plaintiff argues that the floodplain provision is preempted by N.C. Gen. Stat. § 130A-295.6(c)(1) and N.C. Gen. Stat. § 130A-294(a)(4)(c)(5).

N.C. Gen. Stat. § 130A-295.6(c)(1) (2013) provides that "[a] waste disposal unit of a sanitary landfill shall not be constructed within: (1) A 100-year floodplain or land removed from a 100-year floodplain designation. . . ." N.C. Gen. Stat. § 130A-294(a)(4)(c)(5) (2013) provides the following:

> (a) The Department [of Environment and Natural Resources ("DENR")] is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish a state-wide solid waste management program. In establishing a program, the [DENR] shall have authority to (4) a. Develop a permit system governing the establishment and operation of solid waste management facilities. . . . c. The [DENR] shall deny an application for a permit

> for a solid waste management facility if the [DENR] finds that: 5. The proposed facility would be located in a natural hazard area, including a floodplain, a landslide hazard area, or an area subject to storm surge or excessive seismic activity, such that the facility will present a risk to public health or safety.

Plaintiff argues that while N.C. Gen. Stat. § 130A-295.6(c)(1) prohibits a landfill from being constructed within an 100-year floodplain, other portions of the landfill facility, "i.e. portions aside from the waste disposal unit," could be constructed in the 100-year floodplain so long as there is no public health or safety risk. In addition, plaintiff argues that since it is DENR's discretion to judge whether a landfill may be developed in a floodplain, the floodplain provision applies a "blunt, blanket prohibition against any portion of a regional landfill from being built in a 100-year flood plain, even if the development is authorized by DENR." We find plaintiff's arguments meritless.

Pursuant to N.C. Gen. Stat. § 153A-136(a)-(b) (2013), a county has the authority to regulate "the storage, collection, transportation, use, disposal and other disposition" of solid wastes and to regulate such disposal and disposition by ordinance that is "consistent with and supplementary to any rules" adopted by the DENR. In addition, defendant is not prevented "from providing by ordinance or regulation for solid waste management standards which are *stricter or more extensive* than those imposed by the State solid waste management program and rules and orders issued to implement the State program." N.C. Gen. Stat. § 130A-309.09C(c) (2013) (emphasis added). That is exactly what the floodplain provision of the challenged ordinance does.

Next, plaintiff argues that the airport radius provision is preempted by state and federal law. Plaintiff asserts that although collectively, these state and federal laws provide a specific regulatory scheme addressing the siting of landfills near airports, the airport radius provision attempts to prohibit landfills in locations where they are expressly permitted by state and federal law.

Plaintiff directs our attention to the following State regulations regarding MSW landfills near airports:

> (a) A new MSWLF unit shall be located no closer than 5,000 feet from any airport runway used only by piston-powered aircraft and no closer than 10,000 feet from any runway used by turbine-powered aircraft.

(b) Owners or operators proposing to site a new MSWLF unit or lateral expansion within a five-mile radius of any airport runway used by turbine-powered or piston-powered aircraft shall notify the affected airport and the Federal Aviation Administration prior to submitting a permit application to the Division.

(c) The permittee of any existing MSWLF unit or a lateral expansion located within 5,000 feet from any airport runway used by only piston-powered aircraft or within 10,000 feet from any runway used by turbine-powered aircraft shall demonstrate that the existing MSWLF unit does not pose a bird hazard to aircraft. The owner or operator shall place the demonstration in the operating record and notify the Division that it has been placed in the operating record.

15A N.C. Admin. Code 13B.1622(1)(a) – (c) (2012). In addition 40 C.F.R. § 258.10(a) (2013) states that

> Owners or operators of new MSWLF units, existing MSWLF units, and lateral expansions that are located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft must demonstrate that the units are designed and operated so that the MSWLF unit does not pose a bird hazard to aircraft.

Our review indicates that defendant is correct in its argument that there is "nothing in the language of these State or federal regulations expressly or impliedly demonstrat[ing] any intent to preclude more stringent regulations on the siting of MSW landfills near airports." Thus, we reject plaintiff's assertions.

Next, plaintiff challenges the following provision of the ordinance applicable to regional landfills as being preempted by state law:

a. The Truck entrance driveway shall be located on or within two thousand (2000) feet of a major arterial highway.

(hereinafter "truck entrance provision"). Plaintiff argues that the county does not have authority to regulate vehicular traffic on a State

highway pursuant to N.C. Gen. Stat. § 153A-121(b) (2013) which provides as follows:

> This section does not authorize a county to regulate or control vehicular or pedestrian traffic on a street or highway under the control of the Board of Transportation, nor to regulate or control any right-of-way or right-of-passage belonging to a public utility, electric or telephone membership corporation, or public agency of the State. In addition, no county ordinance may regulate or control a highway right-of-way in a manner inconsistent with State law or an ordinance of the Board of Transportation.

We find that plaintiff's reading of the truck entrance provision rests upon a misapprehension. The truck entrance requirement does not regulate any vehicular traffic on a street or highway, but rather regulates the location of a driveway placed on a landfill. Therefore, we reject plaintiff's argument.

Lastly, plaintiff challenges the following provision of the ordinance as being preempted by State law:

> 3. An application for development approval shall include all the site plans and information submitted to the Department of Environment and Natural Resources for the permitting of a solid waste management facility.

Plaintiff argues that this provision is preempted by N.C. Gen. Stat. § 13A-294(b1)(4) and 15A NCAC Admin. Code 13B.1618 which sets forth requirements for an applicant's permit for a MSW landfill. Further, plaintiff alleges that this provision places a landfill developer in a "catch-22" position because while state law prohibits the developer from submitting the application for a permit to DENR until the developer has obtained local zoning approval, the ordinance prohibits local zoning approval for the landfill developer until *after* it has submitted the application for a permit to DENR. In other words, plaintiff argues that the ordinance precludes landfill developers from complying with both State and local law by requiring a developer to submit its permit application to DENR at a time when DENR prohibits such submission.

We find plaintiff's arguments to be based on a misreading of the challenged ordinance. The challenged provision does not require the developer to submit an application to the DENR but requires the developer to submit the "site plans and information" that must be submitted to the DENR for the permitting of a MSW landfill. Accordingly, we reject plaintiff's argument as it has no merit.

IV. Conclusion

Based on the reasons stated above, we reject plaintiff's argument that the ordinance violates the Equal Protection and Commerce Clauses of the North Carolina and United States Constitutions and also reject plaintiff's arguments that certain provisions of the ordinance are preempted by state and federal law. The judgment of the trial court is affirmed.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

JEFF ROLAN; MATTHEW COLE ROLAN, Minor, by WILLIAM S. MILLS as Guardian Ad Litem; MATTHEW BALDWIN, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and TIMOTHY BALDWIN and KELLIE BALDWIN; ISABEL SEVERA, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and KATHLEEN SEVERA; WILLIAM SHY, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and TODD SHY and JENNIFER SHY; SCOTT VENABLE, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and WILLIAM VENABLE and SUSAN VENABLE; CARTER CHURCH, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and CHAD CHURCH and AMANDA CHURCH; LUKE CHAUVIN, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and KEITH CHAUVIN and JENNIFER CHAUVIN; CHAD ENNIS, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and JAYSON ENNIS and WENDY ENNIS; KATHLEEN MANESS, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and MICHAEL MANESS and REBECCA MANESS; CARSON MCGEE, Minor, by SIDNEY S. EAGLES, JR., as Guardian Ad Litem and MIKE McGEE and VICKIE McGEE; TERRA PERRIGO, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and TERRY PERRIGO and LAURA PERRIGO; CAMERON CHAUVIN, Minor, by SIDNEY S. EAGLES, JR.[,] as Guardian Ad Litem and KEITH CHAUVIN and JENNIFER CHAUVIN; AEDIN GRAY, Minor, by WILLIAM W. PLYLER as Guardian Ad Litem; KYLE GRAY; ELIZABETH GRAY; and REECE C. BUFFALOE, Minor, by WADE H. PASCHAL, JR.[,] as Guardian Ad Litem, Plaintiffs

v.

N.C. DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Defendant

No. COA13-601

Filed 1 April 2014

1. Appeal and Error—standard of review—findings—challenge required

In a Tort Claims action arising from an *E. coli* outbreak at the North Carolina State Fair, there was no appellate review of certain findings where plaintiffs did not challenge either the factual or legal elements of the findings. Although plaintiffs reminded the Court of Appeals of the distinction between a finding of fact and a conclusion

of law, plaintiffs must contest these findings in order to take advantage of the relevant standards of review.

2. Appeal and Error—preservation of issues—conclusion in final decision—not raised below

The plaintiffs in a tort claims case were not barred from contesting on appeal the validity of the Industrial Commission's conclusion in its decision and order regarding the standard of care where plaintiffs did not raise the issue before the Commission. It would have been impossible for plaintiffs to challenge the legal principle articulated by the Commission before it was actually stated and plaintiffs could not be barred by the "swap horses" doctrine.

3. Negligence—standard of care—petting zoo—E coli outbreak

Plaintiffs' argument that the Industrial Commission used the wrong standard of care in a Tort Claims action arising from an outbreak of *E. coli* at the North Carolina State Fair was misplaced. Plaintiffs' argument assumed that the Industrial Commission's decision turned on whether plaintiffs had adequately established that defendant knew or should have known about the risk of *E. coli*, but defendant admittedly knew there was some risk of an *E. coli* infection when operating a petting zoo. Plaintiffs were not required to show that defendants knew or should have known about the risk.

4. Negligence—premises liability—petting zoo

In a Tort Claims action arising from an outbreak of *E. coli* at a petting zoo at the North Carolina State Fair, the Industrial Commission correctly determined that defendant took reasonable steps to reduce the inherent risks. While it was certainly possible for defendant to take additional precautions, North Carolina premises liability law does not require landowners to eliminate the risk of harm to lawful visitors on their property or to undergo unwarranted burdens in maintaining their premises.

5. Negligence—findings—proximate cause

In a Tort Claims action arising from an *E. coli* outbreak at the North Carolina State Fair, plaintiffs' argument concerning a finding about proximate cause was based on a misreading of the finding. The finding was not, in fact, relevant to proximate cause.

Appeal by Plaintiffs from Decision and Order filed 4 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 November 2013.

Roberts & Stevens, P.A., by Mark C. Kurdys and Robin A. Seelbach; Kirby & Holt, Inc., by William B. Bystrynski and David F. Kirby; Pulley Watson King & Lischer, P.A., by Charles F. Carpenter and Guy Crabtree; Moody, Williams & Roper, by C. Todd Roper; and Marler Clark, LLP, PS, by William D. Marler, for Plaintiffs.

Attorney General Roy Cooper, by Associate Attorney General Christopher McLennan; and North Carolina Department of Agriculture and Consumer Services, by Tina L. Hlabse, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from an *Escherichia coli* O157:H7 ("*E. coli*") outbreak linked by the North Carolina Department of Health and Human Services and the Centers for Disease Control to a petting zoo operated during the 2004 North Carolina State Fair ("the Fair"). *E. coli* is a bacterium that can cause potentially life-threatening illness in humans. Children under five years old are especially at risk. Exposure to the bacterium can result from "eating contaminated meat or leafy greens, exposure to contaminated water, or through contact" with the feces of animals carrying the bacteria in their intestinal tract. Animals carrying the disease "can look perfectly healthy and still be shedding the *E. coli*[] bacteria in their stool," and transmission can occur "when people pet, touch, or are licked by animals." Over 800,000 people visited the Fair in October of 2004. Of those 800,000 people, an estimated 20,000 visited the petting zoo, and approximately 108 contracted *E. coli*.

Among the people who contracted *E. coli*, a number of minor children ("Plaintiffs") were found to be infected. As a result, Plaintiffs filed claims for damages against Defendant North Carolina Department of Agriculture and Consumer Services under the North Carolina Tort Claims Act. Those claims were eventually consolidated into a single action, and Plaintiffs submitted a joint motion for partial summary judgment on the issue of liability to the North Carolina Industrial Commission ("the Commission") on 5 November 2010. Plaintiffs' motion was denied by order filed 20 July 2011. Following a hearing on the merits, a deputy commissioner entered a decision denying Plaintiffs' claims. Plaintiffs appealed to the full Commission, and, following a hearing on Plaintiffs' appeal, the Commission entered a Decision and Order denying all of Plaintiffs' claims.

In its Decision and Order, the Commission found the following pertinent facts: In preparation for the Fair, Defendant employed a number of veterinarians and other professionals who worked to ensure the health and safety of Fair patrons. A pre-fair risk assessment revealed that, while "hand washing stations were strategically positioned in or near the petting zoo[,] . . . there was an almost complete absence of signs warning people to wash their hands after contacting animals . . . ." As a result, one of the veterinarians put up additional signage and hand sanitizers before the Fair opened. Testimony and exhibits presented before the Commission indicate that there were a number of signs at the petting zoo during the Fair.

Structurally, the petting zoo

> consisted of a 40 foot by 60 foot open tent with a 10[ ] foot-wide gate area at the front. At the center of the front gate was a 4[ ]foot-wide area covered by a large, wooden sign that contained the petting zoo rules, including rules against smoking, eating[,] or drinking inside the petting zoo. On either side of that sign were 3[ ]foot-wide gates, with the one on the right being the entrance to the petting zoo, and the one on the left being where patrons would exit from the petting zoo. Fair patrons standing outside the petting zoo could see inside and would know that they were entering an area with sheep and goats roaming about on a bed of wood shavings. At the back of the tent there were separate pens containing animals that were too large to be roaming among small children. At the entrance to the petting zoo, there were two hand sanitizing dispensers, and immediately outside the exit gate, there were three more hand sanitizing dispensers. In addition, [a building containing] 8 permanent bathrooms with soap and water facilities[] was immediately across the street from the petting zoo, and there was another building with 4 bathrooms and soap and water facilities across from the petting zoo . . . .
>
> . . . In addition to the zoo rules sign located at the entrance to the petting zoo, there were approximately 5 signs taped to the side of the tent above the feed machines which said, in English and in Spanish, "ALWAYS WASH HANDS *BEFORE AND AFTER* TOUCHING ANIMALS IN ORDER TO PROTECT THEM AND YOU." [The owner of the

> petting zoo also] posted a sign . . . on the exit gate which read, "REMEMBER . . . wash hands after petting animals." [Moreover, t]here were . . . hand washing signs posted beneath the hand sanitizing dispensers, which [the owner] recalled having [an image of two hands being washed]. The sign was laminated and done on paper reflecting that it was issued by [Defendant]. The sign states "Hand to Mouth contact after touching animals or their environment is a health risk! Always Wash hands Before and After Touching Animals in Order to Protect Them and You!" At the bottom of that sign[] additional information was provided regarding high risk individuals, washing hands with soap and water before eating and before and after touching animals and their environment, and avoiding hand[ ] to[-]mouth activities in the livestock areas, such as eating, smoking[,] and nail biting. . . . [S]igns warning patrons to wash their hands were posted inside the petting zoo and at the petting zoo exit, and . . . the more detailed signage . . . was posted at the bottom of the hand sanitizing stations outside the entrance and exit to the zoo.

