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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 10, 2016

MAILING ADDRESS: The Judicial Department
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OF
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APPEAL AND ERROR

Argument abandoned—no clear or reasoned argument—Defendant's argument that the trial court erred in a child abuse case by admitting testimony relating to his uncharged prior bad acts under Rule 404(b) was not addressed and was deemed abandoned. Defendant offered no clear or reasoned argument in support of his position as required by N.C. R. App. P. 28(b)(6). **State v. Dinan, 694.**

Interlocutory orders and appeals—denial of post-separation support—affects substantial right—Defendant's appeal from the denial of her request for post-separation support was heard on the merits. While orders for post-separation support are not immediately appealable, orders denying post-separation support affect a substantial right and are immediately appealable. **Sorey v. Sorey, 682.**

Preservation of issues—failure to make offer of proof—Although defendant argued in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case that the trial court abused its discretion by precluding him from cross-examining the medical examiner regarding her preliminary report of death, defendant failed to preserve this issue for appellate review by failing to make an offer of proof. **State v. Posey, 723.**

Preservation of issues—failure to object at trial—failure to allege plain error on appeal—Defendant failed to preserve for appellate review his argument that the trial court erred in a child abuse case by admitting unfavorable character evidence. Defendant failed to object to the evidence at trial and failed to specifically allege plain error on appeal. **State v. Dinan, 694.**

Standing—child abuse, dependency, and neglect—Respondent father's argument that the trial court erred by adjudicating R.R.N. an abused juvenile was dismissed because respondent lacked standing to appeal the adjudication of abuse. Respondent did not fall within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B-1001 and 7B-1002. **In re J.C.B., 641.**

Statement of grounds for appellate review—Appellate defense counsel violated N.C. R. App. P. 28(b) by failing to include a statement of the grounds for appellate review. **State v. Dinan, 694.**

Untimely notice of appeal—writ of certiorari denied—desire to pursue appeal—Respondent mother's argument that the trial court erred by entering a civil custody order transferring the cases of C.R.R. and H.F.R. to a Chapter 50 action was dismissed. Respondent failed to give proper notice of appeal from this order and her petition for writ of *certiorari* was denied where the Court of Appeals could not infer from her notice of appeal from the order of adjudication and disposition that she desired to pursue an appeal from the civil custody order. **In re J.C.B., 641.**

Workers' compensation—intermediate opinion and award—appeal timely—Defendants' appeal from an opinion and award in a workers' compensation case was

timely under N.C.G.S. § 1-278 where defendant timely objected to the order; the order was interlocutory and not immediately appealable; and the order involved the merits and necessarily affected the final judgment. **Tinajero v. Balfour Beatty Infrastructure, Inc., 748.**

ATTORNEYS

Disciplinary action—embezzlement of client funds—conviction of crime not required—The Disciplinary Hearing Commission did not erroneously discipline defendant and impose disbarment from the practice of law as a sanction for defendant's embezzling client funds where defendant had not been convicted of embezzlement in criminal court. Conviction of a crime is not a necessary element in a disciplinary proceeding and defendant need only have committed the crime to be disciplined. **N.C. State Bar v. Simmons, 669.**

Disciplinary action—embezzlement of client funds—sufficient evidence—knowingly and willfully—The State Bar did not fail to present clear, cogent, and convincing evidence that defendant knowingly and willfully misappropriated or embezzled client funds. There was substantial evidence in the record upon which the Disciplinary Hearing Commission could find that defendant intended to embezzle client funds. **N.C. State Bar v. Simmons, 669.**

Disciplinary action—disbarment—adequate factual support—The Disciplinary Hearing Commission's (DHC) order imposing disbarment as a sanction for defendant's misconduct conformed to the requirements of *N.C. State Bar v. Talford*, 356 N.C. 626. The DHC provided support for its decision by including adequate and specific findings that addressed the two key statutory considerations. **N.C. State Bar v. Simmons, 669.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Sexual assault—family member—perpetrator not the caretaker—The trial court erred by adjudicating a minor child as abused and neglected. The family member who sexually assaulted the minor child was not the minor child's caretaker, even though the child was under his temporary supervision. Further, not every child who is the victim of a crime where the perpetrator is a family member requires the protection of the Juvenile Code. **In re R.R.N., 647.**

Substantial risk of abuse of neglect—insufficient findings of fact—The trial court erred by adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. The findings of fact did not support a conclusion that respondent father's conduct created a "substantial risk" that abuse or neglect of the juveniles might occur. **In re J.C.B., 641.**

CHILD CUSTODY AND SUPPORT

Custody modification—best interests of child—The trial court did not err in a child custody modification case by making conclusion of law number 6. It was based on findings that illustrated that it would be in the best interest of the minor child for the parties to successfully co-parent and that plaintiff was the party most likely to facilitate a relationship between the minor child and the other parent based on defendant's past interference with the minor child and plaintiff's relationship. **Thomas v. Thomas, 736.**

CHILD CUSTODY AND SUPPORT—Continued

Custody modification—parenting coordinator—The trial court did not err in a child custody modification case by failing to appoint a parenting coordinator. N.C.G.S. § 50-91 governs what findings must be made only if the trial court, in its discretion, appoints a parenting coordinator. There was no authority imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one was not appointed. **Thomas v. Thomas, 736.**

Custody modification—substantial change in circumstances—The trial court did not err in a child custody modification case by concluding that there had been a substantial change in circumstances affecting the parties' minor child, thereby warranting a modification of the 2006 and 2007 California custody orders. Although the trial court's finding of fact regarding the parties' stipulation to a substantial change in circumstances was invalid and ineffective, the trial court's findings were adequate to support its conclusion of law. **Thomas v. Thomas, 736.**

CONSTITUTIONAL LAW

Effective assistance of counsel—dismissed without prejudice—Defendant's argument that he received ineffective assistance of counsel was dismissed without prejudice to defendant to bring these claims in post-conviction proceedings, rather than on direct appeal. **State v. Dinan, 694.**

Right to counsel—waiver—knowing, voluntary, and intelligent—not established—The trial court erred in a probation violation hearing by allowing defendant to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C.G.S. § 15A-1242. **State v. Jacobs, 701.**

CRIMINAL LAW

Prosecutor's cross-examination—not inappropriate—Defendant's argument in a child abuse case that the prosecutor's improper cross-examination deprived him of a fair trial was without merit. The Court of Appeals was not persuaded that the prosecutor questioned defendant in an unreasonable manner. **State v. Dinan, 694.**

Restraints—defendant wore shackles at trial—The trial court did not abuse its discretion in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case by requiring defendant to wear restraints at trial. The shackles were not visible to the jury. **State v. Posey, 723.**

DIVORCE

Post-separation support—abandonment—sufficient evidence—The trial court did not err by denying defendant's request for post-separation support because its finding that she abandoned her husband was supported by the evidence, as was its finding that plaintiff did not consent to defendant's abandonment. These findings support the trial court's conclusion that defendant had committed marital misconduct and its ultimate decision to deny defendant post-separation support. **Sorey v. Sorey, 682.**

EVIDENCE

Photographs—no plain error—The trial court did not commit plain error in a first-degree murder and attempted robbery with a dangerous weapon case by allowing

the State to introduce and publish photos of defendant and his friends when they were juveniles posing for Facebook photos. None of the photos had a probable impact on the jury's finding that the defendant was guilty. **State v. Sterling, 730.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by felon—constructive possession—insufficient evidence—The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon for insufficiency of the evidence. The State failed to produce circumstantial evidence that defendant constructively possessed the firearm. **State v. Bailey, 688.**

HOMICIDE

First-degree murder—denial of requested second-degree murder instruction—The trial court did not err in a first-degree murder case by denying defendant's request for a second-degree murder instruction. Defendant's testimony alone established the elements of attempted robbery, and his further testimony that he then shot the victim twice, whether he had changed his mind about committing the robbery or not, established the elements of first-degree murder. **State v. Sterling, 730.**

First-degree murder—findings of fact—sufficiency of evidence—The trial court did not err in a first-degree murder case by its findings of fact 3, 4, and 6. Capital sentencing statutes had no application in the context of this case. Further, the challenged findings of fact were supported by competent evidence. **State v. Lovette, 706.**

Second-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. The State's evidence, including the testimony of the officer, was sufficient to convince a rational trier of fact that there was no quarrel or altercation between the victim and defendant prior to the shooting, and that defendant did not act in self-defense. **State v. Posey, 723.**

INSURANCE

Automobile liability policy coverage—accident—causal connection—reformation—declaratory judgment—The trial court did not err in a declaratory judgment action by holding that plaintiff Integon's automobile liability policy provided coverage in the full amount of the policy limits to defendant Helping Hands for its liability, if any, with respect to the accident. There was a sufficient "causal connection" between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage. Nothing in the record showed that plaintiff argued reformation of the policy before the trial court. **Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc., 652.**

JURISDICTION

Personal—consent to jurisdiction provision—The trial court did not err in a case involving default on a guaranty agreement when it concluded that it had personal jurisdiction over defendant. There was competent evidence to support the court's finding that defendant signed and executed the guaranty that contained a consent to jurisdiction provision that expressly submitted defendant to the jurisdiction of the State of North Carolina. **GECMC 2006-C1 Carrington Oaks, LLC v. Weiss, 633.**

PUBLIC OFFICERS AND EMPLOYEES

Wrongful termination of city employee—police officer—Civil Service Act— The trial court did not err by finding that the termination of respondent police officer from his employment with the city police department was not justified. A fact finder could rationally have found that respondent was discharged for conduct amounting to mere negligence in failing to "wipe" his personal use rented computer before its return. **City of Asheville v. Aly, 620.**

Wrongful termination of city employee—police officer—reinstatement to former rank and back pay—The trial court did not exceed its authority in a wrongful termination case by ordering that respondent city police officer be fully reinstated to his former rank and receive all back pay due. **City of Asheville v. Aly, 620.**

REFORMATION OF INSTRUMENTS

Separation agreement—interpretation of terms—basic annuity—issue fully litigated and decided previously—law of the case—The trial court erred in a case involving the interpretation of terms of an amended separation agreement by ordering defendant to pay plaintiff one-half of his monthly basic retirement annuity because plaintiff was barred from raising this issue in her 2012 motion for contempt. The issue of whether plaintiff was entitled to receive one half of the defendant's monthly basic annuity was fully litigated and decided at a prior hearing and the trial court had already denied this same relief in its order. That order was not appealed by either party and thus was the law of the case. Furthermore, the trial court also erred in finding defendant in contempt for failing to pay plaintiff one-half of his monthly basic retirement annuity because he had never been ordered to do so. The matter was remanded to the trial court for consideration of defendant's motion for sanctions based on the issue of the basic annuity in light of the Court of Appeals' opinion. **Burakowski v. Burakowski, 601.**