(Italics added). There were also a number of people working at the petting zoo who monitored the people entering and exiting, removed feces, and "replace[d] the soiled wood shavings with clean wood shavings." Some parents recalled seeing the signs and others did not. "Many parents testified that it was very crowded inside the petting zoo and that their children were knocked down by goats and sheep trying to get food." At oral argument, Plaintiffs' counsel referred to the zoo as a "free for all."

Field veterinarian Dr. Carol Woodlief, Defendant's main point of contact on the ground, testified that she and the other field veterinarians were aware of and took steps to protect against a number of diseases, including *salmonella*, campylobacter, coccidiosis, sore mouth, ringworm, and *E. coli*. Dr. Woodlief noted, however, that "*E. coli*[] was not 'any bigger on her mind' than any of the other potential diseases" in 2004. The field veterinarians "made sure that every animal arriving at the Fair had the requisite health certificate . . . ." They also "observed the animals to make sure there were no obvious signs of illness" and "physically handled animals to check for lumps or anything that would suggest sore mouth or ringworm . . . ." Animals showing signs of disease were pulled. Field veterinarians also "continued to observe all of the animals throughout the duration of the . . . Fair."

Given the above facts, the Commission concluded that the precautions taken by Defendant were sufficient to meet its duty of care. Specifically, the Commission stated that:

> 5. . . . [T]hose responsible for conducting the 2004 . . . Fair exercised reasonable care to keep its premises in a reasonably safe condition for lawful visitors. Further, the evidence demonstrates that the . . . Fair was conducted well within the industry standards at that time. The primary recommendations of all concerned groups and publications, *i.e.*, hand washing or hand sanitizing stations, separation of food and beverages from contact areas, and signage advising that a health risk exists and that hand washing is recommended, were fulfilled at the . . . Fair[] in accordance with then-existing nationwide industry standards, which did not require that handouts and signage include information regarding the potential severity of the health risk. Moreover, the practices in place at the . . . Fair were identical to or better than those that had been utilized at prior [state fairs in North Carolina], none of which had produced documented cases of *E. coli*[] infection resulting from human[-]to[-]animal contact.
>
> 6. In the absence of evidence that [Defendant's] employees knew or had reason to know that the animals in the [petting zoo] were actively shedding *E. coli*[] during the 2004 . . . Fair (as contrasted with their knowledge that ruminants have the potential to shed *E. coli*[]), the . . . Commission concludes that [Defendant's] employees were not negligent in failing to warn fair patrons of a hidden hazard. Given the presence of pathogens in our environment, the inability to completely eliminate enteric pathogens if human[-to]animal contact is going to be permitted, and the precautions they had in place to reduce and minimize the risk, [Defendant's] employees were not negligent with respect to their duty to warn or their duty to exercise reasonable care to keep the premises safe for lawful visitors.

(Citations and internal quotation marks omitted; italics added). In coming to that conclusion, the Commission focused on the fact that — in 2004 — the danger of *E. coli* infection at state fairs was "still an emerging issue" throughout the country. According to reports published in the months before the Fair, few states had written guidelines on

zoonotic disease or the connection between zoonotic diseases and animal exhibits. With the goal of reducing the risks of disease transmission, certain reports recommended the use of informational signage; hand sanitizer or hand washing stations with running water, soap, and disposable towels; human-to-animal contact supervision; regular removal of animal feces; and the prevention of eating and drinking in human-to-animal-contact areas.[1]

Given its conclusions, the Commission denied Plaintiffs' claims for damages. Commissioner Bernadine S. Ballance dissented from the Commission's decision on grounds that Defendant's pertinent employees — "all [d]octors of [v]eterinary [m]edicine" — "knew or reasonably should have known that *E. coli*[] was a hidden danger and posed a substantial risk of serious illness and death [to the young children who visited the petting zoo]" and failed to adequately warn the Fair's patrons of that danger. Plaintiffs appealed the Decision and Order of the Commission.

Standard of Review

"The standard of review for an appeal from the . . . Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." *Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (citation and internal quotation marks omitted). "Moreover, findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus[,] conclusively established on appeal." *Kee v. Caromont Health, Inc.*, 209 N.C. App. 193, 195, 706 S.E.2d 781, 782–83 (2011) (citation and internal quotation marks omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965).

Discussion

On appeal, Plaintiffs assert that the Commission's decision should be reversed because its conclusions of law are not supported by its findings of fact. More specifically, Plaintiffs contend that: (1) the Commission's

1. One report noted that "the only way to eliminate the risk of zoonotic transmissions is to completely prevent interaction between animals and humans at animal exhibits." Recognizing that such an option "might not be feasible or desirable," however, the report suggested the above strategies for minimizing exposure.

findings of fact 32 and 33 are, in part, conclusions of law and, therefore, should not be analyzed under our deferential competent evidence standard[2]; (2) the Commission applied an incorrect standard of care, which "led the Commission . . . to the erroneous conclusion that [Defendant] was not negligent in this case"; and (3) the Commission erred in concluding that Plaintiff's injuries were not proximately caused by Defendant's negligence because the parties had already stipulated to this fact. We affirm the Commission's Decision and Order.

I. Findings of Fact 32 and 33

[1] In pertinent part, findings of fact 32 and 33 read as follows:

> 32. [T]he operators of the 2004 . . . Fair . . . exercised reasonable care in [their] respective duties to keep the [fairgrounds, including the petting zoo], in a safe condition for its lawful visitors. Regardless of whether the measures [taken] were done in response to the [reports published prior to the Fair], and regardless of whether there was strict compliance with all recommendations [made therein], the . . . Commission finds that the evidence of record establishes that [Defendant] carried out [its] respective duties with reasonable care to minimize and hopefully eliminate the risk that fair patrons who attended the [petting zoo] would contract *E. coli*[]. The signage [Defendant] used and the hand washing protocols [it] relied upon, in conjunction with [its] observation and monitoring of activities inside the petting zoo, including constant removal of fecal material by employees of the petting zoo, were in keeping with the usual and customary conduct and practices of other state fairs in 2004 under similar circumstances. The specific training that plaintiffs suggest should have been given . . . had not been developed or implemented by other state fairs in 2004, when *E. coli*[] was an emerging public health issue. The failure of any of [Defendant's] employees to give . . . specific zoonotic disease training, as opposed to . . . general discussions regarding the need to protect the public from the spread of disease from animals to humans, did not . . . constitute a failure to exercise

2. Plaintiffs do not dispute the validity of the Commission's other findings of fact. Therefore, those findings are presumed to be supported by competent evidence and conclusively established on appeal. *Kee*, 209 N.C. App. at 195, 706 S.E.2d at 782–83.

> reasonable care for the safety of the fair patrons [in 2004]. The . . . Commission finds that it was reasonable on the part of [Defendant's] employees to believe that the practices that were in place at the 2004 . . . Fair were sufficient to provide adequate protection for [f]air patrons against the transmission of zoonotic diseases. Plaintiffs have failed to prove that they contracted *E. coli*[] as a result of failure on the part of [Defendant's] employees to exercise due care for their safety.
>
> 33. With regard to [Defendant's] duty to warn fair patrons of unsafe conditions, the . . . Commission finds . . . that [Defendant] exercised reasonable care to provide warnings at the [petting zoo] that contact with the animals posed a health risk. The . . . Commission finds that [the] signage used by [Defendant's] employees in 2004 was sufficient to warn petting zoo patrons of a possible health risk and sufficient to advise them of what precautions they should observe, particularly given the fact that none of the . . . employees knew or could have determined in the exercise of due diligence that any of the animals in the petting zoo were actively shedding *E. coli*[] during the . . . Fair. The . . . Commission finds that a reasonable person exercising due care for the safety of fair patrons in 2004 was not required to provide handouts or signage describing the potential severity of the health risk, which had never surfaced before at the . . . Fair, given the precautions that were in place at the time to prevent the spread of zoonotic disease.

On appeal, Plaintiffs contend that these "findings" are more properly labeled mixed findings of fact and conclusions of law because they find facts and make legal determinations based on those findings. Therefore, Plaintiffs assert, we must not accord findings 32 and 33 "the same deference as true findings of fact on appeal." Defendant does not contest this point in its brief, merely noting that mixed findings of fact and conclusions of law are nonetheless reviewable by this Court and pointing out that "the *factual portion* of these mixed [findings]" should still be reviewed under the competent evidence standard. (Emphasis added). We agree.

With regard to mixed questions of law and fact, the factual findings of the Commission are conclusive on appeal if supported by any competent evidence. *Davis v. Columbus Cnty. Schs.*, 175 N.C. App. 95, 100, 622

S.E.2d 671, 675 (2005). As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts. *See Horn v. Sandhill Furniture Co.*, 245 N.C. 173, 177, 95 S.E.2d 521, 524 (1956) (reviewing the Commission's mixed finding and concluding that "[t]he specific facts found are insufficient to sustain the conclusion that the injury resulting in death arose out of and in the course of the employment"); *see also Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941) ("If [a finding of fact] is a mixed question of fact and law, it is likewise conclusive, provided there is sufficient evidence to sustain the element of fact involved.").

Therefore, findings of fact 32 and 33 are conclusive as to their factual elements if supported by competent evidence and reviewable *de novo* as to their legal elements. Here, though Plaintiffs have elected to remind us of the distinction between a finding of fact and a conclusion of law, they fail to challenge either the factual or legal elements of findings 32 and 33 as not based on competent evidence or not supporting the conclusions. Instead, they merely note in their second argument, discussed *infra*, that the Commission committed reversible error by employing an incorrect statement of the law. Therefore, we need not review the specific elements of findings 32 and 33 or engage in an analysis of whether those elements are "factual" or "legal." *See generally Helfrich v. Coca-Cola Bottling Co. Consol.*, __ N.C. App. __, __, 741 S.E.2d 408, 412 (2013) ("Findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus[,] conclusively established on appeal.") (citations, internal quotation marks, and brackets omitted); N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Plaintiffs must contest these findings in order to take advantage of the relevant standards of review and has not done so here. Accordingly, we proceed to Plaintiffs' premises liability argument.

II. Premises Liability

1. Appellate Review

[2] In their second argument on appeal, Plaintiffs contest the validity of the Commission's conclusion that Defendant did not breach its duty of care on grounds that the conclusion is based on an incorrect standard of care. Plaintiffs go on to argue that Defendant failed to act with due care under the correct standard. In response, Defendant contends that Plaintiffs are barred from challenging the standard of care applied

by the Commission because they did not raise this issue before the Commission. We disagree.

As a general rule, a party may not make one argument on an issue at the trial level and then make a new and different argument as to that same issue on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."). The rationale behind this rule is twofold. First, principles of fairness to both parties do not permit one party to use the appellate system to advance a new or different argument than it employed at trial simply because that party did not properly prepare or was unable to think of the argument below. *See id.* Second, as required by the process of preserving an issue for appellate review, the contention argued on appeal must have been raised, argued, and ruled on in the trial court. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citing the "swap horses" rule and the rule requiring the preservation of issues for appellate review for the same point), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Therefore, it is implicit within the rule that a party must have actually been able to raise an argument before the trial court in order for it to be barred as impermissible "horse swapping." *See Weil*, 207 N.C. at 10, 175 S.E. at 838; *see also Wood*, 160 N.C. App. at 699, 586 S.E.2d at 803. Accordingly, arguments limited to alleged errors of law made for the first time in the trial court's written opinion cannot be deemed improper simply because those arguments were never made before the trial court. *Cf. Carden v. Owle Constr., LLC*, __ N.C. App. __, __, 720 S.E.2d 825, 827 (2012) ("A trial court's conclusions of law are fully reviewable on appeal.") (citation, internal quotation marks, and ellipsis omitted). That is to say, the appealing party cannot be charged with impermissibly *swapping* horses when it never mounted one in the first place.

Here, as discussed above, Plaintiffs are not contesting a statement or application of the law made by the Commission *during* the hearing. Rather, Plaintiffs contest the Commission's articulation and application of the law *in its Decision and Order*. As it would be impossible for Plaintiffs to challenge the legal principle articulated by the Commission before it was actually stated, Plaintiffs cannot be barred by the "swap horses" doctrine in this case. To hold otherwise would be to require a party to anticipate a court's opinion before it is written, and we decline to require such foresight here. Accordingly, Defendant's preliminary argument is overruled, and we proceed to Plaintiffs' second argument on appeal.

2. Standard of Care

Plaintiffs' second argument contains two elements. First, Plaintiffs contend that the Commission applied an incorrect legal standard in reaching its conclusions of law on the duty of care owed by Defendant to the Fair patrons. Second, Plaintiffs contend that the Commission erred in concluding that Defendant did not violate its duty of care. We are unpersuaded on both counts.

In order to prove a defendant's negligence in a premises liability case, the plaintiff must first show that the defendant either "(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342–43 (1992). "The ultimate issue which must be decided in evaluating the merits of a premises liability claim[, however,] is . . . whether [the defendant] breached the duty to exercise reasonable care in the maintenance of [its] premises for the protection of lawful visitors." *Burnham v. S&L Sawmill, Inc.*, __ N.C. App. __, __, 749 S.E.2d 75, 80 (citation and internal quotation marks omitted), *disc. review denied*, __ N.C. __, 752 S.E.2d 474 (2013).

> Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regards to reasonably foreseeable injury by an animal. However, premises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses . . . attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

Thomas v. Weddle, 167 N.C. App. 283, 290, 605 S.E.2d 244, 248–49 (2004) (citations, internal quotation marks, and certain ellipses omitted). Reasonable care does not require "owners and occupiers of land to undergo unwarranted burdens in maintaining their premises." *Royal v. Armstrong*, 136 N.C. App. 465, 469, 524 S.E.2d 600, 602, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 495 (2000).

A. Created Harm

[3] Plaintiffs first contend that the Commission erred by relying solely on the rule that landowners "have a duty to exercise reasonable care so as not to unnecessarily expose lawful visitors to danger and to warn

them of hidden hazards of which the landowner has express or implied knowledge." Plaintiffs assert that the standard used by the Commission is incorrect because Plaintiffs were not required to show that Defendant knew or should have known about the danger of *E. coli* where, as here, Defendant "created the condition causing [the] injury." (Emphasis in original). Therefore, Plaintiffs assert that we must remand to the Commission for proper application of the correct standard of care. This argument is misplaced.

> Plaintiffs' argument assumes that the Commission's decision turns on whether Plaintiffs adequately established that Defendant knew or should have known about the risk of *E. coli*. This is incorrect. Defendant *admittedly* knew there was some risk of an *E. coli* infection by operating a petting zoo at the Fair. Indeed, Dr. Woodlief testified during the hearing that she was concerned about the possibility of a number of diseases, *including E. coli*. The fact that the Commission did not acknowledge that negligence could be proven by showing that Defendant either created the harm or had express or implied knowledge of the harm has no effect on the resolution of this case. The relevant question is whether Defendant exercised due care in October of 2004 to protect Fair patrons against *E. coli* infection and, in doing so, adequately fulfilled its duty to warn those patrons of the risk of harm. Accordingly, the omission described above cannot constitute reversible error, and Plaintiffs' argument is overruled. *See Vaughn v. N.C. Dep't of Human Res.*, 37 N.C. App. 86, 90, 245 S.E.2d 892, 894 (1978) ("We will not reverse the order of the Commission for harmless error. To warrant reversal, the error must be material and prejudicial.") (citation omitted).

B. Reasonable Care Under the Circumstances

[4] Second, Plaintiffs contend that Defendant failed to meet its duty of care because the petting zoo unreasonably exposed lawful visitors to "a significantly increased risk of contracting a potentially deadly bacteria . . . ." In order to satisfactorily minimize that risk, Plaintiffs suggest that Defendant should have done all or some of the following: provide better supervision, put up a fence between the children and the animals, require parents to carry or hold hands with small children in order to reduce the likelihood of falling, refrain from allowing or offering food in the zoo, and provide more detailed information to Fair patrons about the *specific* danger of *E. coli* infection. Plaintiffs contend that Defendant's

failure to take such precautions was a deviation from its duty of care because Defendant (1) was "charged with the responsibility to minimize and prevent the transmission of diseases from animals to humans at the . . . Fair," (2) "conducted its own assessments of the risks for disease transmission at the . . . [f]airs in 2002 and 2004," (3) "developed and issued its own recommendations toward reducing that risk," and (4) had "the latest and best available information and recommendations" regarding zoonotic diseases. We do not find Plaintiffs' position persuasive.

As Defendant notes in its brief, the precautions taken by Fair officials must be viewed in light of what a reasonable person would have done in October of 2004 to protect against the danger of *E. coli*. *See Thomas*, 167 N.C. App. at 290, 605 S.E.2d at 248–49. In 2004, *E. coli* was considered to be an "emerging public health issue." Only one state had legislation addressing the disease in the context of petting zoos, and "there were no federal laws or regulations in 2004 prohibiting petting zoo exhibits or preventing people from intermingling directly with animals at petting zoo exhibits." No evidence was presented at the hearing that an *E. coli* outbreak had occurred at the Fair prior to 2004, and the petting zoo had been an exhibit at the Fair for the past three years — in 2001, 2002, and 2003 — without an illness-related incident.

In addition, a doctor hired in 2005 by the International Association of Fairs and Expositions[3] to train fair officials to prepare for the danger of *E. coli* in human-to-animal contact settings testified that "most fairs allowed people to intermingle with animals, despite the risk of *E. coli*[] transmission." Having visited fifteen to twenty fairs each year, the doctor observed that signs used by other fairs in 2004 did not list "specific zoonotic factors or describ[e] the specific zoonotic risk, or severity of risk." Rather, the signs "primarily focused on suggesting that patrons wash their hands." Regarding enteric pathogens like *E. coli*, the doctor had previously commented that:

> We do not live in a pathogen-free environment. . . . [T]here is no known process or system to completely eliminate the risk associated with enteric pathogens. Pathogens are part of our world[,] and we must continue to manage our environment such that risk is reduced and consumers are protected as effectively as possible.

The doctor testified that, even by August of 2011, he did not see fairs listing *specific* zoonotic risks on signs.

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3. The Fair is associated with this organization.

Despite the inherent difficulty in eliminating the risk that comes from enteric pathogens, officials at the 2004 Fair participated in a "pre-fair risk assessment." This assessment was designed to "identify and correct any deficiencies prior to the opening of the Fair." According to the Commission, the "concerns raised in the . . . [pre-fair risk assessment report] regarding signage and hand washing stations were adequately and appropriately addressed prior to the opening of the 2004 . . . Fair." In addressing those concerns, officials erected additional signage and hand sanitizing stations at and near the petting zoo. The signs indicated that individuals visiting the zoo should wash their hands before and after touching the animals. Though the signs did not specifically mention *E. coli*, this omission was not atypical for fairs at that time.

While it was certainly *possible* for Defendant to take the additional precautions suggested by Plaintiffs, we agree with the Commission's conclusion that Defendant did not fail to act with due care in October of 2004 to minimize the risk of exposure to *E. coli*. Sources cited by the Commission note that it is impossible to eliminate the risk of enteric pathogens, like *E. coli*, in human-to-animal contact settings without eliminating petting zoos altogether. While sparing the children and animals from this "free for all" would have been the safer option by all accounts, Defendant's decision not to do so was not a breach of its duty of care. Petting zoos were lawful in 2004, and the Commission's findings make clear that the precautions taken by Defendant were well within the range of acceptable care for such zoos.

Our premises liability law does not require landowners to *eliminate* the risk of harm to lawful visitors on their property or undergo unwarranted burdens in maintaining their premises. We conclude that the Commission correctly determined that Defendant took reasonable steps in 2004 to appropriately reduce the inherent risks of operating a petting zoo. While such steps might not be sufficient to do so today, especially given the 2004 outbreak, Plaintiffs' suggested precautions go beyond the reasonable standard of care required of a landowner in October of 2004. To hold otherwise would be to engage in the type of Monday-morning quarterbacking that the law of negligence should avoid, and we decline to do so here. Accordingly, Plaintiffs' second argument is overruled.

3. Proximate Cause

[5] Lastly, Plaintiffs argue that the Commission erred in finding of fact 32 by stating that Plaintiffs' injuries were not proximately caused by Defendant's negligence, in contravention to the parties' stipulations

and the undisputed evidence presented at the hearing. This argument is based on a misreading of finding of fact 32.

As discussed above, finding of fact 32 states in pertinent part that "Plaintiffs have failed to prove that they contracted *E. coli*[] as a result of failure on the part of [Defendant's] employees to exercise due care for their safety." This finding is not relevant to the issue of proximate cause. Rather, it addresses whether Defendant acted with "due care." Plaintiffs' interpretation of the Commission's use of the words "as a result of" transmogrifies the Commission's statement into something other than what it is. Accordingly, Plaintiffs' third argument is overruled, and the Commission's Decision and Order is

AFFIRMED.

Judges ERVIN and DILLON concur.

STATE OF NORTH CAROLINA
v.
DAVID KEITH PRICE

No. COA13-904

Filed 1 April 2014

1. Jurisdiction—motions to dismiss—variance between oral and written orders

The trial court had jurisdiction to enter written orders granting defendant's motions to dismiss a charge of possession of a firearm by a felon where defendant made three motions to dismiss on the grounds that the Felony Firearms Act was unconstitutional, that the stop had been unnecessarily prolonged, and that the firearm had been illegally seized. The charge arose when a Wildlife Officer approached defendant while defendant was hunting, asked for defendant's hunting license, and later asked if defendant was a convicted felon. The trial court granted the dismissal in open court based solely upon the seizure being prolonged past the point where the hunting license was produced, but addressed the Felony Firearms Act constitutional issue in deference to defendant's attorney. The trial then issued two written orders dismissing the charge, one based on the Fourth Amendment violations, and the other based upon the Second Amendment violations.

2. Firearms and Other Weapons—dismissal of action—findings—supported by evidence

In a prosecution for possession of a firearm by a felon arising from a Wildlife Officer checking defendant's hunting license, the challenged findings in an order dismissing the case were supported by the evidence or were not material.

3. Firearms and Other Weapons—possession by a felon—prohibition—preservation of peace and public safety

The conclusions of law in an order dismissing a charge of possession of firearms by a felon were incorrect as a matter of law where the facts of the case more closely aligned with *Britt v. State*, 363 N.C. 546, than *State v. Whitaker*, 201 N.C. App. 190. Given the circumstances, it was not unreasonable to prohibit defendant from possessing firearms to preserve public peace and safety.

4. Search and Seizure—scope of stop—hunting license check—voluntary conversation

The trial court erred by granting defendant's motion to dismiss a charge of possession of a firearm by a felon based on the trial court's conclusion that a Wildlife Enforcement Officer exceeded the scope of a stop to check defendant's driver's license by asking defendant if he was a convicted felon. Nothing in the record indicated that defendant had an objective reason to believe that he was not free to end the conversation once he produced his driver's license and he was not "seized" in the constitutional sense when the officer asked him about his criminal history. The officer had the authority to seize defendant's rifle under the plain view doctrine.

Appeal by the State from orders entered 28 May 2012 by Judge Theodore S. Royster, Jr. in Alexander County Superior Court. Heard in the Court of Appeals 10 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defendant David W. Andrews, for defendant-appellee.

ELMORE, Judge.

On 14 January 2013, David Keith Price (defendant) was indicted by superseding indictment for possession of a firearm by a felon under N.C.

Gen. Stat. § 14-415.1. Defendant filed three pre-trial motions. First, he filed a motion to dismiss in which he argued, *inter alia*, that the North Carolina Felony Firearms Act was unconstitutional on its face and as applied to him. Subsequently, he filed two motions to suppress–one to suppress illegally obtained statements and one to suppress illegally obtained evidence. Following a motions hearing on 11 February 2013 in Alexander County Superior Court, Judge Theodore S. Royster, Jr. granted each of defendant's motions. The State now appeals. After careful consideration, we reverse.

I. Background

At the motions hearing, Officer Chad Starbuck (Officer Starbuck), an enforcement officer for the North Carolina Wildlife Resources Commission, testified that on 2 December 2010 he was patrolling a portion of Alexander County, investigating reports of trespassing and hunting violations, when he encountered defendant near a deer stand in a pine forest. Defendant was in full camouflage and was carrying a hunting rifle. Officer Starbuck was in uniform, and, upon seeing defendant, he "got out of the vehicle and walked towards [defendant's] direction."

Officer Starbuck identified himself and asked defendant to produce his hunting license. Pursuant to N.C. Gen. Stat. § 113-136, wildlife enforcement officers are "authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, *including license requirements*." N.C. Gen. Stat. § 113-136(f) (2013) (emphasis added). Officer Starbuck also asked defendant, "how he had got to that location?" Defendant replied that his wife dropped him off on the property.

Officer Starbuck asked defendant if he was a convicted felon? Defendant answered, "yes." After further investigation, Officer Starbuck determined that defendant was in fact a felon, and he called in Officer Michael Bruce (Officer Bruce) of the Alexander County Sheriff's Department as "backup." Officer Bruce took custody of the firearm. Defendant was neither told that he was under arrest nor placed in handcuffs at any point, and he was released from the scene to his wife. He was later arrested on 16 December 2010 on a charge of being a convicted felon in possession of a firearm.

At the motions hearing, Judge Royster granted defendant's motion to dismiss:

> I'm dismissing it based upon violation of this 4th Amendment rights of the seizure at the time past the point where he said yes, I have a hunting license, here it is, past that point I think the seizure is, or the appellate cases in the US Supreme Court have ruled when you stop someone longer than is necessary to initially investigate what you're initially stopping for, and in this case it could only be a violation, possible violation of the wildlife laws, that's what he was there for, and once he determined there was no violation of those laws any further detainment would be a seizure under the 4th Amendment. And that's the reason I'm dismissing it based upon the violation of that.

Judge Royster subsequently instructed defense counsel "to draw me an order to that effect[.]" However, the written dismissal order filed 28 May 2013 does not reference any Fourth Amendment violation; it dismisses the charge on the basis of an unconstitutional application of the Felony Firearms Act to defendant. Specifically, Judge Royster, Jr. concluded in the written order: (1) that the trial court had jurisdiction to hear and determine defendant's motion to dismiss as a violation of his constitutional rights; (2) that the Federal Firearms Act as applied was unconstitutional because defendant did not present a danger to the community; and (3) the "2004 versions of North Carolina General Statute § 14-415.1 is an unconstitutional violation of Article I, Section 30 of the North Carolina Constitution as it is an unreasonable regulation, not fairly related to the preservation of public peace and safety."[1]

II. Standard of Review

When reviewing the trial court's grant of a criminal defendant's motion to dismiss, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation and citation omitted). We review the trial court's conclusions of law *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

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1. We note that conclusion 3 is an incorrect statement of law. Our analysis focuses on whether § 14-415.1 is unconstitutional as applied to defendant. We decline to address whether the statute is unconstitutional on its face, as its constitutionally has been previously upheld. *See State v. Whitaker*, 201 N.C. App. 190, 203, 689 S.E.2d 395, 403 (2009).