SENTENCING

First-degree murder—resentencing under new statute—motion for appropriate relief—due process—The trial court did not err in a first-degree murder case by overruling defendant's objection to resentencing under the new sentencing statute in N.C.G.S. § 15A-1340.19A *et. seq.* Defendant requested the very relief as to resentencing he was granted in his motion for appropriate relief. Thus, the Court of Appeals' prior opinion was the law of the case and defendant could not challenge his resentencing on the grounds of due process. To the extent defendant raised a facial challenge to the new sentencing statute, he failed to cite any authority in support of this argument. **State v. Lovette, 706.**

Life imprisonment without parole—defendant's developmental age—The trial court did not err in a first-degree murder case by failing to consider defendant's developmental age before imposing a life sentence without parole. Defendant's age fell past the bright line drawn by *Miller*, which applied only to those who committed crimes prior to the age of 18. **State v. Sterling, 730.**

Life imprisonment without parole—failure to show abuse of discretion—The trial court did not err in a first-degree murder case by sentencing defendant to a term of life imprisonment without parole. Defendant failed to demonstrate an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed all the circumstances of the offenses in light of them. **State v. Lovette, 706.**

WORKERS' COMPENSATION

Adaptive transportation—defendants not required to purchase vehicle—The Full Industrial Commission did not err in a workers' compensation case by refusing to order defendants to provide plaintiff with the use of an adaptive van. The Commission's finding that plaintiff's access to transportation was satisfactory at the time was supported by competent evidence and under *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, the Commission was not required to mandate that defendants purchase a vehicle for plaintiff. **Tinajero v. Balfour Beatty Infrastructure, Inc., 748.**

Attorneys' fees—costs—The Full Commission erred in a workers' compensation case by determining that plaintiff was not entitled to attorneys' fees under N.C.G.S. § 97-88.1. On remand, following the taking of a certain deposition, the Commission must revisit whether such an award is appropriate and, if so, what the amount of any award should be. Furthermore, following that deposition, the Commission must revisit whether a previous life care plan report constituted a valid rehabilitative service and whether defendants should pay for the cost of the preparation of that report. Finally, plaintiff's argument that defendants should be assessed attorneys' fees for pursuing the prior interlocutory appeal was without merit where the Court of Appeals had already implicitly denied that request. **Tinajero v. Balfour Beatty Infrastructure, Inc., 748.**

Denial of motions—reopen evidence—receive additional testimony—no abuse of discretion—The Full Industrial Commission did not err in a workers' compensation case by denying defendants' motions to reopen the record to receive rebuttal testimony from three doctors and to reconsider its opinion and award in light of this rebuttal testimony. The Commission did not abuse its discretion in denying defendants' motions and the rulings did not prevent them from effectively and meaningfully cross-examining a witness. **Willard v. VP Builders, Inc., 773.**

Introduction of new evidence—opportunity to rebut evidence—deposition—The Full Industrial Commission erred in a workers' compensation case by refusing to allow plaintiff to depose the individual who submitted a life care plan to the court at defendants' expense and upon which the Commission based its ruling. Where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence. The Commission did not err by denying plaintiff's request to take a deposition of an individual for the sole purpose of asking the Commission to reconsider a prior ruling. However, the decision was without prejudice to plaintiff filing a new motion to take the deposition following remand of the case. **Tinajero v. Balfour Beatty Infrastructure, Inc., 748.**

Offer of proof—opportunity must be afforded—The Full Industrial Commission erred in a workers' compensation case by failing to allow defendants the opportunity to make an offer of proof. While the rules of procedure and evidence governing proceedings in our general courts of justice do not generally apply in hearings before the Industrial Commission, upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent. **Willard v. VP Builders, Inc., 773.**

Reinstatement of vocational rehabilitation efforts—disability not established—The Full Industrial Commission did not err in a workers' compensation case by declining to order reinstatement of vocational rehabilitation efforts for plaintiff. A

disability must be shown before vocational rehabilitation services can be awarded or reinstated as part of a workers' compensation claim. Competent evidence supported the Full Commission's findings of fact, and those findings supported the conclusions of law, that plaintiff failed to carry the burden of establishing disability during the relevant time period. **Johnson v. S. Tire Sales and Service, Inc., 659.**

Rental cost—handicapped accessible housing—required—The Full Industrial Commission did not err in a workers' compensation case by requiring defendants to pay the rental cost of reasonable handicapped accessible housing for plaintiff. The Commission acted within its authority as set out in *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, and *Espinosa v. Tradesource, Inc.*, 752 S.E.2d 153, in determining that because defendants had previously been willing to pay the full cost for plaintiff's housing in a skilled nursing facility, which was not in plaintiff's medical best interests, they were obligated to pay the rental cost of reasonable handicapped accessible housing, which was in plaintiff's medical best interests. **Tinajero v. Balfour Beatty Infrastructure, Inc., 748.**

Time-barred—further compensation—The Full Industrial Commission did not err in a workers' compensation case by ruling that plaintiff was time-barred by N.C.G.S. § 97-47 from seeking further compensation because the two-year limitation began upon receipt of final payment and had since run. **Johnson v. S. Tire Sales and Service, Inc., 659.**

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.

SUZIE JANE BURAKOWSKI, PLAINTIFF
v.
STEVEN ALLEN BURAKOWSKI, DEFENDANT

No. COA13-986

Filed 6 May 2014

Reformation of Instruments—separation agreement—interpretation of terms—basic annuity—issue fully litigated and decided previously—law of the case

The trial court erred in a case involving the interpretation of terms of an amended separation agreement by ordering defendant to pay plaintiff one-half of his monthly basic retirement annuity because plaintiff was barred from raising this issue in her 2012 motion for contempt. The issue of whether plaintiff was entitled to receive one half of the defendant's monthly basic annuity was fully litigated and decided at a prior hearing and the trial court had already denied this same relief in its order. That order was not appealed by either party and thus was the law of the case. Furthermore, the trial court also erred in finding defendant in contempt for failing to pay plaintiff one-half of his monthly basic retirement annuity because he had never been ordered to do so. The matter was remanded to the trial court for consideration of defendant's motion for sanctions based on the issue of the basic annuity in light of the Court of Appeals' opinion.

Appeal by defendant from contempt order entered 25 March 2013 by Judge Eula E. Reid in District Court, Gates County. Heard in the Court of Appeals 9 January 2014.

Mitchell S. McLean, for plaintiff-appellee.

Davis Law Office, by Mary Elizabeth Davis, for defendant-appellant.

STROUD, Judge.

Defendant appeals order allowing plaintiff's motion for contempt, awarding plaintiff certain annuity payments, and denying defendant's motion for sanctions. For the following reasons, we reverse and remand in part.

I. Background

In 2008, plaintiff and defendant were divorced in Kentucky by a decree of dissolution of marriage which incorporated a separation agreement. The separation agreement, entered on 8 October 2008, included a provision regarding the division of defendant's retirement benefits as follows:

> Parties agree that wife is entitled to one half of the husband's retirement account, which specifically is TSP and FERS accounts, as of the date of the entrance of the final decree of dissolution in this case. Wife shall execute any orders as directed by the Court to effectuate said division including but not limited to any QDROs.[1]

Thereafter, on 19 November 2008, the parties entered into an Amended Separation Agreement ("Amended Agreement") which was also incorporated into the decree of dissolution of marriage. The Amended Agreement further addressed defendant's retirement benefits as follows:

> The parties agree that wife is entitled to one half (½) of husband's Retirement Accounts, more specifically his TSP account and FERS account. His TSP account shall be divided, with wife to receive ½ the value thereof as of the date of the entrance of the Final Decree of Dissolution in this case. Wife shall execute any orders as directed by the Court to effectuate said division, including but not limited to any Qualified Domestic Relations Order (QDRO). Husband's *FERS account* shall be divided, with wife to receive ½ of the amount in said account as of the date of the entrance of the Final Decree in this case. Both parties understand that wife will not receive payment of this amount until husband retires. Wife shall execute any Orders necessary to effectuate division of the same. Wife shall also receive ½ of the *supplemental annuity* to be received by husband from the date of his retirement or when he reaches age 57, whichever shall come earlier[.]

(Emphasis added.) Thus, the Amended Agreement provided additional details as to the portions of the defendant's retirement benefits that plaintiff would receive and how the distributions would be accomplished.

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1. The original agreement is not in our record but this provision was read out loud at a hearing by defendant's attorney and plaintiff testified that this was what the separation agreement stated. There is no dispute about this provision, which was later amended.

In 2010, a North Carolina trial court entered a consent order which domesticated the Kentucky modified decree of dissolution of marriage making it "enforceable as a valid Order of the State of North Carolina, so the terms of the Amended Agreement became enforceable as a court order. Later in 2010[2], plaintiff filed a verified "MOTION IN THE CAUSE AND FOR CONTEMPT" ("2010 Motion") seeking to hold defendant in contempt under the terms of the Amended Agreement regarding her health insurance benefits, which are not at issue in this appeal, and also seeking "clarification" of the provisions of the Amended Agreement as to defendant's retirement benefits. Plaintiff alleged:

> 7. That the Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement benefits, upon his retirement. A problem has arisen regarding the Office Of Personal Management's interpretation of the provision of the Amended Separation Agreement that divides defendant's FERS retirement annuity. The OPM has interpreted the wording of the Amended Separation Agreement contrary to the clear intent of the parties, because the term "retirement account" was used rather than the term "retirement annuity." The intent of the parties was clearly for the plaintiff to receive one half of the monthly annuity payments that defendant is entitled to receive, pursuant to his FERS retirement benefit/annuity. However, because the Amended Separation Agreement did not us[e] the specific word "annuity", OPM has construed the Amended Separation Agreement as only giving her a one half interest in the set contributions that were made to the FERS account after the date of the October 10, 2008 Decree, which was only for a one year period, as indicated in document attached hereto as "Exhibit 2".
>
> 8. That the court should clarify the wording of the Amended Separation Agreement to conform with the clear intentions of the parties and should specify that the OPM shall divide and apportion the defendant's monthly FERS retirement annuity payment so that the plaintiff

2. Both parties state that plaintiff's motion was made in 2011; however, the file stamp is illegible and the date written in by plaintiff's attorney indicates the motion was made in 2010. As such, we will refer to this motion as the 2010 Motion noting that whether it was filed in 2010 or 2011 is irrelevant to the issues on appeal. There is no doubt that it preceded the motion and order at issue here.