"The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454–55, 650 S.E.2d 1, 4 (2007) (citations, quotations, and ellipses omitted). Under N.C. Gen. Stat. § 15A-954(a)(1) (2013), "[t]he court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: [t]he statute alleged to have been violated is unconstitutional on its face or as applied to the defendant." *Id.*

III. Constitutional Violation

The State makes three arguments to support its position that the trial court erred in dismissing the charge against defendant. First, the State challenges the trial court's subject matter jurisdiction. Second, the State avers that the trial court's findings of fact do not support its conclusions of law. Third, the State argues that the trial court's conclusions are erroneous as a matter of law. We will address each of these arguments in turn.

A. Subject Matter Jurisdiction

[1] The State specifically avers that the trial court lacked subject matter jurisdiction, while the case was on appeal, to enter a written order that did not accurately reflect its oral ruling at the motions hearing. The thrust of the State's argument is that because the trial court orally dismissed the charge against defendant based on a violation of his Fourth Amendment rights, the trial court lacked jurisdiction to enter a written order dismissing the charge due to an unconstitutional application of the Federal Firearms Act. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). N.C. Gen. Stat. § 15A-1448(a) sets forth the guidelines for time for entry of an appeal and jurisdiction over a case. Under N.C. Gen. Stat. § 15A–1448(a)(3), "[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and the period described in [N.C.G.S. § 15A–1448(a)(1)-(2)] . . . has expired." Subsection (1) of N.C. Gen. Stat. § 15A–1448(a) provides that "[a] case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal." *Id.* § 15A–1448(a)(1).

Rule 4 of the North Carolina Rules of Appellate Procedure allows two modes of appeal in a criminal case. First, a party may give oral notice

of appeal, provided it is spoken at the time of trial. *State v. Oate*s, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Second, notice of appeal may be in writing and "filed with the clerk of court . . . at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order." *Id.*

In making its argument, the State relies on *State v. Davis*, where this Court stated that the "general rule is that the jurisdiction of the trial court is divested when notice of appeal is given[.]" 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996) (citation omitted) (holding that the trial court was without jurisdiction to amend the judgment in the course of settling the record on appeal to reflect the intentions of the trial court when the original judgment clearly did not reflect the trial court's intentions).

Here, defendant filed three pre-trial motions which were heard at the 11 February 2013 hearing. Two of these motions, defendant's "Motion to Suppress Illegally Obtained Evidence," and defendant's "Motion to Suppress Defendant's Statements," were each less than a page in length. The third motion, defendant's "Motion to Dismiss as a Violation of Defendant's Constitutional Rights," was twenty-one pages. This motion was entirely devoted to defendant's arguments that the Felony Firearms Act violated the Second and Fourteenth Amendments, and that the Act was unconstitutional on its face and as applied to defendant. *Id.*

The trial court heard defendant's suppression arguments first. Defendant argued that Officer Starbuck illegally seized defendant's firearm pursuant to the "plain view" doctrine because Officer Starbuck lacked probable cause to believe the firearm was "contraband, or an instrumentality or evidence of a crime." The trial court moved on to the Fourth Amendment analysis at the hearing. Following defendant's suppression arguments, the trial court ruled that it was going to grant both suppression motions because of its determination that defendant's Fourth Amendment rights had been violated by an illegally prolonged seizure of defendant. The trial court then allowed defendant to proceed and make his arguments based upon the alleged unconstitutionality of the Felony Firearms Act.

Following the argument on defendant's third motion, the trial court stated in open court that it was going to dismiss the charge of possession of a firearm by a felon based solely on its ruling that defendant's Fourth Amendment rights had been violated because defendant had been detained after the purpose of the seizure – determining whether defendant possessed a valid hunting license – had ended. However, the

trial court then continued on to address whether the Felony Firearms Act was unconstitutionally applied to defendant in this instance:

> [I]n deference to you [defendant's attorney], since this is a very important question, I will find as applied to this defendant, his constitutional rights concerning the 2nd Amendment were violated.
>
> If you want to [appeal] we'll see what's going to happen, but I'm actually dismissing it not based on that grounds. She asked me to rule on the constitutionality concerning, as applied to him and I'm doing that, but I'm dismissing it because I think his 4th Amendment right was violated[.]

The trial court then entered two orders on 28 May 2013, one granting defendant's motions to suppress and dismissing the charge based upon the Fourth Amendment violation found by the trial court, and the other granting defendant's motion to dismiss based upon the Second Amendment violations found by the trial court.

The State argues that this case is analogous to *Davis*, in which this Court determined the trial court had acted without jurisdiction when it materially amended its judgment after notice of appeal had been taken from that judgment. *Id.* In *Davis*, the defendant was convicted of felonious breaking or entering, felonious larceny, and felonious possession of stolen property pursuant to a breaking or entering. The defendant then admitted to having attained habitual felon status. *Id.* at 241, 472 S.E.2d at 393. Because the General Assembly did not intend to punish the defendant for larceny of property *and* possession of the same property that he stole, judgment needed to be arrested for either the felonious larceny or felonious possession of stolen property charge. *See State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled in part on different grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010) (holding that a defendant may not be convicted and punished for both larceny of property and the possession of that same property). However, neither party moved for arrest of either judgment at trial, and the trial court did not do so *ex mero motu*. *Davis*, 123 N.C. App. at 243, 472 S.E.2d at 394. The trial court subsequently entered its written judgment, which mistakenly arrested judgment on all three underlying convictions, and sentenced the defendant solely based upon his having attained habitual felon status. *Id.* at 241, 472 S.E.2d at 393. This error having been brought to its attention, the trial court, subsequent to the defendant's having entered notice of appeal, conducted a hearing in which the State moved for arrest of judgment solely on the conviction for possession of stolen

goods. *Id.* at 241-42, 472 S.E.2d at 393. The trial court then entered an amended judgment which stated in relevant part:

> The Jury returns into open court with its verdict and finds the defendant Guilty of Felonious Breaking and Entering, Larceny, and Possession of Stolen Goods.
>
> Motion is made by the State to Arrest Judgment as to Possession of Stolen Goods. Motion is allowed.
>
> IT IS THEREFORE ORDERED by the Court to Arrest Judgment as to Possession of Stolen Goods.

Id. at 242, 472 S.E.2d at 393.

This Court in *Davis* vacated the "amended" judgment, reasoning:

> Our review of the trial transcript in this case reveals no motion [made at trial] by the State to arrest judgment as to the charge of possession of stolen property, and no indication that the court did so ex mero motu. Indeed, the judgment of the court, as rendered in open court, indicates that the court did not arrest judgment as to any of the three felonies for which defendant was convicted by the jury. After the court accepted the jury's verdicts, defendant admitted the existence of prior convictions necessary to establish his status as an habitual felon.
>
> . . . .
>
> Thus, we must conclude that the amended judgments do not accurately reflect the actual proceedings and, therefore, were not a proper exercise of the court's inherent power to make its records correspond to the actual facts and "speak the truth." To the contrary, it appears that the amended judgments impermissibly corrected a judicial error.

Id. at 243, 472 S.E.2d at 394.

In contrast, defendant in this case argued vigorously at the hearing that "as applied to [defendant] [the Felony Firearms Act] should not be applied, that it's unconstitutional. And Your Honor, even on a broader fashion we would argue that the statute is too broadly applied and does not meet the test of strict scrutiny." The trial court, after considering the arguments of defendant and the State, stated that defendant "asked me to rule on the constitutionality concerning, as applied to him and I'm doing that[.]" The trial court then ruled in part: "I will find as applied to

this defendant, his constitutional rights concerning the 2nd Amendment were violated." The State then entered oral notices of appeal from the rulings granting each of defendant's three motions. One of those notices of appeal was for the trial court's granting of defendant's motion to dismiss based upon its determination that the Felony Firearms Act was unconstitutional on its face and as applied to defendant.

Unlike the factual situation in *Davis*, in this matter defendant argued the constitutionality of the Act to the trial court, and submitted a written motion, the trial court acknowledged the argument, stated that it would rule on the motion, and did so orally. The State, clearly aware that the motion to dismiss had been decided in defendant's favor, gave notice of appeal from that motion. The trial court then reduced its ruling to writing and entered it.

We do not believe *Davis* stands for the proposition that the trial court is restricted to only including in its written judgments or orders that which it had already stated in open court. *Davis* stands for the principle that the trial court lacks jurisdiction to correct judicial errors, or address issues never litigated, by written order or judgment following valid entry of notice of appeal.

The case before us does not involve the correction of judicial error, and we hold that the events at trial, and resulting orally rendered judgment, sufficiently signaled the contents of the written order now contested by the State. We hold that the trial court had jurisdiction to enter all three of its written orders.

B. Findings of Fact Unsupported by Competent Evidence

[2] Assuming the trial court had subject matter jurisdiction, which it did, the State assigns error to the trial court's findings of facts 1, 14, 20, 22, 23, 26, and 34.

Unchallenged findings of "fact[] are presumed to be correct and are binding on appeal." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (citation omitted). As such, we limit our review to whether the unchallenged facts support the trial court's conclusions of law. *Id.* "Immaterial findings of fact are to be disregarded." *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971).

The challenged findings are as follows:

> 1. Defendant is a resident of Alexander County, North Carolina, and has resided in the state of North Carolina since his youth.

> 14. Officer Starbuck . . . searched [defendant] for weapons.
>
> 20. Defendant was held at the scene approximately 20-30 minutes before being allowed to leave.
>
> 22. Officer Starbuck testified that E-315 of the Wildlife Resources Policy Manual applies in this case.
>
> 23. The State has presented no evidence that the search of [d]efendant's person or the seizure of his weapon were consensual.
>
> 26. The crime with which Defendant was charged and convicted of [sic] did not involve any act or threat of violence and did not involve a firearm.
>
> 34. Since completing his sentences for the offense in which he was convicted the Defendant has become a reputable member of the community. Defendant's voting rights were restored in 2010 and he is able and registered to vote in Stony Point, Alexander County, North Carolina. Defendant participates in a Wildlife Commission.

Findings #14, #20, #22, and #23 are supported by the record, specifically by Officer Starbuck's testimony. Officer Starbuck testified that once he "secured the firearm [I] made sure that [defendant] had no other firearms." When asked how long defendant was held at the scene, Officer Starbuck replied: "It could have been 30 minutes. You know, it could have been 20." In addition, Officer Starbuck testified that he followed the procedure set forth in section E-315 of the Wildlife Resources Policy Manual. Finding #23 is supported by the record: Officer Starbuck searched defendant for weapons, and a statement in the chain of custody provides that the "[g]un was seized by [Officer] Starbuck [] when [defendant] came out of the woods." Finding #26 is in reference to defendant's conviction for selling and delivering marijuana and is supported by competent evidence. In support of Finding #34, Officer Starbuck testified that defendant "tended to be a prominent person in the community." However there is no evidence regarding defendant's voting rights. Finding #1 is irrelevant; however, it is supported in that defendant's hunting license states that he is a resident of Alexander County. The challenged facts are supported by competent evidence. To the extent that any of the challenged findings are unsupported, they are immaterial to the outcome and are disregarded.

C. Erroneous Conclusions of Law

[3] Lastly, the State argues that the conclusions of law set out in the dismissal order are incorrect as a matter of law. We agree.

The Felony Firearms Act (the Act), codified in N.C. Gen. Stat. § 14–415.1, was enacted by the General Assembly in 1971. The Act made it unlawful for any person previously convicted of a crime punishable by imprisonment of more than two years to possess a firearm, with certain exemptions for felons whose civil rights had been restored. *Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 864-65 (2012) *writ allowed*, *review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013) *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013) *aff'd*, 749 S.E.2d 278 (2013); 1971 N.C. Sess. Laws ch. 954, § 2. Initially, the Act only prohibited felons from the possessing of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches[.]" *Britt v. State*, 363 N.C. 546, 547, 681 S.E.2d 320, 321 (2009)(citation omitted). In 2004 the General Assembly amended the statute "to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felons own home and place of business." *Id.* at 548, 681 S.E.2d at 321 (emphasis added); Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737.1.

At the time defendant was charged and presently, N.C. Gen. Stat. § 14-415.1 (2013) provides:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in G.S. 14-409.11.

Our courts have held that a felon may challenge the statute as it applies to him or her on grounds that it violates Article I, Section 30 of the North Carolina Constitution. In considering these "as-applied" challenges, we must contemplate the following five factors: "(1) the type of felony convictions, particularly whether they involved violence or the threat of violence[;] (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime[;] (4) the

felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited[;] and (5) the felon's assiduous and proactive compliance with the 2004 amendment." *Whitaker*, at 205, 689 S.E.2d at 404 (quotations omitted) (citing *Britt*, 363 N.C. at 550, 681 S.E.2d at 323 (2009), *aff'd on other grounds*, 364 N.C. 404, 700 S.E.2d 215 (2010)).

In *Britt*, the plaintiff, Mr. Britt, pled guilty to the nonviolent offense of felony possession with intent to sell and deliver the controlled substance (methaqualone) in 1979. 363 N.C. at 547, 681 S.E.2d at 321. Mr. Britt completed his probation in 1982 and his civil rights were fully restored in 1987. *Id.* When the 2004 amendment to the Act took effect, Mr. Britt "had a discussion with the Sheriff of Wake County, who concluded that possession of a firearm by plaintiff would violate the statute as amended in 2004. [Mr. Britt] thereafter divested himself of all firearms, including his sporting rifles and shotguns that he used for game hunting on his own land." *Id.* at 548, 681 S.E.2d at 322. Mr. Britt then initiated "a civil action against the State of North Carolina, alleging that N.C.G.S. § 14-415.1 as amended violat[ed] multiple rights he [held] under the United States and North Carolina Constitutions." *Id.* at 548-49, 681 S.E.2d at 322. Our Supreme Court found the 2004 version of N.C. Gen. Stat. § 14-415.1 to be unconstitutional *as applied* to Mr. Britt because of "his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation[.]" *Id.* at 550, 681 S.E.2d at 323. Specifically, our Supreme Court concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* at 550, 681 S.E.2d at 323.