> shall begin receiving one half of these monthly annuity payments. The court should also require that the defendant reimburse the plaintiff for the plaintiff's one half share of each monthly FERS annuity payment that she has not received since the date the defendant retired and began receiving his FERS annuity monthly payment.
>
> . . . .
>
> 11. That the plaintiff has requested and demanded of the defendant that he comply with the health insurance provisions of the Amended Separation Agreement and has requested and demanded of the defendant that he cooperate in amending the prior Amended Separation Agreement to specify that plaintiff is entitled to receive one half of the defendant's monthly FERS retirement annuity. However, the defendant has failed and refused to abide or comply with these requests and demands, which has required the plaintiff to initiate this Motion to enforce the defendant's compliance with the health insurance provision and to clarify the FERS annuity provision, to conform with the clear intent of the parties.

Plaintiff then specifically requested that the trial court "clarif[y]" the Amended Agreement to provide specifically that she would receive one half of the defendant's monthly "FERS retirement annuity payment" and that OPM be ordered to pay this directly to plaintiff:

> 4. That the retirement provision of the Amended Separation Agreement be clarified to specify that the plaintiff is entitled to receive one half of the defendant's monthly FERS retirement annuity payment, and to order the OPM to begin directing one half of each monthly annuity payment to the plaintiff. Also, the defendant be ordered to reimburse the plaintiff for the plaintiff's one half share of each monthly FERS retirement annuity payment that the defendant has received since his retirement.

In other words, because the Amended Agreement referred specifically only to the defendant's "FERS account" and "supplemental annuity[,]" the OPM had taken the position that the Amended Agreement did not permit it to pay the *basic annuity* benefits to plaintiff. Plaintiff testified at the hearing on her 2010 Motion that defendant had already retired and one-half of his TSP or Thrift Savings Plan, had been paid to her in the lump sum of $119,030.00, and an additional $7,400.00 had been paid

over the course of six months as her one-half interest from the FERS account.[3] However, plaintiff was not being paid a one-half share of the *basic annuity*, so she requested the trial court to "clarif[y]" that the parties actually meant for the term "FERS account" to include the *basic annuity* so that the OPM would pay one-half of the *basic annuity* benefits to her. Plaintiff also requested that defendant be required to pay to her the arrearages of her one-half of the *basic annuity* payments that had accrued up to that time.

In 2011, the trial court entered an order ("2011 Order") after a hearing on plaintiff's 2010 Motion and found:

> 11. That the defendant currently receives a *gross regular monthly FERS annuity of $2,327.00. He also receives an additional FERS supplemental annuity of $915.00 per month.* The defendant is also gainfully employed at Fort Lee and testified that he earns $80,000.00 per year from his employment, and began his employment in June, 2010.
>
> . . . .
>
> 22. That the plaintiff contends that the Amended Separation Agreement should be modified and clarified to require the defendant to pay her ½ of his FERS regular retirement benefits. However, the court deems that the Amended Separation Agreement is unambiguous in regards to the plaintiff's right concerning the defendant's retirement benefits and will not modify or supplement the provisions contained therein.
>
> 23. *That the specific wording of the Amended Separation Agreement, as agreed to and admitted by each party in open court, provides that the plaintiff is entitled to receive ½ of the defendant's monthly FERS supplemental annuity payments, less ½ of the taxes.*
>
> 24. That the defendant started receiving his monthly FERS supplemental annuity payments on March 1, 2010.

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3. The parties' use of informal terminology to identify the TSP retirement account, FERS retirement account, and the two FERS annuities, in the Amended Agreement, before the trial court, and in their briefs before this Court has made it challenging to determine at times exactly which asset the parties are referring to, but ultimately the accounts and annuities as identified in this opinion are consistent with those found by the trial court, and these particular findings are not challenged.

> 25. That the defendant currently receives the sum of $915.00 per month as FERS supplemental annuity payments. The amount of taxes are deducted is $269.60 per month. Therefore, the plaintiff's net ½ share of the current monthly supplemental annuity payment is $322.70. For the 13 months that the defendant received this supplemental annuity payment up to the March 25, 2011 court date, the total net payment due to the plaintiff from the defendant, for her share of the supplemental annuity payments, is $4,195.10.
>
> 26. That the total amount of the plaintiff's share of the defendant's monthly supplemental annuity payments, as of July 31, 2011, will be $5,485.90.
>
> 27. That the defendant should be ordered to directly pay the plaintiff, each month, her ½ share of his supplemental annuity payment, less taxes, the current net monthly amount due plaintiff being $322.70, by the 5th day of each month, beginning August 5, 2011.
>
> 28. That the defendant has the present financial ability to pay the plaintiff the reimbursement/arrearage that he owes her for her ½ share of his supplemental annuity payments, dating back to March 1, 2010. The amount of the arrearage/reimbursement owed by the defendant to the plaintiff, through July 31, 2011, is $5,485.90. The defendant has the present financial ability to pay to the plaintiff, provided that he is allowed to pay this reimbursement/arrearage amount in 6 equal monthly installments, with the first installment being due and payable by September 5, 2011.

(Emphasis added.)

The trial court concluded that plaintiff would receive one-half of the *supplemental annuity* payments, past and future:

> 16. That the plaintiff's share of the defendant's monthly FERS *supplemental annuity* payments that he has received since March 1, 2010, through the March 25, 2011 court date, is $4,195.10. The total amount of plaintiff's share of the defendant's monthly supplemental annuity payments through July 31, 2011, will be $5,485.90.

> 17. That the defendant has the present financial ability to reimburse the plaintiff for her ½ share of the *supplemental annuity* payments defendant has received since March 1, 2010, provided that he is allowed to pay this reimbursement/arrearage total in 6 equal installments, payable monthly, with the first installment payment being due September 5, 2011.

(Emphasis added.)

The trial court thus ordered payment of the *supplemental annuity* benefits, including arrearages as well as future payments:

> 9. . . . The total *supplemental annuity* reimbursement that the defendant owes the plaintiff, through July 31, 2011, is $5,485.90. The total arrearage/reimbursement that the defendant owes the plaintiff, through July 31, 2011, is $13,041.56. Defendant shall pay plaintiff the full sum of $13,041.56 in six monthly installments, beginning with a first monthly installment due September 5, 2011, in the amount of $2,173.59. The defendant shall make an equal payment of $2,173.59 to the plaintiff on October 5, 2011, November 5, 2011, December 5, 2011, and January 5, 2012. The defendant shall make a final arrearage installment payment of $2,173.61 to plaintiff on February 5, 2012.
>
> 10. That willful violation of the provisions of this Order shall be punishable by the contempt of court sanctions of this court.

(Emphasis added.) In sum, the 2011 Order did not "clarif[y]" the Amended Agreement as plaintiff requested nor did it order defendant to pay any *basic annuity* payments, but instead only ordered payments as to the "*supplemental annuity*[.]" (Emphasis added.) The record does not indicate that either party appealed from this order.

In 2012, plaintiff filed a verified "MOTION FOR CONTEMPT" ("2012 Motion") which requested that defendant be held in contempt for failure to pay her one-half of his *basic annuity* payments under the Amended Agreement, alleging:

> 6. That the defendant should be found to be in willful contempt of court for his willful violation of the provisions of the aforesaid Amended Separation Agreement,

which has been incorporated into the Divorce Decree entered in this cause, in that:

A. The Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement account, upon his retirement.

B. The defendant's FERS retirement account encompasses the retirement annuity that provides defendant with monthly annuity payments.

C. The intent of the parties was clearly for the plaintiff to receive one half of the monthly annuity payments that defendant is entitled to receive, pursuant to his FERS retirement account.

D. The defendant has willfully failed and refused to pay plaintiff one half of his monthly retirement annuity payment since his retirement, as required by the aforesaid Amended Separation Agreement, despite demand from the plaintiff.

E. The only portion of the defendant's FERS retirement account that plaintiff has received is one half of the direct contributions that were made by the defendant into his FERS account after the date of the October 10, 2008 Decree, and prior to the retirement date of the defendant.

F. The specific wording of the Amended Separation Agreement, that was incorporated into the October 10, 2008 Decree, provided for the plaintiff to receive one half of the defendant's "retirement account", not just one half of the direct contributions made between October 10, 2008 and the date of the defendant's retirement. The said Amended Separation Agreement, as incorporated into the Decree, required the defendant to provide plaintiff with one half of his full "retirement account" upon retirement, which emcompasses and includes the monthly FERS retirement annuity payment received by the defendant.

G. The purposes of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the defendant to be in willful

contempt of court and imposing such sanctions against the defendant as deemed appropriate.

H. An appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, due to his willful failure and refusal to provide the plaintiff with one half of his FERS retirement account since his date of retirement, would be for the court to specifically order the defendant to do the following:

1. Order the defendant to reimburse the plaintiff for plaintiff's one half share of each monthly FERS annuity payment that he has received since the date the defendant retired and began receiving his FERS annuity monthly payment.

2. Order the defendant to directly forward the plaintiff her one half share of each prospective monthly FERS annuity payment that he receives.

3. Order the defendant to pay the plaintiff an award of reasonable attorney fees to reimburse her for her costs and attorney fees incurred in connection with the enforcement of the retirement account provisions of the aforesaid Amended Separation Agreement and Decree.

7. That the Amended Separation Agreement had a "default" provision that required that in the event either party defaults in or breaches any of his or her respective obligations and duties as contained in the Agreement, the defaulting or breaching party shall be responsible for and pay the injured party, in addition to such damages as any court may award, all of his or her attorney fees, court costs and other related expenses incurred to enforce the provisions contained in the Amended Separation Agreement against the defaulting party.