Alternatively, in *Whitaker*, after applying the five factors relied upon in *Britt*, this Court found N.C. Gen. Stat. § 14–415.1 to be constitutional as applied to Mr. Whitaker who was convicted of three prior non-violent felonies, the most recent conviction on a drug charge only a few years prior, and who had notice of the 2004 amendment and demonstrated a disregard for the law despite never misusing a firearm. 201 N.C. App. at 206–07, 689 S.E.2d 404–05.

Defendant argues on appeal that the circumstances in his case are analogous to those in *Britt*, not *Whitaker*. Applying the five-factor test enumerated in *Britt*, we are not persuaded. Defendant has two felony convictions for selling a controlled substance (marijuana) and one conviction for felony attempted assault with a deadly weapon. While

defendant was convicted of the drug offenses in 1989, he was more recently convicted of the felony of attempted assault with a deadly weapon in 2003. Although there is no evidence to suggest that defendant has misused firearms, there is also no evidence that defendant has attempted to comply with the 2004 amendment to the statute. We think it noteworthy that defendant completed his sentence for the conviction of attempted assault with a deadly weapon in 2005, *after* the 2004 amendment was enacted. Therefore, he should have been on notice of the changes in legislation. When Mr. Britt learned of the 2004 amendment, he relinquished his hunting rifle on his own accord. Defendant took no such action. We conclude that facts of this case more closely align with those in *Whitaker*, not *Britt*. Given the circumstances, it is not unreasonable to prohibit defendant from possessing firearms in order to preserve public peace and safety. The trial court erred in dismissing the charge against defendant on the basis that the Act was unconstitutional as applied to him.

IV. Motions to Suppress

[4] The State next argues that the trial court erred in granting defendant's motion to suppress his statements and the motion to suppress evidence. We agree. The crux of this issue is whether Officer Starbuck exceeded the scope of a valid stop when he asked defendant if he was a convicted felon.

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." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial court's conclusions of law are reviewed *de novo* on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Here, the trial court made twenty-three findings of fact in its order granting defendant's motions to suppress. The State challenges four of these findings as being unsupported by competent evidence. The remaining nineteen findings are binding on appeal. *See Eliason*, *supra*. The challenged findings are as follows:

> 13. Officer Starbuck . . . searched [defendant] for weapons.
>
> 19. Defendant was held at the scene approximately 20-30 minutes before being allowed to leave.

> 21. Officer Starbuck testified that E-315 of the Wildlife Resources Policy manual applies in this case.
>
> 22. The State has presented no evidence that the search of [d]efendant's person or the seizure of the weapon were consensual.

These challenged findings mirror the challenged findings entered in the trial court's dismissal order. As discussed above, these findings were supported by substantial evidence and, therefore, are binding upon this Court. Based on the findings, the trial court concluded: (1) defendant was illegally questioned about his prior criminal record as he was not advised of his Miranda rights; (2) defendant was held beyond the time required for the investigation; (3) defendant's gun was illegally seized without a warrant, probable cause, or defendant's consent; (4) the seizure of defendant's gun was not within the written policies and procedures of the North Carolina Wildlife Resources Commission; and (5) the State failed to justify a warrantless search and seizure of defendant's property. These conclusions of law are fully reviewable on appeal. *Id.* As such, we turn to applicable principles of law in reviewing the trial court's conclusions. *State v. Farmer*, 333 N.C. 172, 186, 424 S.E.2d 120, 128 (1993).

The Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. *State v. McBennett*, 191 N.C. App. 734, 737, 664 S.E.2d 51, 54 (2008) (citations omitted). This constitutional protection is designed to "prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 49 L. Ed. 2d 1116, 1126 (1976) (citations omitted).

It is well established that

> [l]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not

> answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

Farmer, 333 N.C. 186-87, 424 S.E.2d 120, 128-29 (citation and quotation omitted). "Seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Foreman*, 133 N.C. App. 292, 296, 515 S.E.2d 488, 492 (1999) *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) (citation and quotation omitted). A person "subject to detention beyond the scope of the initial seizure is still seized under the Fourth Amendment." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009).

Like seizure, deciding whether a person is in "custody" requires an objective review of the circumstances surrounding the interrogation and a determination of the effect those circumstances would have on a reasonable person. *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004). "A person is in custody for purposes of *Miranda* when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 396, 597 S.E.2d at 736 (quotations and citations omitted).

Defendant concedes that Officer Starbuck was allowed to stop him pursuant to N.C. Gen. Stat. § 113-136(f), which, again, authorizes an enforcement officer to make a temporary stop of a person that he reasonably believes is engaging in activity regulated by the Wildlife Resources Commission to determine whether such activity is being conducted within the requirements of the law, including license requirements. N.C. Gen. Stat. § 113-136(f) (2013). Defendant also acknowledges that per N.C. Gen. Stat. § 113-136(k), he was required to show a valid hunting license. However, because he was required by law to stop, defendant maintains that the stop constituted a "seizure," and was not consensual. Moreover, because the scope of the stop was limited to confirming or dispelling Officer Starbuck's suspicion that he was hunting within the requirements of the law, defendant argues that Officer Starbuck exceeded the scope of the stop when he asked defendant if he was a felon *after* defendant produced a valid hunting license. The State

argues that defendant was neither seized nor in custody when Officer Starbuck asked defendant whether he was a felon.

The record indicates that Officer Starbuck found defendant hunting in the woods, approached him, identified himself, and asked defendant to show his hunting license. Defendant was holding a hunting rifle. Once Officer Starbuck was satisfied that defendant held a valid license, he asked, without demanding, if defendant was a convicted felon. Defendant answered, "yes."

Here, defendant admits that he knew that the stop was valid and he knew its purpose. As such, nothing in the record indicates that defendant had an objective reason to believe that he was not free to end the conversation once he produced his hunting license. Again, law enforcement officers do not violate the Fourth Amendment simply by putting questions to a person who is willing to listen. We conclude defendant was not "seized" in the constitutional sense when Officer Starbuck asked him about his criminal history. *See Farmer*, 333 N.C. at 188-89, 424 S.E.2d at 129-30 (holding that the defendant was not "seized," briefly or otherwise, when officers approached him on a public street, identified themselves as law enforcement, displayed no weapons, and simply asked him for information concerning his identity, place of residence, and why he was covered with what appeared to be blood).

Likewise, the record does not support a conclusion that defendant was in custody at the time he was questioned—he was neither arrested nor restrained. As such, the trial court's conclusions of law #1 and #2 are erroneous. Defendant's statement that he was a felon was voluntary, and he was seized no sooner than when Officer Starbuck learned that he was a felon. Accordingly, the trial court erred in granting defendant's motion to suppress his statements.

In addition, Officer Starbuck had authority to seize defendant's rifle without a warrant. "Under the plain view doctrine, police may seize contraband or evidence without a warrant if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband." *State v. Grice*, ___ N.C. App. ___, ___, 735 S.E.2d 354, 357 (2012), *review allowed*, *writ allowed*, 743 S.E.2d 179 (2013) (quotations and citations omitted). "The term 'immediately apparent' in a plain view analysis is satisfied only if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (quotations

and citations omitted). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty[.]" *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (quotations and citations omitted).

Here, the first prong of the plain view test is clearly met as Officer Starbuck was rightfully patrolling hunting grounds in accordance with his job duties. The second prong of the test is also satisfied because Officer Starbuck discovered that the rifle was contraband inadvertently when defendant admitted that he was a convicted felon. Lastly, a reasoned analysis of the record evidence suggests that Officer Starbuck had probable cause to believe that defendant committed the crime of possession of a firearm by a convicted felon. In fact, the commission of the crime could not have been more apparent—defendant, while holding his rifle, admitted that he was a convicted felon. Thus, prong three is satisfied because it certainly became immediately apparent to Officer Starbuck that the rifle was contraband once defendant confessed to being a felon. The trial court's conclusions of law #3, #4, and #5 are erroneous. Accordingly, the trial court erred in concluding that defendant was entitled to the suppression of the gun.

V. Conclusion

The trial court erred in granting defendant's motion to dismiss the charge on the basis that N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to defendant. Further, defendant's Fourth Amendment rights were not violated during the stop and seizure. Accordingly, the trial court also erred in concluding that defendant was entitled to the suppression of his statements and the suppression of the firearm. We reverse.

Reversed.

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

STATE v. TALBERT

[233 N.C. App. 403 (2014)]

STATE OF NORTH CAROLINA
v.
MICHAEL TALBERT

No. COA13-896

Filed 1 April 2014

1. Satellite-Based Monitoring—second-degree rape—aggravated offense

The trial court did not err in a satellite-based monitoring (SBM) case by finding that defendant's second-degree rape conviction constituted an aggravated offense, subjecting him to lifetime SBM. Bound by the decision in *State v. Oxendine*, 206 N.C. App. 205, the Court of Appeals determined that the elements of second-degree rape under N.C.G.S. § 14-27.3(a)(2) are sufficient to constitute an "aggravated offense" as defined in N.C.G.S. 14-208.6(1a).

2. Satellite-Based Monitoring—aggravated offense—second-degree rape—elements of offense—reliance on underlying facts harmless

The trial court improperly relied on several underlying facts of defendant's second-degree rape offense in its determination that defendant had committed an aggravated offense for satellite-based monitoring (SBM) purposes. Although the trial court was only to have considered the elements of the offense of which defendant was convicted, the offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2) constituted an aggravated offense, so any reliance on the underlying facts of defendant's offense was harmless.

Appeal by defendant from order entered 14 February 2013 *nunc pro tunc* to 30 September 2011 by Judge A. Robinson Hassell in Forsyth County Superior Court. Heard in the Court of Appeals 9 December 2013.

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

Mark L. Hayes for defendant-appellant.

McCULLOUGH, Judge.

Defendant Michael Talbert appeals an order by the trial court requiring him to enroll in lifetime satellite-based monitoring after finding that

defendant had committed an aggravated offense within the meaning of N.C. Gen. Stat. § 14-208.6(1a). For the reasons discussed herein, we affirm the trial court's order.

I. Background

On 12 September 2002, an indictment was returned charging defendant with one count of second-degree rape in violation of N.C. Gen. Stat. § 14-27.3(a). Defendant was also charged with one count of second-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5(a). Both indictments alleged that the victim was physically helpless at the time of the incident.

On 14 February 2003, a jury found defendant guilty of both charges. Defendant was sentenced to an active term of fifty-one (51) to seventy-one (71) months imprisonment. Defendant was also required to register as a sex offender upon release.

Defendant appealed to our Court. Our Court found no error in the trial court's proceedings in *State v. Talbert*, 2004 N.C. App. LEXIS 711 (2004) (unpublished).

On 5 August 2011, defendant was sent a notice from the North Carolina Department of Correction ("DOC"), informing him that he was to appear for a satellite-based monitoring ("SBM") determination hearing scheduled for 29 August 2011 in Forsyth County Superior Court. DOC had made an initial determination that defendant had been convicted of an aggravated offense as defined in section 14-208.6(1a) of the North Carolina General Statutes, and thus, had met the criteria set out in section 14-208.40(a)(1) requiring enrollment in SBM for life.

Following the hearing, the trial court entered an order 6 July 2012 *nunc pro tunc* to 30 September 2011. The 6 July 2012 order made the following pertinent findings of fact:

> 2) In the State's indictment, the State alleged as to Count 2 specifically with regard to the second-degree rape and sex offense charges — in Count 1 and Count 2 — both allegations were with respect to the victim being, at the time, physically helpless. . . .
>
> 3) Upon conviction, the defendant appealed, and the case was heard in the Court of Appeals on February 4, 2004 whereupon it issued its opinion on May 4, 2004 finding no error with the trial court proceedings or with the sentencing.

4) A copy of the Court of Appeals' opinion was obtained in a duplication by microfilm of the court file upon which the Court takes judicial notice as being an accurate copy and within the bounds as maintained by the Clerk of Superior Court in Forsyth County. . . .

5) The Court further finds as a fact as set forth in the body of the appellate opinion . . . an account of the facts, the defendant's acknowledgement that he had sex with the victim and his acknowledgment that she had not consented, and his acknowledgement and admission that he removed the victim's pants and underwear while she was passed out[.] [T]he next day, the victim went to the Forsyth Medical Center for a sexual assault examination. Forensic Nurse Courtney Tucker found at least 14 tears to the victim's cervix and bruise on her outer right thigh. Nurse Tucker indicated she did not believe the sex was consensual[.] Nurse Tucker also believed that the injuries were consistent with blunt force trauma and with the victim's assertion that she was asleep or passed out at the time of digital penetration and intercourse.

The trial court concluded that defendant had committed an aggravated offense within the meaning of N.C. Gen. Stat. § 14-208.6 and that defendant was an appropriate candidate for lifetime SBM. For reasons unclear from the record, on 14 February 2013, the trial court entered another written order making the same findings of fact and conclusions of law as in the 6 July 2012 order.

Defendant appeals.

II. Standard of Review

In reviewing the SBM orders, "[w]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. McCravey*, 203 N.C. App. 627, 637, 692 S.E.2d 409, 418 (2010) (citation omitted). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Jarvis*, 214 N.C. App. 84, 94, 715 S.E.2d 252, 259 (2011) (citation and quotation marks omitted).

III. Discussion

On appeal, defendant argues that (A) because defendant's prior conviction did not involve the use of "force" as contemplated in N.C. Gen. Stat. § 14-208.6(1a), his conviction for second-degree rape did not constitute an aggravated offense, and thus, the trial court erred by requiring defendant to enroll in lifetime SBM. In the alternative, defendant argues that (B) the trial court erred by relying on the particular underlying facts of defendant's prior conviction in determining whether defendant had committed an aggravated offense.

A. Aggravated Offense

[1] First, defendant argues the trial court erred by finding that his second-degree rape conviction constituted an aggravated offense pursuant to N.C. Gen. Stat. § 14-208.6(1a), subjecting him to lifetime SBM. Specifically, defendant argues that his second-degree rape conviction did not involve the "use of force or threat of serious violence." We disagree.