8. That the defendant has defaulted on his obligations pursuant to the Amended Separation Agreement by his willful failure to abide and comply with the retirement account provisions of said Agreement, by his failure and refusal to separate and apportion the plaintiff's one half of his monthly FERS retirement annuity payment

> to plaintiff. Therefore, the defendant should be required to reimburse the plaintiff for all of her attorney fees, court costs and other related expenses connected with this proceeding.
>
> 9. That the plaintiff has requested and demanded of the defendant that he comply with the retirement account provisions of the Amended Separation Agreement and has requested and demanded of the defendant that he provide her with her one half share of his monthly FERS retirement annuity payment. However, the defendant has failed and refused to abide or comply with these requests and demands, which has required plaintiff to initiate this Motion to enforce the defendant's compliance with the retirement account provisions and to secure plaintiff's receipt of her one half share of the defendant's monthly FERS retirement annuity payment, retroactive to the date of the defendant's retirement.

> Plaintiff requested that defendant be held in contempt "for his willful violation of the provisions of the aforesaid Amended Separation Agreement" and that he be requiredin order to purge himself of contempt, to do the following:
>
> A. Reimburse the plaintiff for her one half share of each monthly FERS retirement annuity payment that the defendant has received since his date of retirement.
>
> B. The defendant be required to henceforth directly pay plaintiff her one half share of each monthly FERS retirement annuity payment that he receives.
>
> C. The defendant be required, in order to purge himself of contempt, to pay the plaintiff an award of reasonable attorney fees to defray her costs and attorney fees incurred in connection with this Motion, consistent with the "default" provision of the Amended Separation Agreement, as incorporated into the said Decree.

Thus, plaintiff again requested one half of defendant's *basic annuity* payment, based on the provisions of the Amended Agreement. Plaintiff's motion was not based upon the 2011 Order, nor did it mention this order in which the trial court had already denied this same substantive relief.

Defendant responded to plaintiff's 2012 Motion with "NOTICE AND MOTION FOR RULE 11 SANCTIONS" arguing that

> Plaintiff's current Motion for Contempt is barred by collateral estoppel and/or Res Judicata, said matter having been subject to previous litigation . . . [in] 2011. The matters raised in Plaintiff's Motion are substantially identical to matters ruled upon by the . . . [trial court's 2011 Order]. Defendant avers that Plaintiff should be responsible for his attorneys fees in defending against her currently pending Motion.
>
> WHEREFORE, Defendant respectfully requests that this Court dismiss with prejudice Plaintiff's Motion and the Order to Show Cause set for . . . 2012.

On 25 March 2013, the trial court entered a "CONTEMPT ORDER" ("2013 Order") finding defendant in willful contempt based on his failure to comply with the Amended Separation Agreement, for the following reasons:

> A. The Amended Separation Agreement provided for the plaintiff to receive one half of the defendant's FERS retirement accounts, upon his retirement.
>
> B. Based upon the testimony of the plaintiff and defendant at trial, it was clear understanding of each party that the FERS accounts included the defendant's basic annuity payments as well as the supplemental annuity payments.
>
> C. Based upon the Amended Separation Agreement and the understanding of each party, as testified to at trial, the plaintiff was to receive from the defendant one half of the monthly FERS basic annuity payments that the defendant received.
>
> D. Despite the provisions of the Amended Separation Agreement, and the understanding of the defendant that the plaintiff was to receive one half of his monthly FERS basic annuity, he has failed and refused to pay plaintiff one half of his monthly FERS basic annuity payment since his retirement, despite demand from the plaintiff that he do so.

E. The plaintiff has received one half of the direct contributions that were made by the defendant into his FERS accounts after the date of the October 10, 2008 Decree, and prior to the retirement date of the defendant, and one half of the FERS supplemental annuity, per prior Order of this court entered March 25, 2011[.]

F. The specific wording of the Amended Separation Agreement, that was incorporated into the October 10, 2008 Decree, provided for the plaintiff to receive one half of the defendant's "retirement accounts", not just one half of the direct contributions made between October 10, 2008 and the date of the defendant's retirement. The said Amended Separation Agreement, as incorporated into the Decree, required the defendant to provide plaintiff with one half of his full "retirement accounts" upon retirement, which encompasses and includes the monthly FERS basic annuity payments received by the defendant.

G. The defendant began receiving his monthly FERS basic annuity payments on March 1, 2010 and has continued to receive these monthly payments. Plaintiff was entitled to receive one half of the defendant's monthly FERS basic annuity payments from the March 1, 2010 date that the defendant began receiving these payments; however, the defendant has not provided the plaintiff with any portion of the monthly FERS basic annuity payments that he has received since March 1, 2010.

H. The defendant has received a gross monthly basic FERS annuity payment of $2,327.00. The plaintiff is entitled to one half of each monthly payment, related back to March 1, 2010, when the defendant began receiving his monthly FERS basic annuity payments.

I. The defendant willfully failed and refused to abide by the terms of the Amended Separation Agreement by failing and refusing to pay the plaintiff her one half portion of his monthly FERS basic annuity payments that he has received since March 1, 2010.

> J. The plaintiff has requested and demanded of the defendant that he comply with the retirement account provision of the Amended Separation Agreement and has requested and demanded of the defendant that he provide her with her one half share of his monthly FERS basic retirement annuity payments. However, despite these requests, and the defendant's knowledge that the monthly FERS basic annuity payments were included in, and a part of, his FERS accounts that the plaintiff was entitled to receive one half of, he failed and refused to pay her any portion of the monthly basic annuity payments since March 1, 2010, thereby requiring the plaintiff to initiate this motion to enforce the defendant's compliance.
>
> K. The purpose of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the defendant to be in willful contempt of court and imposing the sanctions against the defendant as set forth in the Decree of this Order.

9. That the defendant has the current financial ability to pay the plaintiff one half of his monthly FERS basic annuity payments and has the present financial ability to reimburse the plaintiff for her share of the past due basic annuity payments that he failed and refused to pay her since March 1, 2010, based upon the repayment schedule as set forth in the Decree of this Order.

10. That the defendant receives a gross monthly basic FERS annuity payment of $2,327.00. He also receives an additional monthly FERS supplemental annuity payment of $915.00, but of this amount he pays $322.70 per month to the plaintiff, pursuant to the prior Order of this court. The defendant is also gainfully employed and earns an annual income of approximately $80,000.00 per year.

11. That an appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, due to his willful failure and refusal to pay the plaintiff her one half share of his monthly FERS basic annuity since the date of his retirement, would be for the defendant to directly pay the plaintiff for her one half share of each prospective monthly

FERS basic annuity payment that he receives, within five days of the date that he receives each monthly payment.

12. That an additional appropriate sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement would be for the court to order the defendant to reimburse the plaintiff for her one half share of each monthly FERS basic annuity payment that he has received since the defendant began receiving his payments on March 1, 2010, pursuant to the repayment schedule as set forth in the Decree of this Order.

13. That the defendant has received his $2,327.00 per month FERS basic annuity payment since March 1, 2010. The plaintiff's one half share of each of these monthly payments is $1,163.50. As of April 30, 2013, the defendant will owe the plaintiff an arrearage of $45,376.50 for the plaintiff's one half share of the defendant's monthly FERS basic annuity payments since March 1, 2010.

14. That as a sanction against the defendant for his willful violation of the provisions of the Amended Separation Agreement, he should be required to directly pay the plaintiff the sum of $500.00 per month, beginning May 1, 2013, to be applied toward the defendant's arrearage, in addition to the $1,163.50 that the defendant is to pay to the plaintiff each month for her one half share of the ongoing monthly FERS basic annuity payments.

15. That the defendant has the present financial ability to pay the plaintiff the sum of $500.00 per month to be applied toward his aforesaid arrearage owed to the plaintiff, and has the present financial ability to pay the plaintiff the sum of $1,163.50 per month, as plaintiff's one half share of his ongoing monthly FERS basic annuity payments.

16. That the plaintiff has waived and abandoned her claim against the defendant for attorney fees in this proceeding.

17. That the defendant's Motion For Sanctions should be denied in that the prior Order of this court did not serve as res judicata for the issues determined in this proceeding. The issue of whether or not the plaintiff is entitled to

> receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011.

The trial court concluded:

> 3. That the defendant is in willful contempt of court for his willful violation of the provisions of the aforesaid Amended Separation Agreement, which has been incorporated into the Divorce Decree entered in this cause, due to his willful failure to pay the plaintiff her one half share of his monthly FERS basic annuity payments that he has received since March 1, 2010.
>
> 4. That the purposes of the Amended Separation Agreement can still be accomplished by the court entering an Order finding the litigated or decided as a result of the court's prior ruling in the hearing in this matter on March 25, 2011.

The trial court ordered:

> 1. That the defendant is in willful contempt of court for his willful noncompliance with the provisions of the Amended Separation Agreement, due to his willful failure to pay the plaintiff her one half share of his monthly FERS basic annuity payments that he has received since March 1, 2010.
>
> 2. That as a sanction against the defendant, in order for him to purge himself of contempt, he shall pay directly to the plaintiff one half of his gross monthly FERS *basic annuity* payments within five days of the date that he receives each payment. The defendant's initial payment to the plaintiff shall be paid on or before five days from the date he receives his FERS *basic annuity* payment for May, 2013, and he shall continue to pay the plaintiff her one half share of each *basic annuity* payment within five days of the date he receives each monthly payment thereafter.
>
> 3. That the current monthly amount that the defendant shall pay the plaintiff, as the plaintiff's one half share of defendant's monthly FERS *basic annuity*, shall be $1,163.50. However, said monthly payment shall increase or decrease accordingly due to any increases or decreases

in the monthly FERS *basic annuity* payments that the defendant receives.

4. That as a further sanction against the defendant, in order for him to purge himself of contempt, he shall pay the plaintiff the sum of $45,376.50, which represents the plaintiff's one half share of the defendant's monthly FERS *basic annuity* payments that he has received since March 1, 2010 through April 30, 2013. The defendant shall pay this arrearage directly to the plaintiff at the rate of $500.00 per month, until the full arrearage has been paid. The initial $500.00 monthly arrearage payment shall be due and payable from the defendant to the plaintiff on or before May 1, 2013 with an equal $500.00 arrearage payment being due on or before the first day of each month thereafter, until the full $45,376.50 arrearage has been paid.

5. That the plaintiff's claim against the defendant for attorney fees in this proceeding has been waived and abandoned.

6. That the defendant's Motion For Sanctions against the plaintiff is denied.

7. That willful violation of the provisions of this Order shall be punishable by the contempt of court sanctions of this court.