"When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in [SBM], the Division of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)." N.C. Gen. Stat. § 14-208.40B(a) (2013). "If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides." N.C. Gen. Stat. § 14-208.40B(b) (2013).

At defendant's hearing, the trial court found that defendant's second-degree rape conviction constituted an "aggravated offense" within the meaning of N.C. Gen. Stat. § 14-208.6(1a). An "aggravated offense" is defined as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through *the use of force or the threat of serious violence*; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2013) (emphasis added).

"When a trial court determines whether a crime constitutes an aggravated offense, it is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In other words, the elements of the offense must fit within the statutory definition of aggravated offense." *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 464 (2013) (citation and quotation marks omitted).

In the case *sub judice*, defendant was convicted of second-degree rape based upon an indictment alleging a violation of N.C. Gen. Stat. § 14-27.3(a), which governs situations in which the victim was "physically helpless." N.C.G.S. § 14-27.3(a) provides the following:

> (a) 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; or
>
> (2) Who is mentally disabled, mentally incapacitated, or *physically helpless*, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or *physically helpless*.

N.C.G.S. § 14-27.3(a) (2013) (emphasis added).

The only applicable North Carolina case regarding this issue is addressed in *State v. Oxendine*, 206 N.C. App. 205, 696 S.E.2d 850 (2010). In *Oxendine*, the defendant pled guilty to numerous charges including three counts of second-degree rape involving a mentally disabled victim under subsection (a)(2). *Id.* at 206, 696 S.E.2d at 851. The defendant was ordered to enroll in SBM after being released from prison and he appealed the trial court's order. *Id.* at 208, 696 S.E.2d at 851-52. The majority accepted the State's argument that the defendant "should nonetheless be required to enroll in lifetime SBM given that he pled guilty to three counts of second-degree rape of a mentally disabled victim, an aggravated offense as defined by N.C.G.S. § 14-208.6(1a)" and based its conclusion solely on our Court's decision in *State v. McCravey*, 203 N.C. App. 627, 692 S.E.2d 409 (2010) (holding that where the essential elements of second-degree rape pursuant to N.C.G.S. § 14-27.3(*a*)(*1*) are "covered by the plain language of 'aggravated offense' as defined by N.C. Gen. Stat. § 14-208.6(1a), we hold that second-degree rape is an

'aggravated offense' " subject to lifetime SBM). *Id.* at 209, 696 S.E.2d at 853 (emphasis added).

Because we are bound by the decision in *Oxendine*, we reject defendant's arguments that subsection (a)(2) of N.C. Gen. Stat. § 14-27.3 does not constitute an aggravated offense for SBM purposes. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[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").

While we reinforce the ultimate conclusion reached in *Oxendine*, we find valuable guidance in Judge Stroud's separate concurring opinion. In her concurrence, Judge Stroud agreed with the ultimate result reached by the majority opinion "to the extent that it . . . remands to the trial court for entry of an order that defendant enroll in SBM for life under N.C. Gen. Stat. § 14-208.40A(c), as second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an 'aggravated offense' as defined by N.C. Gen. Stat. § 14-208.6(1a)." However, she noted that mere citation to *McCravey* by the majority opinion "is not an adequate rationale for this holding, given the issues raised in this case." *Id.* at 212, 696 S.E.2d at 855. Judge Stroud observed that while *McCravey* held that second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a)(1) is an aggravated offense, "this Court has not previously addressed the issue of whether second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an 'aggravated offense.' " *Id.* at 213, 696 S.E.2d at 855. In order to provide a "more in-depth analysis" of the issue, Judge Stroud stated the following:

> In *McCravey*, the defendant argued "that the statutory definition of 'aggravated offense' in N.C. Gen. Stat. § 14-208.6(1a) is unconstitutionally vague because it does not specify what constitutes 'use of force[.]' " [*McCravey*] at __, 692 S.E.2d at 418. This Court considered the context and purpose of the SBM statute and the case law which has defined "the force required in a sexual offense of this nature." *Id.* at __, 692 S.E.2d at 419-20. In *McCravey*, we held that
>
> > The language of N.C. Gen. Stat. § 14-208.6(1a) – 'through the *use of force* or the threat of serious violence' – reflects the established definitions as set forth in case law of both physical force and constructive force, in the context of the sexual

> offenses enumerated in N.C. Gen. Stat. §§ 14-27.2, 14-27.3, 14-27.4, and 14-27.5. (emphasis added).
>
> The legislature intended that the same definition of force, as has been traditionally used for second-degree rape, to apply to the determination under N.C. Gen. Stat. § 14-208.6(1a) that an offense was committed by 'the use of force or the threat of serious violence.' *Id.*

Id. at 213-14, 696 S.E.2d at 855-56 (emphasis added).

Furthermore, Judge Stroud discussed our Supreme Court's decision in *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994), a case we find relevant to the issue before us. In *Holden*, the defendant argued that there was no evidence presented from which a jury could find that a prior conviction of attempted second-degree rape involved violence or the threat of violence, sufficient to prove an aggravating factor pursuant to N.C.G.S. § 15A-2000(e)(3). *Id.* at 404, 450 S.E.2d at 883. The North Carolina Supreme Court held that attempted second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a)(2) involved the "use or threat of violence to the person" within the meaning of N.C. Gen. Stat. § 15A-2000(e)(3), which lists aggravating circumstances that may be considered when sentencing a defendant to life or death. *Id.* Under N.C. Gen. Stat. § 15A-2000(e)(3), the required prior felony

> can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.

Id. (citations omitted) (emphasis added). The *Holden* Court noted that "for purposes of N.C.G.S. § 15A-2000(e)(3), rape is a felony which has as an element the use or threat of violence to the person" and that the "felony of attempt to commit rape is therefore by nature of the crime a felony which threatens violence." *Id.* at 404-405, 450 S.E.2d at 883-84 (citations omitted). The *Holden* Court rejected the "notion of any felony which may properly be deemed 'non-violent rape'" and relied on the opinions of military courts:

> Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*,

> 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts "specifically reject the oxymoronic term of 'non-violent rape.' The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission." *Myers*, 22 M.J. at 650. "Among common misconceptions about rape is that it is a sexual act rather than a crime of violence." *United States v. Hammond*, 17 M.J. 218, 220 n.3 (C.M.A. 1984).

Id. at 405, 450 S.E.2d at 884 (citation omitted). Based on similar logic, the *Holden* Court held that the crime of attempted rape always involved at least a "threat of violence" within the meaning of N.C. Gen. Stat. § 15A-2000(e)(3) and stated the following:

> The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting – just as with a person who refuses to consent – involve the "use or threat of violence to the person" within the meaning of N.C.G.S. § 15A-2000(e)(3). In this context, the force inherent to having sexual intercourse with a person who is deemed by law to be unable to consent is sufficient to amount to 'violence' as contemplated by the General Assembly in this statutory aggravating circumstance. Likewise, the attempt to have sexual intercourse with such a person inherently includes a threat of force sufficient to amount to a "threat of violence" within the meaning of this aggravating circumstance.
>
> Nor do we believe that having or attempting to have sexual intercourse with a "physically helpless" person in violation of N.C.G.S. § 14-27.3(a)(2) may properly be deemed "non-violent" rape or attempted rape. We find no merit in the suggestion that N.C.G.S. § 14-27.3(a)(2) makes it a crime to have *consensual* sexual intercourse with a physically helpless person.

Id. at 406, 450 S.E.2d at 884-85 (citations omitted) (emphasis in original).

For the foregoing reasons, we conclude that the elements of second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) are sufficient to constitute an "aggravated offense" as defined in N.C. Gen. Stat. 14-208.6(1a).

Accordingly, we hold that the trial court did not err in ordering defendant to enroll in lifetime SBM.

B. Elements of the Convicted Offense

[2] Defendant argues and the State concedes that at the SBM hearing and in both the 29 June 2012 order and 14 February 2013 order, the trial court referenced and relied on several underlying facts of defendant's second-degree rape offense in its determination of whether defendant had committed an aggravated offense for SBM purposes.

It is well established, when determining whether an offense is an aggravated offense pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario. *See Green*, __ N.C. App. at __, 746 S.E.2d at 464. However, as discussed above, this Court has previously held that the offense of second-degree rape under subsection (a)(2) constitutes an aggravated offense. Therefore, the trial court properly ordered defendant to enroll in lifetime SBM. Any reliance on the underlying facts of defendant's offense to determine that it was an aggravated offense and any procedural defects were harmless in the circumstances before us. The order of the trial court subjecting defendant to lifetime SBM is affirmed.

Affirm.

Chief JUDGE MARTIN and JUDGE ERVIN concur.

WASHINGTON v. CLINE

[233 N.C. App. 412 (2014)]

FRANKIE DELANO WASHINGTON AND
FRANKIE DELANO WASHINGTON, JR., PLAINTIFFS
v.
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA13-224-2

Filed 1 April 2014

1. Appeal and Error—interlocutory orders and appeals—Rule 54(b) certification—prevention of fragmentary appeals

Although plaintiffs' appeal was from an interlocutory order since it dismissed one but not all parties, that order was properly certified under N.C.G.S. § 1A-1, Rule 54(b) and defendant Baker's appeal from the trial court's denial of a motion to dismiss for insufficient service of process was allowed in order to prevent fragmentary appeals.

2. Process and Service—motion to dismiss—sufficiency of service of process

The trial court's order dismissing all defendants-appellees except the City was reversed, and the trial court's order denying defendant Baker's motion to dismiss for insufficient service of process was affirmed. Plaintiffs properly proved service via N.C.G.S. § 1A-1, Rule 4(j)(1)d and under N.C.G.S. § 1-75.10(5); further, the trial court's order dismissing the City revealed that plaintiffs failed to properly serve a party designated by rule to receive service on behalf of the City.

3. Process and Service—denial of motion to amend summons—correction of name of city manager—jurisdiction

The trial court did not abuse its discretion by denying plaintiffs' motion to amend the summons against the City to correct the name of the person currently holding the office of city manager. It would have conferred jurisdiction over the City without proper service of process.

4. Appeal and Error—preservation of issues—failure to cite authority

Although defendant Baker contended that the trial court erred by denying his motion to dismiss an action for failure of the

summonses to contain the "title of the cause," he failed to cite any authority for this proposition.

Appeals by plaintiffs and defendant Patrick Baker from orders entered 6 November 2012 by Judge W. Osmond Smith, III in Durham County Superior Court. Originally heard in the Court of Appeals 28 August 2013. Petition for Rehearing allowed 6 January 2014.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiffs-appellants.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., and Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellant Patrick Baker and defendants-appellees the City of Durham, North Carolina, Edward Sarvis, Beverly Council, and Steven Chalmers.

Kennon Craver, PLLC, by Joel M. Craig and Henry W. Sappenfield, for defendants-appellees Anthony Smith, William "Doug" Bell, John Peter, Moses Irving, and Anthony Marsh.

HUNTER, Robert C., Judge.

Frankie Washington ("Washington") and Frankie Washington, Jr. ("Washington, Jr.") (collectively "plaintiffs") and defendant Patrick Baker ("Baker") appeal from interlocutory orders entered by Judge W. Osmond Smith, III on 6 November 2012 in Durham County Superior Court. Plaintiffs appeal from orders granting nine of twelve defendants'[1] motion to dismiss for insufficient service of process and denying plaintiffs' motion to amend the summons against defendant City of Durham ("the City"). Baker appeals from orders denying his motion to dismiss for insufficient service of process and denying his motion to dismiss the action for failure of the summonses to contain the "title of the cause" as is required by North Carolina Rule of Civil Procedure 4(b).

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1. Baker is the only defendant-appellant. Andre T. Caldwell, although named in the complaint, is not listed in the briefs as an appellee, and does not appear to have been a party to the suit at the time the trial court entered its orders. Therefore, the nine defendants whose motion to dismiss was granted, and thus the nine appellees to plaintiffs' appeal, are Steven Chalmers ("Chalmers"), Beverly Council ("Council"), Anthony Smith ("Smith"), William Bell ("Bell"), John Peter ("Peter"), Moses Irving ("Irving"), Anthony Marsh ("Marsh"), Edward Sarvis ("Sarvis"), and the City of Durham ("the City") (collectively "defendants-appellees," or, when including Baker, "defendants").

On appeal, plaintiffs assert that: (1) the trial court erred by granting defendants-appellees' motion to dismiss for insufficient service of process because plaintiffs properly served those defendants via designated delivery service and defendants are estopped from asserting such defense, and (2) the trial court erred by denying plaintiffs' motion to amend the summons for the City because such amendment would not prejudice the City. Baker argues that: (1) the trial court erred by denying his motion to dismiss for insufficient service of process because plaintiffs failed to meet the statutory requirements for designated delivery service, and (2) the trial court erred by failing to dismiss the action because the summonses did not contain the "title of the cause" as is required by statute.

On 5 November 2013, this Court filed an opinion affirming the trial court's orders granting the City's motion to dismiss for insufficient service of process, denying Baker's motion to dismiss for insufficient service of process, denying plaintiffs' motion to amend the summons, and denying Baker's motion to dismiss for failure of the summonses to contain the "title of the cause." However, we reversed the trial court's order granting all other defendants-appellees' motion to dismiss for insufficient service of process. Upon reexamination, we maintain this disposition, but we modify the originally filed opinion. This opinion supersedes the previous opinion filed 5 November 2013.

Background

Plaintiffs' claims against defendants arise out of the arrest, prosecution, conviction, and ultimate release of Washington that took place over a six-year period between 30 May 2002 and 22 September 2008. After a four-year, nine-month delay between arrest and trial, Washington was convicted of first-degree burglary, two counts of second-degree kidnapping, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, assault and battery, and attempted first-degree sex offense. This Court vacated his convictions due to delays attributed to the State in violation of Washington's right to a speedy trial under the Sixth Amendment of the United States Constitution and Article I, Section 18 of the North Carolina Constitution. *See State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008). On 21 September 2011, Washington and Washington, Jr. filed a complaint and obtained civil summonses against defendants for, *inter alia*, violations of federal and state constitutional provisions, malicious prosecution, negligence, negligent and intentional infliction of emotional distress, conspiracy, and supervisory liability.

Plaintiffs attempted to serve process on defendants using FedEx, a designated delivery service. All defendants except Council were served between 23 and 27 September 2011; Council was served on 25 October 2011.

The packages containing summonses and copies of the complaint sent to the City and Baker contained the following directory paragraphs, respectively:

> City of Durham
> c/o Patrick Baker
> 101 City Hall Plaza
> Durham NC 27701
>
> Patrick Baker City Manager
> City of Durham
> 101 City Hall Plaza
> Durham NC 27701

At the time of service, Baker was the City Attorney, not the City Manager. Both packages were received by April Lally ("Lally"), a receptionist and administrative assistant in the City Attorney's Office; Lally signed for the packages and later handed them to Baker. Baker later filed an affidavit with the trial court in which he admitted to receiving the summons and complaint against him.

Plaintiffs attempted to serve Chalmers at his home, but left the package containing the summons and complaint with Chalmers' visiting twelve-year-old grandson who was playing in the front yard. Chalmers' grandson went inside and gave Chalmers the package; Chalmers later filed an affidavit with the trial court admitting that he received the summons and complaint against him.

Plaintiff attempted to serve Council by delivering the package via FedEx to her home, but no one was there at the time of delivery. The driver left the package on the door step to the side door; Council later filed an affidavit with the trial court admitting that she received the summons and complaint against her later that evening when she returned home.

Plaintiff attempted to serve Bell, Irving, Marsh, Peter, Sarvis, and Smith by having a FedEx driver deliver their summonses and copies of the complaint to the City Police Department's loading dock. Bell and Irving were former employees of the City's Police Department at the time of delivery; Marsh, Peter, Sarvis, and Smith were then-current employees. The driver left the package with Brenda T. Burrell ("Burrell"),

an employee for the City's Police Department who is responsible for "receiving materials and supplies delivered to the Police Department for use in its operations." Each of these defendants filed an affidavit with the trial court admitting that he received the summons and complaint against him.

Plaintiffs filed with the trial court affidavits of service and receipts generated by the designated delivery service for each defendant. They also re-filed the defendants' affidavits in which they admitted to receiving the summonses and copies of the complaint against them as evidence of effective service of process.

On 11 January 2012, Cline and the State of North Carolina filed motions to dismiss for insufficient service of process, among other claims not relevant to this appeal. On 23 March 2012, all remaining defendants also filed a motion to dismiss for insufficient service of process. That same day plaintiffs filed a motion to amend the summons issued to the City to replace Baker with the then-current City Manager. On 6 November 2012 Judge Smith entered orders: (1) denying plaintiffs' motion to amend the summons; (2) denying motions to dismiss for insufficient service of process as to Baker, Cline, and the State of North Carolina[2]; and (3) granting motions to dismiss for insufficient service of process as to defendants-appellees. On 15 November 2012, plaintiffs filed a timely notice of appeal. On 27 November 2012, Baker also filed timely notice of appeal.

Grounds for Appellate Review

[1] The orders from which plaintiffs and Baker appeal are interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, the Court does allow immediate appeal of interlocutory orders in some circumstances.

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

2. Only Baker appeals from this order.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2013) ("An appeal may be taken from every judicial order . . . which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action.").

Here, plaintiffs appeal from an order dismissing defendants-appellees, who comprise more than one but not all parties. This order is in effect a final judgment as to those defendants-appellees, and the trial court certified in the order dismissing them that there was no just reason for delay in appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. As such, plaintiffs appeal of the trial court's order granting defendants-appellees' motion to dismiss is properly before this Court. *See DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) ("[I]f the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable.").

Although Baker admits that his appeal does not stem from a final judgment or an order affecting a substantial right, he argues that the Court should hear his appeal in order to prevent "fragmentary appeals." The circumstances here are comparable to those in *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000), in which this Court chose to hear an appeal from the trial court's denial of a motion to dismiss for insufficient service of process that was not itself immediately appealable, but was related to an issue properly before the Court. The Court reasoned that "to address but one interlocutory or related issue would create fragmentary appeals." *Id.* at 531, 534 S.E.2d at 252. Here, Baker's appeal involves the application of the same rules to the same facts and circumstances as plaintiffs' appeal, which we choose to allow. Therefore, in order to prevent fragmentary appeals, we find that Baker's appeal is also proper at this time.

Additionally, we find the appeals from the trial court's orders denying plaintiffs' motion to amend the summons against the City and denying defendants' motion to dismiss for failure of the summons to "contain the title of the cause" are also properly before the Court pursuant to N.C. Gen. Stat. § 1-278, which provides that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." Here, plaintiffs properly appeal from a final judgment, and the above orders involve the merits and necessarily affect that judgment. Therefore, appellate review is appropriate at this stage of litigation.

Discussion

I. Sufficiency of Service of Process

[2] Plaintiffs first argue that the trial court erred by granting defendants-appellees' motion to dismiss for insufficient service of process. Baker argues that the trial court erred by denying his motion to dismiss for insufficient service of process. After careful review, we reverse the trial court's order dismissing all defendants-appellees except the City and affirm the trial court's order denying Baker's motion to dismiss.

A. Estoppel

At the outset, plaintiffs cite *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994), in support of their argument that defendants are estopped from asserting the defense of insufficient service of process. In *Storey*, this Court ruled that the defendants were estopped from asserting insufficient service of process as a defense where they asked for and received extensions of time without alerting the plaintiff to any possible defects in service, and plaintiffs ran out of time to effect valid service due to the extensions. The Court reasoned that by doing so, the defendants in effect "lulled [the] plaintiff into a 'false sense of security' and probably prevented [the] plaintiff from discovering her error and effecting valid service within the statutory period." *Storey*, 114 N.C. App. at 176, 441 S.E.2d at 604. Here, although defendants did receive extensions of time from the trial court, they explicitly stated that the reason for the extensions was to "determine whether any Rule 12 or other defenses [were] appropriate." Defendants-appellees' and Baker's motion to dismiss for insufficient service of process were entered pursuant to Rule 12(b)(5). Therefore, plaintiffs had notice that such motions could be filed. Furthermore, defendants-appellees in fact served plaintiffs with their answer containing the defenses on 16 December 2012, four days before the last day in which plaintiffs could have obtained extensions of the summonses. It is evident that plaintiffs had actual notice of the defenses, because they served their reply to the answer on 20 December 2011, the same day that the summonses expired. Therefore, because defendants were not responsible for plaintiffs' failure to extend the life of the summonses, we find that *Storey* is inapposite and defendants are not estopped from asserting the defense of insufficient service of process.

B. Natural persons

Defendants-appellees and Baker moved to dismiss this action under Rule 12(b)(5) for insufficient service of process. "We review *de novo* questions of law implicated by denial of a motion to dismiss for

insufficiency of service of process." *New Hanover Cnty. Child Support Enforcement ex rel. Beatty v. Greenfield*, __ N.C. App. __, __, 723 S.E.2d 790, 792 (2012).

Rule 4(j)(1)d of the North Carolina Rules of Civil Procedure sets forth the requirements for service of process on natural persons via designated delivery service, the method utilized by plaintiffs here:

> d. By depositing with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)d (2013). Where defendants appear in an action and challenge the service of the summons (as all defendants did here), service by designated delivery service may be proved in the following manner:

> (5) Service by Designated Delivery Service. - In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:
>
> a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.
>
> b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.
>
> c. That the delivery receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(5) (2013).

At issue in this case is the interpretation of the phrase "delivering to the addressee" in Rule 4(j)(1)d and section 1-75.10(5). Defendants summarize their argument as follows: "because FedEx did not deliver the process to the addressee or an agent of the addressee, the requirement of Rule 4(j)(1)d of 'delivering to the addressee' was not met, and therefore service was insufficient." In support of this contention, they further argue that "[e]stablished case law of the Supreme Court and this Court holds that Rule 4's requirements for service of process are to be strictly enforced." We agree that Rule 4 is "to be strictly *enforced* to insure that a defendant will receive actual notice of a claim against him." *Hamilton v. Johnson*, __ N.C. App. __, __, 747 S.E.2d 158, 162 (2013) (emphasis added) (quoting *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92,

94 (1996)). However, the greater weight of precedent supports a liberal approach to interpreting the language of the rules. Both of our appellate courts have explicitly recognized liberality as the canon of construction when interpreting the North Carolina Rules of Civil Procedure. *See Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 285, 616 S.E.2d 349, 352 (2005) ("It is true that our Supreme Court instructed that when construing the Rules of Civil Procedure . . . that '[l]iberality is the canon of construction.' ") (quoting *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988)). The *Lemons* Court explained that:

> The Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association "to eliminate the sporting element from litigation." The philosophy underlying these rules was that:
>
> > *Technicalities and form are to be disregarded in favor of the merits of the case.* One of the purposes of the rules was to take the sporting element out of litigation. No single rule is to be given disproportionate emphasis over another rule which also has application. Rather, the rules are to be applied as a harmonious whole. The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants. The aim is to achieve simplicity, speed and financial economy in litigation. *Liberality is the canon of construction.*

Lemons, 322 N.C. at 274-75, 367 S.E.2d at 657 (emphasis added) (citation omitted).

Furthermore, the General Assembly itself added commentary to Rule 4 indicating that it is "complementary" to the jurisdiction statutes in N.C. Gen. Stat. § 1-75.1 et. seq. which were "proposed for consideration contemporaneously with [the North Carolina Rules of Civil Procedure]." *See* N.C. Gen. Stat. § 1A-1, Rule 4 official commentary (2013). Section 1-75.1 states that the jurisdiction statutes, including section 1-75.10, "shall be *liberally construed* to the end that actions be speedily and finally determined *on their merits*. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Article." N.C. Gen. Stat. § 1-75.1 (2013) (emphasis added). The canon of liberality noted by both this Court and the Supreme Court and the General Assembly's explicit intent to have actions "speedily and finally determined on their merits" underlie the general recognition in this state that:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Wiles v. Welparnel Const. Co., Inc., 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978) (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

Turning to the facts of this case, we believe that *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 493, 586 S.E.2d 791, 797 (2003), is helpful to our analysis. In *Granville Medical Center*, the plaintiff served the defendant via certified mail under Rule 4(j)(1)c of the North Carolina Rules of Civil procedure and won default judgment when the defendant failed to answer the complaint. *Id.* at 485-86, 586 S.E.2d at 793. To prove service under section 1-75.10(4), the plaintiff presented the trial court with an affidavit attesting that the summons and complaint were delivered to the defendant and a signature was obtained on the registry receipt. *Id.* at 490-91, 586 S.E.2d at 796-97. The defendant attempted to rebut the presumption of proper service by averring that the individual who signed for the summons and complaint was not connected to the defendant in any way. *Id.* at 493, 586 S.E.2d at 798.

In addressing section 1-75.10(4) and Rule 4(j)(1)c, the *Granville Medical Center* Court held that "a defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons." *Granville Med. Ctr.*, 160 N.C. App. at 493, 586 S.E.2d at 797 (2003) (citing *In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002) (where the defendant "did not rebut this presumption by showing he never received the summons and complaint" the Court held that "defendant was sufficiently served with process"); *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 555, 239 S.E.2d 479, 482 (1977) (a defendant who "did not attempt to rebut this presumption by showing that he did not receive copies of the summons and complaint" held to have "failed to show that service of process was insufficient because a delivery was not made to a proper person")). Thus, the *Granville Medical Center* Court held that:

> In the present case, defendant's affidavit essentially states that (1) he did not personally sign the registry receipt indicating delivery of the summons, (2) the receipt was signed by "S" or "F" Hedgepeth, and (3) defendant had never employed a person named Hedgepeth "as an agent, officer, employee, or principal[.]" On this basis, defendant asserts his affidavit proves the person signing for receipt of the summons "was not in any way connected with the defendant." However, as the trial court observed, the fact that Hedgepeth was not defendant's agent or principal does not necessarily mean he had no connection to defendant. *Further, as discussed above, the crucial issue is not whether the individual signing for the summons was formally employed by defendant as his agent, but whether or not defendant in fact received the summons. Conspicuously absent from defendant's affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit.*
>
> We conclude that it was not error for the trial court to conclude that defendant was properly served with the summons. This assignment of error is overruled.

Granville Med. Ctr., 160 N.C. App. at 493-94, 586 S.E.2d at 798 (emphasis added).

Although the holding of *Granville Medical Center* is distinguishable because it analyzed whether the defendant could rebut a presumption of service, we find its reasoning as to the interplay between Rule 4 and section 1-75.10 persuasive. The rules analyzed by the *Granville Medical Center* Court are materially similar to those at issue in this case. Rule 4(j)(1)c, like Rule 4(j)(1)d, requires "deliver[y] to the addressee" to effectuate valid service; section 1-75.10(4), like section 1-75.10(5), allows proof of delivery to the addressee with "other evidence" sufficient to establish that the summons and complaint were "in fact received." The *Granville Medical Center* Court held that whether the defendant in fact received the summons and complaint is the "crucial issue" to rebut a presumption of "deliver[y] to the addressee" under Rule 4(j)(1)c and section 1-75.10(4). Thus, given the nearly identical language of these rules, it follows that where defendants challenge "deliver[y] to the address" under Rule 4(j)(1)d and section 1-75.10(5), the "crucial issue" is whether the summons and complaint were in fact received by the defendants challenging service.