8. That this cause is retained by the court for such other and further Orders as may be deemed just and proper.

(Emphasis added.) Thus, based upon the Amended Agreement, the trial court ordered defendant be held in contempt for failing to pay plaintiff one-half of payments received from the *basic annuity* since his retirement, ordered defendant to begin paying plaintiff one-half of his *basic annuity* payments, ordered defendant to pay arrearages based on his previous failure to pay plaintiff the *basic annuity* payment, and denied defendant's motion for sanctions.[4] Defendant appeals the 2013 Order.

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4. In denying defendant's motion for sanctions the trial court also found that "[t]he issue of whether or not the plaintiff is entitled to receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011."

II. 2013 Order

Both plaintiff and defendant have inaccurately labeled various requests and claims both before the trial court and this Court. For example, plaintiff requested that the trial court "clarify the wording of the" Amended Agreement, although her motion would more properly be called a request for reformation, *see Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) ("Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement. . . . Negligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake. In other words, the fact that the mistake arises because the party who is seeking the reformation supplied the incorrect information does not make the mistake unilateral." (citations, quotation marks, and brackets omitted)), and defendant sought a form of relief that is not even available when he requested a dismissal of a motion, rather than a denial of said motion. *See generally* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011) (regarding the dismissal of claims, not other motions). Yet it is clear that both parties knew and understood the substantive requests or challenges the other was making and both parties have addressed these issues, so we will simply address the issues on appeal in substance, rather than attempting to use the titles which the parties proposed in their arguments both before the trial court and this Court. *See generally In re Testamentary Tr. of Charnock*, 158 N.C. App. 35, 39, 579 S.E.2d 887, 890 (2003) ("It is the substance of the application, or petition, and the relief which is sought thereunder that determines its true nature, not the title appended thereto by the petitioner. It has long been the law that the nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought. We will, therefore, undertake our own inquiry into the . . . issues arising on the pleadings and the relief sought in appellants' petition." (citation, quotation marks, and brackets omitted)), *aff'd*, 358 N.C. 523, 597 S.E.2d 706 (2004).

In substance, defendant contends that the trial court erred in ordering him to pay plaintiff one-half of his *basic annuity* because plaintiff was barred from raising that issue in her 2012 Motion since the trial court had already denied this same relief in the 2011 Order; in addition, the trial court also erred in finding defendant to be in contempt for failing to do something he had never been ordered to do and in denying defendant's motion for sanctions based on the issue of the *basic annuity*.

Plaintiff contends that her 2010 and 2012 Motions are substantively different, mainly because the 2010 Motion was a motion to "clarif[y]" wording of the Amended Agreement as to the retirement benefits to reflect the "the clear intentions of the parties" for plaintiff to receive one-half of defendant's *basic annuity* payments, while, in contrast, the 2012 Motion was a motion for contempt for defendant's failure to pay plaintiff her one-half of the *basic annuity.* We agree with defendant.

Contrary to the trial court's finding of fact that "[t]he issue of whether or not the plaintiff is entitled to receive one half of the defendant's monthly FERS basic annuity was not fully litigated and decided at the prior hearing in this cause on March 25, 2011[,]" we find, based upon consideration of the motions, the transcript from the 2011 hearing, and the 2011 Order, that the issue was quite fully litigated and decided. In plaintiff's 2010 Motion, she very specifically requested that the trial court order defendant to pay of one-half of the *basic annuity* payments, including both reimbursement of past sums due and continued payment in the future. Plaintiff contends she was seeking to "clarif[y]" the Amended Agreement, but legally, what she sought would more properly be termed reformation of the Amended Agreement. *See Metropolitan Property and Cas. Ins. Co.*, 126 N.C. App. at 798, 487 S.E.2d at 159.

But in its 2011 Order, the trial court denied reformation of the Amended Agreement, although it did not use this terminology.[5] The trial court found that the Amended Agreement was "unambiguous" and that it would not "modify or supplement" the Amended Agreement, and the trial court quite specifically awarded plaintiff payment of one-half of the *supplemental annuity* only and not the *basic* annuity. We know that this issue was litigated and that the trial court did not overlook the *basic annuity* or confuse it with the *supplemental annuity*, because the trial court also found that defendant was already receiving *basic annuity* payments and plaintiff had requested that she receive half of both the *basic* and *supplemental* annuities. Yet in plaintiff's 2012 Motion, she again requested that defendant be required to pay her one-half of the *basic annuity* payments, past and future.

While the 2011 Order did not explicitly state that it was denying plaintiff's request for the *basic annuity*, in that order the trial court made numerous and detailed findings regarding *both* the basic annuity and the supplemental annuity but ultimately awarded plaintiff only a portion of the *supplemental annuity*. In the 2011 Order, the trial court

5. As the 2011 Order was not appealed, we express no opinion as to whether the trial court could have or should have granted reformation of the Amended Agreement in 2011.

found that while "plaintiff contend[ed] that the Amended Separation Agreement should be modified and clarified to required the defendant to pay her ½ of his" *basic annuity* . . . "the court deems that the Amended Separation Agreement is unambiguous in regards to the plaintiff's right concerning the defendant's retirement benefits and will not modify or supplemental the provisions contained therein." The trial court then found that plaintiff was "entitled to receive ½ of the defendant's" *supplemental annuity*. The trial court's conclusions of law and decree are supported by the findings of fact as the trial court did not award plaintiff payment for one-half of the *basic annuity*, as it stated it would "not modify or supplement" the Amended Agreement to grant plaintiff these payments as she requested, but the trial court did order that plaintiff should receive one-half of the *supplemental annuity* which was specifically provided for in the Amended Agreement. The 2011 Order was not appealed by either party and thus is the law of the case. *See Wellons v. White*, ___ N.C. App. ___, ___, 748 S.E.2d 709, 720 (2013) ("The law of the case doctrine provides that when a party fails to appeal that order, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." (citation, quotation marks, and brackets omitted)). The question of plaintiff's entitlement to one-half of the *basic annuity* payments was decided in 2011 and the 2011 Order was not appealed. As such, plaintiff's 2012 Motion which again requested payment for one-half of the *basic annuity* had no legal basis in either the Amended Agreement or the 2011 Order, and the trial court should not have allowed such a request. *See id.*

We also agree with defendant that he cannot be held in contempt for something he was never ordered to do. In the 2012 Order, all of the findings of fact and conclusions of law regarding why the trial court found defendant to be in contempt were regarding his failure to pay the *basic annuity* payment, not the *supplemental annuity* payment. But because defendant was under no obligation to pay plaintiff one-half of the *basic annuity* payments, under either the Amended Agreement, as decided in the 2011 Order, or under the 2011 Order itself, which ordered only payment of the *supplemental* annuity, he could not be held in contempt on this issue. As failure to pay one half of the *basic annuity* payment was the only basis upon which plaintiff sought for defendant to be held in contempt, and that basis is improper, the trial court should not have found defendant to be in contempt.

Lastly, because the trial court ultimately determined that plaintiff had not erred in bringing the *basic annuity* payment issue before the court again, it denied defendant's request to sanction plaintiff. But as noted above, this was error on the part of the trial court. As such, on

remand the trial court should reconsider defendant's motion for sanctions in light of this opinion, although we express no opinion on whether the trial court should or should not sanction plaintiff.

III. Conclusion

In conclusion, we reverse the trial court's determination that plaintiff is entitled to receive payment from defendant's *basic annuity*; we reverse the trial court's determination that defendant was in contempt, and we reverse and remand the trial courts determination denying defendant's motion for sanctions.

REVERSED and REMANDED in part.

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

CITY OF ASHEVILLE, Petitioner
v.
ROGER S. ALY, Respondent

No. COA13-720

Filed 6 May 2014

1. Public Officers and Employees—wrongful termination of city employee—police officer—Civil Service Act

The trial court did not err by finding that the termination of respondent police officer from his employment with the city police department was not justified. A fact finder could rationally have found that respondent was discharged for conduct amounting to mere negligence in failing to "wipe" his personal use rented computer before its return.

2. Public Officers and Employees—wrongful termination of city employee—police officer—reinstatement to former rank and back pay

The trial court did not exceed its authority in a wrongful termination case by ordering that respondent city police officer be fully reinstated to his former rank and receive all back pay due.

Appeal by petitioner from order entered 4 January 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 20 November 2013.

Ward and Smith, P.A., by Rendi L. Mann-Stadt, and Office of the City Attorney, by Kelly Whitlock, for petitioner-appellant.

Adams, Hendon, Carson, Crow and Saenger, P.A., by Robert C. Carpenter and John C. Hunter, for respondent-appellee.

DAVIS, Judge.

Petitioner City of Asheville ("the City") appeals from the trial court's order finding that the termination of Respondent Roger S. Aly ("Respondent") from his employment with the City of Asheville Police Department ("APD") was not justified. After careful review, we affirm the trial court's order.

Factual Background

In July 2009, while employed by the APD as a police officer, Respondent rented a laptop computer for his personal use from a rental store called Aaron's. The rental agreement stated the computer was "rent to own," meaning that after a certain number of payments, Respondent would have the option of purchasing the computer. During the rental period, Respondent used the computer to access his personal email, download photographs, and back up his Blackberry cell phone.

In December 2009, Respondent returned the computer to Aaron's. He testified that before doing so, he attempted to remove the files that he had downloaded onto the computer by highlighting the files, moving them into the "recycling bin," and selecting "empty." He further testified that, unbeknownst to him, this procedure failed to remove the files that Respondent had imported from his cell phone and downloaded onto the computer. These files contained, in part, various pictures of Respondent's family, friends, pets, and fellow APD officers in uniform. However, other files contained pictures of nude women and racially offensive images.

In March 2010, Janice Farmer ("Ms. Farmer") went to Aaron's to rent a computer for her son. The computer that Ms. Farmer rented was the computer that had previously been rented by Respondent. While using the computer's webcam to post a picture on a website, Ms. Farmer's son discovered the images that Respondent had downloaded, including the pictures of nude women and the racially offensive images. Ms. Farmer contacted the Buncombe County Sheriff's Office and was referred to Detective Jeff Sluder ("Detective Sluder"). She described to Detective Sluder the offensive images her son had found on the computer and then turned the computer over to him.

Detective Sluder proceeded to extract the images from the computer and recognized some of the pictures as depicting APD officers. Because of this, he notified the APD. Detective Anthony Johnson ("Detective Johnson"), the computer crimes investigator for the APD, retrieved the computer from Detective Sluder and conducted a forensic analysis of the computer's hard drive, discovering approximately 360 images on the computer. Out of these 360 images, Detective Johnson found 16 to be offensive. None of these 16 images depicted officers of the APD. Detective Johnson also determined that none of the images were illegal.

On 9 April 2010, Lieutenant Sean Pound ("Lt. Pound") of the APD Office of Professional Standards notified Respondent that an employee misconduct complaint had been filed against him and that an internal investigation would ensue. He then provided Respondent with a copy of an APD internal incident report and a letter evidencing the complaint.

At the conclusion of the investigation, Lt. Pound found "no indication that [Respondent] had distributed the [offensive] photos to anyone else" and forwarded the results of the internal investigation to APD Chief William Hogan ("Chief Hogan"). On 1 June 2010, Chief Hogan conducted a pre-disciplinary conference with Respondent. At the conference, Respondent explained that the computer had been solely for personal use and that the inappropriate images were from emails and texts sent to him by friends. At the conclusion of the pre-disciplinary conference, Chief Hogan placed Respondent on suspension with pay.

On 10 June 2010, Chief Hogan terminated Respondent's employment with the APD. Respondent appealed his termination to the Asheville City Manager, who upheld the termination. Respondent then appealed to the Asheville Civil Service Board ("the Board") pursuant to his rights under the Asheville Civil Service Act, 2009 N.C. Sess. Laws ch. 401, § 8. ("the Civil Service Act").

On 20 September 2010, the Board held a hearing to determine whether Respondent's termination was justified. Following the hearing, the Board found that Respondent's failure to "prevent the inappropriate images from becoming public through the return of the computer to Aaron's . . . violated one or more of the City's policies and the rules of conduct of the APD, but [that] the violations were not so severe as to warrant termination." Based on this finding, the Board concluded that "the termination of [Respondent] by the City of Asheville was not justified and should be rescinded and the City should take such steps as are necessary for a just conclusion of the matter before the board."

The City appealed the decision of the Board to Buncombe County Superior Court for a trial *de novo* as provided for under § 8(g) of the Civil Service Act. In its petition for review of the Board's decision, the City did not request a jury trial, and on 10 December 2012, a bench trial took place before the Honorable James U. Downs.

At the conclusion of the trial, Judge Downs issued an order (1) finding that the termination of Respondent's employment was not justified; and (2) ordering that Respondent "be immediately reinstated as Senior Police Officer of the Asheville Police Department with the restoration of all back pay due and all other rights as if the termination had not occurred." The City filed a timely notice of appeal to this Court.

Analysis

I. Overview of the Civil Service Act

Originally enacted by the General Assembly in 1953, the Civil Service Act provides a system of civil service protection for employees of the City, establishing the Board and charging it with the duty to make rules for "the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of employees in the qualified service." 1953 N.C. Sess. Laws ch. 757, § 4. While the Civil Service Act — as originally enacted — did not provide a mechanism for judicial review of the Board's decisions, *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443-44, 528 S.E.2d 905, 907 (2000), our Supreme Court held in 1964 that:

> [i]n view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a quasi-judicial function and is reviewable upon a writ of certiorari issued from the Superior Court.

In re Burris, 261 N.C. 450, 453, 135 S.E.2d 27, 30 (1964). In 1977, the General Assembly formally amended the Civil Service Act to authorize an appeal of the Board's decisions to superior court for a trial *de novo*. *Jacobs*, 137 N.C. App. at 444-45, 528 S.E.2d at 907-08; see also 1977 N.C. Sess. Laws ch. 415, §8.

Section 8 of the Civil Service Act provides, in pertinent part, as follows:

(a) Whenever any member of the classified service of the City is discharged . . . that member shall be entitled to a hearing before the Civil Service Board to determine whether or not the action complained of is justified. . . .

(b) Any member of the classified service of the City who desires a hearing shall file his or her request for hearing with the City Clerk within 10 days after learning of the act or omission of which he or she complains but not before the member shall have exhausted his or her remedy provided by the grievance procedures established by ordinance or policy of the City and the grievance procedure shall be concluded within 30 days. . . . Upon receipt of notice as required in this section, the City Clerk shall set the matter for hearing before the Civil Service Board at a date not less than five nor more than fifteen days from the Clerk's receipt of such notice. . . .

. . . .

(e) At such hearing, the burden of proving the justification of the act or omission complained of shall be upon the City . . . .

(f) The Civil Service Board shall render its decision in writing within ten days after the conclusion of the hearing. If the Board determines that the act or omission complained of is not justified, the Board shall order to rescind [sic] whatever action the Board has found to be unjustified and may order the City to take such steps as are necessary for a just conclusion of the matter before the Board. Such decision shall contain findings of fact and conclusions, and shall be based on competent, material, and substantial evidence in the record. Upon reaching its decision, the Board shall, in writing, immediately inform the City Clerk and the member requesting the hearing of the Board's decision.

(g) Within ten days of the receipt of notice of the decision of the Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the

> petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. . . . Therefore, the matter shall proceed to trial as any other civil action.

2009 N.C. Sess. Laws ch. 401, § 8 (alterations in original).

II. Standard of Review

In this appeal, we are reviewing the judgment entered by the trial court following a *de novo* trial conducted pursuant to § 8(g) of the Civil Service Act. "A *de novo* proceeding pursuant to a specific statutory mandate requires [the] judge or jury to disregard the facts found in an earlier hearing or trial and engage in independent fact finding." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 661, 599 S.E.2d 888, 895 (2004). A trial *de novo* is a "new trial on the entire case — that is, on both questions of fact and issues of law — conducted as if there had been no trial in the first instance." *Id.*

This Court has previously explained the scope of a *de novo* trial under the Civil Service Act as follows:

> [T]rial *de novo* vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. . . . *This means that the court must hear or try the case on its merits from beginning to end as if no trial or hearing had been held by the Board and without any presumption in favor of the Board's decision.*

Jacobs, 137 N.C. App. at 445, 528 S.E.2d at 908 (internal citations and quotation marks omitted).

Therefore, "[t]he applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 320–21, 693 S.E.2d 705, 708 (2010) (citation omitted). " '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (quoting *Tillman*

v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

III. Application of § 8 of the Civil Service Act

[1] As noted above, § 8(a) of the Civil Service Act states in pertinent part as follows: "Whenever any member of the classified service of the City is discharged, . . . that member shall be entitled to a hearing before the Civil Service Board to determine whether or not the action complained of is *justified*." 2009 N.C. Sess. Laws ch. 401, § 8 (emphasis added).

The essence of the parties' dispute in this appeal centers on how the term "justified" — which is undefined in the Act — should be construed. Our appellate courts have on several prior occasions determined whether the termination of an employee of the City was justified under the Civil Service Act.

In *In re Burris*, 263 N.C. 793, 140 S.E.2d 408 (1965), our Supreme Court addressed the issue of whether the discharge of an employee in Asheville's Tax Department was justified by the fact that he had acquired an interest in real property which the City was attempting to purchase for its own use in association with its airport. *Id.* at 794, 140 S.E.2d at 409. Our Supreme Court upheld the dismissal, holding that "[w]here an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified." *Id.* at 794, 140 S.E.2d at 410.

In *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), a police officer employed by the City was accused of making a homosexual advance towards a fellow officer while off duty. The accused officer was ordered to take a polygraph examination. After he refused, he was terminated by the chief of police. *Id.* at 403-04, 328 S.E.2d at 861.

He appealed his termination under the Civil Service Act, and a jury ultimately rendered a verdict in his favor. The trial court denied the City's motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial. *Id.* at 405, 328 S.E.2d at 861-62. We affirmed the trial court's ruling, holding that the jury could have rationally concluded the firing was not justified in light of evidence that the department planned to inquire during the polygraph test into highly personal topics about the employee that were not specifically related to the charges against him. *Id.* at 408, 328 S.E.2d at 863.

However, in neither of these cases were we called upon to provide a definition of the term "justified" as used in § 8 of the Civil Service Act. "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). Thus, as a general rule, courts should give "the language of the statute its natural and ordinary meaning unless the context requires otherwise." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988).

Respondent argues that in order for a termination to be "justified" under the Civil Service Act, "just cause" must exist under the standard set out by the General Assembly in the State Personnel Act, which governs the dismissal of State employees. *See* N.C. Gen. Stat. § 126-35(a) ("No career State employee . . . shall be discharged . . . except for just cause."). However, nowhere in the Civil Service Act has the General Assembly expressly indicated that the term "justified" was intended to be synonymous with "just cause." Therefore, principles of statutory construction require that we assume the General Assembly would have made clear in the Civil Service Act its intent that the "just cause" standard be utilized had it intended for that standard to apply. *See* 3A Norman J. Singer, *Sutherland Statutory Construction* § 66:3 at 3 (7th ed. Supp. 2013) ("When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where the term or phrase is excluded.").

The City, conversely, urges us to apply an interpretation of the term "justified" that is far more deferential to its personnel decisions. It argues that "[t]he only job protection intended in the 'justified' standard is the assurance that the employee will not be disciplined for an arbitrary reason based on politics or membership in a particular class."

We likewise reject this proposed definition. Nothing in the language of § 8 suggests a legislative intent to confer upon the City such broad authority to discharge its employees. Moreover, the City's proposed definition is inconsistent with this Court's recognition in *Jacobs* that the Civil Service Act "recognizes the interest of the employee in [his] continued employment, and guarantees full protection of [his] due process rights prior to termination of that employment." *Jacobs*, 137 N.C. App. at 449, 528 S.E.2d at 910.