Furthermore, principles of statutory construction lead us to conclude that defendants' argument that Rule 4(j)(1)d requires direct service exclusively on a defendant or his service agent is without merit. "The best indicia of [legislative] intent are the language of the statute . . . the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). The General Assembly's stated objective in passing the jurisdiction statutes in sections 1-75.1 et. seq. was to have actions "speedily and finally determined on their merits." N.C. Gen. Stat. § 1-75.1. To achieve this end, the General Assembly drafted section 1-75.10 with plain language allowing a plaintiff to prove service under Rule 4(j)(1)d with either a return receipt or "other evidence" that copies of the summons and complaint were "in fact received" by the addressee, not evidence that the delivery service employee personally served the individual addressee or his service agent. N.C. Gen. Stat. § 1-75.10(a)(5)(b). Further, when construing a statute, "the entire sentence, section, or statute must be taken into consideration, and every word must be given its proper effect and weight." *Nance v. S. Ry. Co.*, 149 N.C. 366, 271, 63 S.E. 116, 118 (1908). Defendants' interpretation would provide almost no weight to the phrase "in fact received" in section 1-75.10. Viewed under the doctrine of *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another, the fact that the legislature declined to include a personal delivery requirement in Rule 4(j)(1)d when it did so in other subsections throughout the statute indicates its intention to exclude it. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(5)a (2013) (prescribing "personal service" on a city, town, or village as an effective method of service); *Haywood v. Haywood*, 106 N.C. App. 91, 99-100, 415 S.E.2d 565, 570 (1992) *rev'd in part*, 333 N.C. 342, 425 S.E.2d 696 (1993).

Here, by presenting the trial court with affidavits from defendants-appellees and Baker admitting that they actually received the summonses and complaints after the service documents were addressed to them and sent through FedEx, plaintiffs provided incontrovertible "other evidence" under section 1-75.10(5) that the summonses and complaints were "in fact received" by the addressees. Therefore, based on the persuasive reasoning of the *Granville Medical Center* Court, the General Assembly's stated goal in enacting section 1-75.10, and the plain language of the statute itself, we hold that plaintiffs properly proved service via Rule 4(j)(1)d under section 1-75.10(5), and the trial court's conclusion that plaintiffs failed to properly prove service on defendants-appellees, except the City, was in error.

Defendants disagree with our conclusion for a number of reasons. First, they contend that because Rule 4(j)(1)c and 4(j)(1)d both contain the requirement that a summons and complaint be "deliver[ed] to the addressee," this Court should follow precedent established by cases where Rule 4(j)(1)c was construed. We agree with this general proposition, as is exemplified by our analysis of the *Granville Medical Center* decision above. However, defendants cite *Hunter v. Hunter*, 69 N.C. App. 659, 317 S.E.2d 910 (1984), which they argue is directly on point. Defendants claim that the *Hunter* Court held that "transmitting process via certified mail to the defendant's place of employment, but not delivering the certified mail to the defendant herself, even though the process was ultimately delivered to the defendant, was invalid." However, defendants ignore the *Hunter* Court's application of section 1-75.10. *See id.* at 661, 317 S.E.2d at 911. In applying this provision, the *Hunter* Court actually held that:

> [W]e find that plaintiff has *failed to show proof of service of process in the manner provided by [section 1-75.10]. . . . The affidavit* and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business. There is no showing from *the affidavit that defendant herself received a copy of the summons and complaint. The trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant* since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. We, therefore, conclude that plaintiff did not establish valid service of process over defendant and affirm the order of the trial court setting aside the judgment of divorce.

Id. at 663, 317 S.E.2d at 912 (emphasis added). This case is therefore readily distinguishable; the trial court here, unlike the trial court in *Hunter*, had before it affidavits from each defendant signifying that they all, in fact, received the summons and complaint against them after they were delivered by FedEx. Had the trial court in *Hunter* been presented with similar evidence signifying delivery, it could have determined that the summons and complaint were "in fact received", per section 1-75.10, on which it based its holding.[3]

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3. Defendants also argue that *Osman v. Reese*, No. COA09-950, 2010 WL 1315595 (N.C. Ct. App. Aril 6, 2010) is analogous to *Hunter* and should be followed by this Court despite being unpublished. They claim that the *Osman* Court held that "service via certified mail delivered to defendant's co-worker at defendant's place of employment was

Next, defendants argue that their actual notice of the suit did not cure the defect in service rendered by FedEx's failure to hand the summons and complaint to each defendant or his or her respective service agents. The cases that defendants claim support application of this principle here are distinguishable in material aspects. First, defendants cite *Grimsley*, 342 N.C. at 544-46, 467 S.E.2d at 94, and claim that in that case "[t]here was no question that process was received: [the] defendant answered the complaint. Nevertheless, process was held to be insufficient." In actuality, the basis of the plaintiff's argument in *Grimsley* was that "while [the defendant] *was not actually served with summons and complaint*, *[the insurance company's] 12 October 1992 answer* constituted a general appearance by [the defendant], thereby precluding [the defendant] from raising the defense of lack of personal jurisdiction." *Id.* at 545, 467 S.E.2d at 94 (emphasis added). Thus, it is clear that the defendant in *Grimsley* did not answer the complaint; a third party to the suit did. *Id.* at 546, 467 S.E.2d at 95. The Court stated unequivocally that "[the defendant] has never been served with [the] summons and complain as required by the Rules of Civil Procedure." *Id.* at 546, 467 S.E.2d at 94. This case is therefore distinguishable because defendants here actually received copies of the summons and complaint and filed answers directly.

Furthermore, the other cases cited by defendants in support of this proposition are equally distinguishable because in each of them, the Court held that service was actually defective. *See Mabee v. Onslow Cnty. Sheriff's Dept.*, 174 N.C. App. 210, 211-12, 620 S.E.2d 307, 308 (2005) (holding that service was defective under N.C. Gen. Stat. § 162-16 because it was executed by an individual other than those vested with authority to do so under the statute, and that this defect could not be cured by actual notice of the proceedings); *Fulton v. Mickle*, 134 N.C. App. 620, 624, 518 S.E.2d 518, 521 (1999) (holding that service was defective under Rule 4(j)(6)c because the summons and complaint were not sent to a party vested with authority to accept service on behalf of a corporation); *Long v. Cabarrus Cnty. Bd. of Educ.*, 52 N.C. App. 625, 626, 279 S.E.2d 95, 96 (1981) (holding that service was defective under

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invalid under Rule 4(j)(1)c, *even though defendant ultimately received the process*, because the requirement of 'delivering to the addressee' had not been met." However, the Court explicitly stated that "*[The defendant] signed affidavits averring that he had never been served with process in this case, and that he never 'received a copy of the Summons and Complaint that was purportedly mailed to [him] c/o Merchant's Tire.'*" *Id.* at *2 (emphasis added). The co-worker who received the summons and complaint averred that "[he] never provided copies to [the defendant.]" *Id.* Because of this crucial factual distinction, we disagree with defendants' assertion that *Osman* has precedential value.

Rule 4(j)(5)c because it was not made on a person vested with authority to receive service on behalf of a county or city board of education). For reasons discussed in more detail above, we do not hold that service under Rule 4(j)(1)d here was defective; therefore, we do not purport to hold that actual notice of the suit cured a defect in service.

Defendants next contend that *Hamilton v. Johnson*, __ N.C. App. __, __, 747 S.E.2d 158, 162-63 (2013) is controlling and requires a holding that service was defective because the FedEx employee did not personally serve defendants or their service agents. Although they correctly characterize the holding in *Hamilton* — that delivery by FedEx to an alleged concierge of a building did not constitute "delivery to the addressee" under Rule 4(j)(1)d — we still find this case to be distinguishable. *See id.* at __, 747 S.E.2d at 162-63. In *Hamilton*, the plaintiff attempted to serve the summons and complaint on the defendant by mailing them to his residence in Texas via FedEx. *Id.* at __, 747 S.E.2d at 160. When the package arrived, an individual identified as "KKPONI" signed for the documents, but the defendant failed to appear at the subsequent hearing for which service was meant to provide notice. *Id.* The *Hamilton Court* stated that:

> Absent any statutory presumption, plaintiff bore the burden of proving that "KKPONI" [the alleged concierge] was defendant's agent, authorized by law to accept service of process on his behalf.
>
> Here, the trial court's order is devoid of any findings as to whether "KKPONI" was an agent authorized to accept service of process on defendant's behalf. In fact, it is unclear how "KKPONI" was employed in the building—if an employee at all. Thus, we cannot conclude that service on "KKPONI," an alleged concierge, satisfies Rule 4(j)(1)(d)'s requirement of "delivering to the addressee."

Id. at __, 749 S.E.2d at 163.

The fact that distinguishes *Hamilton* from this case is that the Court makes no mention of whether the defendant actually received the summons and complaint, or more specifically, whether the plaintiff attempted to prove service under section 1-75.10 with affidavits indicating that the defendant received the summons and complaint. In fact, the *Hamilton* Court makes no citation to section 1-75.10, a statute crucial to our holding that the General Assembly explicitly states must be read "contemporaneously" with Rule 4. *See* N.C. Gen. Stat. § 1A-1, Rule

4 general commentary. Thus, because we are faced with additional facts not discussed by the Court in *Hamilton*, its holding is distinguishable.

Ultimately, defendants' arguments as to why Rule 4(j)(1)d should be read to require personal service on a defendant or his service agent, exclusive of all other individuals and regardless of whether the defendant actually receives the summons and complaint, are unavailing. Because the trial court erred in its conclusions, we reverse the trial court's order dismissing defendants-appellees and affirm the order denying Baker's motion to dismiss.

C. The City

Unlike natural persons, service may only be valid and effective upon a city:

> [b]y personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, *addressed to its mayor*, *city manager or clerk*; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the mayor, city manager, or clerk, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen Stat. § 1A-1, Rule 4(j)(5)a (2013) (emphasis added). The list of parties named in the statute is exclusive; service upon anyone other than the mayor, city manager, or clerk is insufficient to confer jurisdiction over a city. *See Johnson v. City of Raleigh*, 98 N.C. App. 147, 149-50, 389 S.E.2d 849, 851-52 (1990) (holding that service of summons was insufficient to confer personal jurisdiction over defendant city where a copy of the summons and complaint was delivered to a person other than an official named in Rule 4(j)(5)), *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176.

Here, the summons and complaint were not addressed to either the mayor, city manager, or clerk, as is required by Rule 4(j)(5)a; they were addressed to Baker, who was the City Attorney. Delivery to Baker, although technically delivery to the addressee, was insufficient to confer jurisdiction over the City because he is not a named official capable of receiving service on behalf of the City. Furthermore, there is no direct evidence that the City's mayor, city manager, or clerk ever received the

summons and complaint or were otherwise served in any way. The only evidence plaintiffs provide is a newspaper article wherein the City's mayor said that he would discuss the lawsuit with other city officials and council members. Although they may have had actual notice of this action, there is no evidence indicating that any of the required parties in Rule 4(j)(5)a were ever served with the summons and complaint. Unlike the service on defendants who are natural persons, service on the City was defective because plaintiffs did not comply with Rule 4(j)(5)a, and any actual notice that those parties enumerated in the rule may have had did not cure this defect. *Fulton*, 134 N.C. App. at 624, 518 S.E.2d at 521 (citation and quotation omitted).

Therefore, we hold that the trial court did not err in granting the City's motion to dismiss for insufficient service of process.

II. Motion to Amend the Summons

[3] Plaintiffs next argue that the trial court abused its discretion by denying its motion to amend the summons against the City to correct the name of the person currently holding the office of city manager. We find no abuse of discretion.

The North Carolina Rules of Civil Procedure vest discretion in the hands of the trial courts to allow or disallow parties to amend summonses:

> At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

N.C. Gen. Stat. § 1A-1, Rule 4(i) (2013). This Court therefore reviews such orders for abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion."). Although the trial courts have wide discretion in this arena, that power has been limited by this Court to those cases where the trial court initially acquired jurisdiction over the defendant. *See Carl Rose & Sons, Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 30 N.C. App. 526, 529, 227 S.E.2d 301, 303 (1976) ("The broad discretionary power given the court . . . does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant

where no jurisdiction has yet been acquired. A defendant cannot, in this short-hand manner by amendment, be brought into court without service of process.") (citation and quotations omitted), *overruled on other grounds*, *Wiles v. Welparnel Const. Co., Inc.*, 295 N.C. 81, 86, 243 S.E.2d 756, 758-59 (1978).

As stated above, in order to confer jurisdiction over the City, plaintiffs needed to comply with Rule 4(j)(5) by sending the summons and complaint addressed to either the City's mayor, city manager, or clerk and delivering to one of those three parties. Because plaintiffs failed to do so, the trial court never acquired jurisdiction over the City. *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997) ("Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.").

Therefore, based on the rule set out in *Carl Rose & Sons*, we find that the trial court did not abuse its discretion by denying plaintiff's motion to amend the summons, as it would confer jurisdiction over the City without proper service of process.

III. Title of the Cause

[4] Baker argues on appeal that the trial court erred by denying his motion to dismiss the action for failure of the summonses to contain all of the necessary information required by Rule 4(b), namely the "title of the cause." We disagree.

This Court reviews the conclusions of law entered by the trial court in its order *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Pursuant to Rule 4(b) of the North Carolina Rules of Civil Procedure, "[t]he summons shall . . . contain the title of the cause." N.C. Gen. Stat. § 1A-1, Rule 4(b) (2013). Here, the title of the cause in the summons listed "Frankie Washington and Frankie Washington, Jr." as plaintiffs and "CITY OF DURHAM (N.C.) ET AL" as defendants. Baker argues that the title of the cause in the summons is defective because it does not list all defendants and does not mirror the title of the cause in the complaint. He cites to no authority for the proposition that these characteristics render the title of the cause in the summons defective, and we find none. Therefore, we find that the argument is abandoned. *See Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 64, 401 S.E.2d 126, 129 (1991) ("Because the appellee cites no authority for this argument, it is deemed abandoned").

Conclusion

Because plaintiffs properly proved service by Rule 4(j)(1)d under section 1-75.10(5), we reverse the trial court's order dismissing all defendants-appellees except the City, and we affirm the trial court's order denying Baker's motion to dismiss for insufficient service of process. We affirm the trial court's order dismissing the City, because the record reveals that plaintiffs failed to properly serve a party designated by rule to receive service on behalf of the City. Finally, we affirm the trial court's denial of plaintiffs' motion to amend the summons against the City and Baker's motion to dismiss for failure of the summonses to contain the title of the cause.

AFFIRMED in part and REVERSED in part.

Judges GEER and McCULLOUGH concur.

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