It is well established that "[i]n the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning

of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000). The American Heritage Dictionary defines "justify" as "to demonstrate or prove to be just, right, or valid." American Heritage Dictionary 738 (3rd ed. 1993). We believe that this definition is consistent with the Legislature's use of the term "justified" in § 8(a) of the Civil Service Act. Therefore, we must now apply this definition in reviewing the trial court's order. In its order, the trial court made the following findings of fact:

> 1. Prior to his termination the respondent, Roger Aly, was a Senior Ashville Police Department officer working as a patrol officer.
>
> 2. During 2009 the respondent rented a computer on a rent to own basis; however, since he could no longer afford the payments, he returned the computer without wiping the computer clean of any and all images from the computer.
>
> 3. Thereafter in early 2010, an [individual] rented the same computer and while using it found numerous unidentified nude images and images that were racially insensitive, offensive and inflammatory. There were in addition many images of the respondent, his family and friends that were not offensive or illegal in any way.
>
> 4. The [individual] and his mother referred the images to the Buncombe County Sheriff's Department who conducted an investigation which eventually led to the respondent because many of the un-offensive images showed the respondent and others in a police uniform.
>
> 5. During all aspects of any investigation, including internal affairs, the respondent freely admitted all images were his, the nudes and racial ones having been sent to him unsolicited on his blackberry by friends. The respondent neither solicited nor ask [sic] his friends to stop sending them; however, while the respondent did transfer the said images to the rented computer, he did not ever forward them on to anyone else. The respondent did not approve of the images in controversy, but he took no steps to erase them or wipe them off the computer when he returned it.
>
> 6. In addition a computer forensic specialist who performed a forensic analysis on the computer found 360

> images in the "documents" folder which included images of the respondent in uniform, family photos, and the pornographic and racially inflammatory pictures and cartoons, which Detective Johnson concluded were intentionally and purposely saved on the computer; however, a fact finder could also conclude that all such images were negligently kept and saved since none had been forwarded to anyone else.
>
> 7. After all intradepartmental investigations were completed the then Chief of Police, William A. Hogan, essentially concluded that the respondent had violated the Asheville Police Department personnel policy, same said department's code of conduct, and the City's Ethics Policy because the respondent had "neglectfully" failed to prevent the inappropriate images from becoming public. As a result the respondent's employment with Asheville Police Department was terminated.

The trial court then made the following conclusions of law:

> 1. The respondent's conduct of failing to take all appropriate measures to erase the inappropriate images as opposed to keeping them on a rented computer amounted to negligence as opposed to violating any law.
>
> 2. While the respondent's conduct of opening each one of the images in question, presumably viewing it or them, not erasing any of them and not requesting the sender(s) to refrain from sending him anymore, none of the aforesaid actions amounted to the respondent violating any law.
>
> 3. While the Respondent's conduct taken as a whole or in segments with regard to the inappropriate images could have been deemed to having been a violation of the Asheville Police Department's personnel policy, the code of conduct and/or the City's Ethics Policy, such was not so severe as to warrant the Respondent being terminated from employment.
>
> 4. The City was not justified in terminating the Respondent's employment.

Petitioner only challenges the trial court's finding of fact 6. Thus, findings of fact 1-5 and 7 are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken

to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.")

Specifically, Petitioner challenges the portion of finding of fact 6 stating that "a fact finder could also conclude that all such images were negligently kept and saved," claiming that this aspect of the finding is unsupported by the evidence. The City points to Detective Johnson's testimony stating his belief that the images he found on the computer were "intentionally saved" in that (1) they were saved to a specific folder; and (2) based on Detective Johnson's training and experience, it was a "very active thing to save pictures from the BlackBerry to the computer." The City also argues that the only evidence supporting the proposition that the images were not intentionally saved was Respondent's own testimony in responding "no" when asked if he knew "how those images ended up on [his] computer."

We are satisfied that competent evidence existed to support the challenged portion of finding of fact 6. Respondent testified that he would "back up his personal phone to the desktop" in order to save his contacts and information in the event they were accidently deleted because of a previous Blackberry "catastrophic failure [where he] lost a lot of information that took [him] a great deal of time to get back." He also testified that he was unaware that the offensive images and emails at issue were being copied to his rental computer as a result of the backup. He stated that the only images he intentionally saved were "photographs of [his] kids or [himself] or events, parties, that kind of thing . . . ." In addition, he answered in the negative when asked if he "intentionally saved any emails containing pictures of naked women . . . pornographic images . . . or racist images on the computer."

It is well-settled that "[f]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk*, 364 N.C. App. at 179, 695 S.E.2d at 434 (internal citations and quotation marks omitted). Accordingly, Respondent's testimony on this issue serves as competent evidence to support the trial court's finding that a fact finder could conclude that the inappropriate photographs and images remained stored on the computer at the time he returned it as a result of negligence rather than intent on his part. Therefore, the trial court's finding on this issue is binding on appeal.

The City then challenges the trial court's conclusion of law 4 that "[t]he City was not justified in terminating the Respondent's employment." The City argues that the termination was, in fact, justified based

on its determination that Respondent's actions had violated various policies issued by the City of Asheville and affected the City's credibility, reputation, image, and effectiveness in the community. However, our only task is to determine whether the trial court's findings of fact support its conclusions of law. *Woodring v. Woodring*, 164 N.C. App. 588, 590, 596 S.E.2d 370, 372 (2004). It "is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*,___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

We believe the trial court's conclusion that Respondent's termination was not justified is supported by its findings of fact. First, Respondent rented a personal computer that was never used for work or during work hours. Second, with regard to the offensive images found on the computer, the undisputed evidence was that he only came into possession of the inappropriate pictures and images through unsolicited emails received from others. Third, he testified that he did not intend to save the offensive images on the computer. Fourth, the investigation completed by Detective Johnson revealed no criminal activity by Respondent resulting from his possession of these images. Finally, there was no evidence that Respondent disseminated the photos or intentionally sought to have them viewed by a third party.

Based on these facts, a fact finder could rationally have found that he was discharged for conduct amounting to mere negligence in failing to "wipe" his rented computer before its return. Therefore, we conclude the trial court's findings of fact support its ultimate conclusion that the City was not justified in terminating Respondent's employment.[1]

IV. Award of Reinstatement and Benefits

[2] In its final argument, the City contends that the trial court exceeded its authority in ordering that Respondent be fully reinstated to his former rank and receive all back pay due. We disagree.

Section 8(f) of the Civil Service Act provides broad authority for the award of a remedy to an employee of the City who has been the subject of unjustified personnel action:

> . . . If the Board determines that the act or omission complained of is not justified, the Board shall order to rescind [sic] whatever action the Board has found to be unjustified

1. We also note that our review of the APD Personnel Ordinance reveals no policy that specifically governs the use of an employee's personal computer. Nor does the City contend that any such policy existed.

> and may order the City to take such steps as are necessary for a just conclusion of the matter before the Board. . . .

2009 N.C. Sess. Laws ch. 401, § 8(f).

We believe this broad conferral of power to the Board in crafting a remedy for an unjustified termination encompasses the power to award reinstatement and back pay. Moreover, the City has failed to make any persuasive argument as to why a superior court conducting a *de novo* hearing pursuant to the Civil Service Act does not possess this same authority.

We also note that in *Warren* the trial court ordered the plaintiff to be "reinstated with full back pay and benefits" after concluding that his discharge had not been justified. *Warren*, 74 N.C. App. at 405, 328 S.E.2d at 861. We affirmed the trial court's order in its entirety, *id.* at 410, 328 S.E.2d at 864, thereby implicitly upholding the trial court's award of back pay.

While the authority of the trial court in *Warren* to award reinstatement and back pay was not expressly discussed in our decision, we believe — as explained above — that the trial court's award of these remedies is not inconsistent with the language utilized by the General Assembly in the Civil Service Act.

Thus, we hold that the trial court here likewise acted within its authority in ordering the City to reinstate Respondent to his former rank with full back pay. Accordingly, the City's argument on this issue is overruled.

Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

GECMC 2006 C1 CARRINGTON OAKS, LLC, Plaintiff
v.
SAMUEL WEISS and EZRA BEYMAN, Defendants

No. COA13-1030

Filed 6 May 2014

Jurisdiction—personal—consent to jurisdiction provision

The trial court did not err in a case involving default on a guaranty agreement when it concluded that it had personal jurisdiction over defendant. There was competent evidence to support the court's finding that defendant signed and executed the guaranty that contained a consent to jurisdiction provision that expressly submitted defendant to the jurisdiction of the State of North Carolina.

Appeal by defendant Samuel Weiss from order entered 17 April 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 2014.

McGuireWoods, LLP, by William O. L. Hutchinson, Steven N. Baker, and T. Richmond McPherson, III, for plaintiff–appellee.

Copeland, Richards & Anderson, PLLC, by Shawn A. Copeland and Michael F. Anderson, for defendant–appellant Samuel Weiss.

MARTIN, Chief Judge.

Defendant Samuel Weiss ("defendant Weiss") appeals from an order denying his motion to dismiss the Verified Amended Complaint ("the Complaint") filed by plaintiff GECMC 2006-C1 Carrington Oaks, LLC ("GECMC") pursuant to N.C.G.S. § 1A 1, Rule 12(b)(2). We affirm.

GECMC, a North Carolina-based limited liability company, filed the Complaint in Mecklenburg County Superior Court against defendant Weiss and against Ezra Beyman ("defendant Beyman"), both citizens of Monsey, New York. In its Complaint, GECMC alleged that it was the holder of a promissory note ("the Note") for $28,290,000.00 made by Empirian at Carrington Place, LLC ("Empirian") to Deutsche Bank Mortgage Capital, LLC and its successors and assigns. Defendant Beyman signed the Note as president of Empirian, which is a Delaware-based limited liability company with its principal place of business in

Montvale, New Jersey. The Note was secured by a deed of trust "covering certain real property located in Mecklenburg County, North Carolina."

Attached to the Complaint was a Guaranty and Indemnity ("the Guaranty") which expressly references the Note executed by defendant Beyman as President of Empirian. The Complaint alleged that such Guaranty was signed by defendants Beyman and Weiss. The document expressly provides that defendants Beyman and Weiss individually "unconditionally and irrevocably guarantee[] up to $6,240,000.00 of the principal balance of the Loan," until such time as certain specified conditions are met, as when there is no event of default continuing. The Guaranty also contains the following provision, entitled "Submission To Jurisdiction":

> EACH GUARANTOR, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, (A) SUBMITS TO PERSONAL JURISDICTION IN THE STATE IN WHICH THE PROPERTY IS LOCATED OVER ANY SUIT, ACTION OR PROCEEDING BY ANY PERSON ARISING FROM OR RELATING TO THIS GUARANTY, (B) AGREES THAT ANY SUCH ACTION, SUIT OR PROCEEDING MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT OF COMPETENT JURISDICTION SITTING IN THE COUNTY AND STATE IN WHICH THE PROPERTY IS LOCATED, (C) SUBMITS TO THE JURISDICTION OF SUCH COURTS, AND (D) AGREES THAT NEITHER OF THEM WILL BRING ANY ACTION, SUIT OR PROCEEDING IN ANY OTHER FORUM (BUT NOTHING HEREIN SHALL AFFECT THE RIGHT OF LENDER TO BRING ANY ACTION, SUIT OR PROCEEDING IN ANY OTHER FORUM).

According to the Complaint, Empirian defaulted under the terms of the Note and GECMC demanded payment for the indebtedness due, but Empirian refused and still refuses to pay, and defendants Beyman and Weiss defaulted "for failure to pay the amounts due under the Note and the Empirian Guaranty." GECMC claimed that defendants breached their commercial guaranty agreement with GECMC and sought to recover the principal amount of $6,240,000.00, as well as interest accrued, reasonable costs, and attorney's fees.

Defendant Weiss moved to dismiss the Complaint pursuant to N.C.G.S. § 1A 1, Rules 12(b)(2), (b)(4), and (b)(5), for lack of personal

jurisdiction, insufficiency of process, and insufficiency of service of process, respectively. After conducting a hearing, the court denied defendant Weiss's motion to dismiss "to the extent that it [sought] dismiss[al] for insufficiency of process and service of process," but deferred ruling on the motion to dismiss for lack of personal jurisdiction to allow GECMC to "take jurisdictional discovery of [d]efendant Weiss."

In his affidavit and in his briefs submitted in support of his motion to dismiss for lack of personal jurisdiction, defendant Weiss asserted that, although the Guaranty is signed by what "appears to be [his] signature" underneath the word "GUARANTOR" and above the words "SAMUEL WEISS, an individual," defendant Weiss attested that he "was never presented with this Guaranty Agreement," and that he "did not sign and would not have signed this Guaranty Agreement" because he "had no intent to expose [him]self in a manner greater than [his] capital contribution."

In its briefs submitted in support of its opposition to defendant Weiss's motion to dismiss, GECMC acknowledged that defendant Weiss "admitted in his deposition testimony that he did not know the contents of all the documents he executed in connection with [this] transaction," but argued that defendant Weiss's "failure to exercise diligence in executing the loan documents does not provide [defendant Weiss] with a shield to avoid liability on the Guaranty Agreement after he benefitted financially from the loan transaction before the loan went into default." GECMC also submitted an affidavit from Dmitry Sulsky, an asset manager of a limited liability company, the sole non member manager of GECMC, and special servicer of the loan that is the subject of this action. Mr. Sulsky's affidavit also included as exhibits documents that he attests "are maintained in the course of the regularly conducted business activities" of his company, which include opinion letters from counsel involved in the transaction at issue that repeatedly refer to defendants Beyman and Weiss as the "Guarantors" of the transaction.

After conducting a hearing and considering the parties' briefs and corresponding affidavits, on 17 April 2013, the trial court entered an order in which it found that, "[a]s a condition of making the loan to Empirian, Deutsche Bank required that [d]efendant Samuel Weiss and [d]efendant Ezra Beyman execute a guaranty agreement," that "[d]efendant Weiss signed and executed a guaranty agreement guaranteeing $6,240,000 of the principal balance of the loan made to Empirian," and that "[t]he guaranty agreement executed by Weiss contains a 'consent to jurisdiction' clause whereby [d]efendant Samuel Weiss 'voluntarily . . . submit[ted] to personal jurisdiction in the State in which the property

is located.' " The court then concluded that it had personal jurisdiction over defendant Weiss "by virtue of the agreement in which [d]efendant Weiss expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina." The trial court also concluded that its exercise of personal jurisdiction of defendant Weiss "comports with Due Process and [that] the maintenance of suit against Samuel Weiss in North Carolina does not offend traditional notions of fair play and substantial justice." Defendant Weiss appeals from the trial court's 17 April 2013 denial of his motion to dismiss the Complaint pursuant to N.C.G.S. § 1A 1, Rule 12(b)(2). Defendant Beyman, against whom the court entered a default judgment upon GECMC's motion, is not a party to this appeal.

Defendant Weiss first contends the trial court erred when it concluded that it had personal jurisdiction over him because he asserts that the court did not consider competent evidence when it found that defendant Weiss "signed and executed a guaranty agreement guaranteeing $6,240,000 of the principal balance of the loan made to Empirian." Thus, defendant Weiss argues that the court erred by concluding that he "expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina," "by virtue of the agreement." We disagree.

Although defendant Weiss's appeal is from an interlocutory order, a defendant has "an immediate right of appeal from the denial of their motion to dismiss for lack of personal jurisdiction." *Retail Investors, Inc. v. Henzlik Inv. Co.*, 113 N.C. App. 549, 552, 439 S.E.2d 196, 198 (1994); *see also* N.C. Gen. Stat. § 1 277(b) (2013) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.").

The general rule requires that the trial court, "as a prerequisite to exercising jurisdiction," *Retail Investors, Inc.*, 113 N.C. App. at 552, 439 S.E.2d at 198, make two basic inquiries: "(1) whether any North Carolina statute authorizes the court to entertain an action against the defendant and if so, (2) whether defendant has sufficient minimum contacts with the state so that considering the action does not conflict with 'traditional notions of fair play and substantial justice.' " *Id.* (quoting *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 96, 414 S.E.2d 30, 35 (1992)).

"A defendant may, however, consent to personal jurisdiction and in such event, the two step inquiry is unnecessary to the exercise of personal jurisdiction over the defendant." *Id.* "One method of consenting to personal jurisdiction is the inclusion in a contract of a consent to jurisdiction provision." *Id.* "This type of provision does not violate the Due Process Clause and is valid and enforceable unless it is the product of fraud or unequal bargaining power or unless enforcement of the provision would be unfair or unreasonable." *Id.*

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When, as here, "both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues," *see id.*, "the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 694, 611 S.E.2d at 183 (alteration and omission in original) (internal quotation marks omitted). "If the trial court chooses to decide the motion based on affidavits, [t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Id.* (alterations in original) (internal quotation marks omitted). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Id.* (internal quotation marks omitted).

In the present case, at the hearing on defendant Weiss's motion to dismiss, the court was presented with evidence consisting of defendant Weiss's affidavit, Mr. Sulsky's affidavit, and defendant Weiss's deposition, as well as the exhibits accompanying each. In his deposition, defendant Weiss admitted that he did "about 15, 16 deals" involving real estate in different states with defendant Beyman's company, one of which was the deal at issue in the present case concerning the Carrington Oaks property in Mecklenburg County, North Carolina. Defendant Weiss, who has between 20 and 25 years of experience in real estate management and ownership, said that all of his deals with defendant Beyman's company would follow a particular pattern:

> [T]his is the same example which I used with all the investments that we did with [Empirian] which related to property. Let's assume [a member of defendant Beyman's company] would say that we are about to approach to buy

> a particular property in a particular state for $30 million, the cost to buy the property. Of the $30 million, he will probably get from the bank approximately 20 to 22 million, about two-thirds, maybe a little bit more. Then the cash equity required to establish such a deal would be let's say $8 million. From the $8 million, we put up 75 percent, "we" meaning our family, Beyman puts up 25 percent. We get a return on the 75 percent first, and we have a 25 percent upside after everybody's paid back—only if there's an upside. If there's a certain return of 9 percent, 10 percent, 11 percent on the money, then there's an upside, so if there's an upside. That's a generalization of it. Now, if we take $8 million, 75 percent of that is approximately 6 million, then I would call my family partners, I would tell them the deal's coming up now, 6 million equity is required, how much do you feel you want to invest in a particular deal. They would give me the numbers, I would put together the numbers. Sometimes it would be more than enough, sometimes it's a little less, we'd ask somebody else to substitute. That's how the deal was structured. . . . Once that was established, $6 million came out of the closing and was sent to one of the accounts which Beyman established. The documents would be drafted by Beyman's lawyer and reviewed by our lawyer, Elliot Gross. Once the documents were signed, they could give fund instructions, and the funding instructions would follow via a wire.

Defendant Weiss also said that, when he was notified that documents were ready for him to sign regarding a transaction with Beyman's company, he went to a small conference room off of the main lobby of the Dreier Law Firm, where he was met by someone from the firm who "came out with approximately sometimes 30, 40, 45 signature pages" and told him that the papers were "for the transaction," and he would sign those papers. Defendant Weiss said that, in these interactions at the firm, he would be presented with signature pages for multiple documents for a particular deal and it would take him about five to ten minutes to sign all of the papers presented to him at that time. He said he "understood that these were the documents which the law firm prepared on behalf of the bank [responsible for giving the loan] at the time," and that he did not ask anyone at the firm for copies of any of the documents he signed.

Here, as indicated above, defendant Weiss admitted that, of the "15, 16 deals" he did with defendant Beyman's company, he "did one

in North Carolina," and agreed it was the Carrington Oaks property in Mecklenburg County. Defendant Weiss also admitted that his company "[h]ad a loan for [Empirian], and the loan was established as, you know, Carrington Place [sic]." Additionally, defendant Weiss indicated that the procedure he followed to execute the paperwork related to this transaction was consistent with the procedure from his other dealings with defendant Beyman's company. First, defendant Weiss was told by his secretary to go to the Dreier Law Firm to sign documents regarding the transaction. Then, upon his arrival, the firm's receptionist called someone, who met him and escorted him into a small room off of the lobby and presented him with "a bunch of papers" that he was asked to sign. After spending between five and ten minutes signing between 25 to 35 documents, defendant Weiss then left without asking any questions about the contents of the documents he was signing and without requesting copies of the documents he was signing. Defendant Weiss then admitted in his deposition that the signature that appeared on the signature page of the Guaranty—which had "GUARANTOR" typed above the signature and "SAMUEL WEISS, an individual" typed below it—"appear[ed] to be [his] signature." Perhaps because defendant Weiss would not definitively admit or deny that he signed the signature page of the Guaranty, plaintiff's counsel questioned defendant Weiss further. When asked whether he was claiming that the document contained a forged signature, whether someone else signed his name, or whether the signature on the Guaranty was an authentic copy of his signature, defendant Weiss repeatedly responded, "I did not say that." Since it is the responsibility of the trial court to determine the weight and sufficiency of this evidence, based on our review of the record, we conclude that there was competent evidence to support the court's finding that defendant Weiss signed and executed the Guaranty that contained the consent to jurisdiction provision that expressly submitted defendant Weiss to the jurisdiction of the State of North Carolina.

We note that defendant Weiss purports to argue that he cannot be bound to the consent to jurisdiction provision of the Guaranty because he cannot be bound to the terms of an agreement that he signed but did not read. However, it has long been held in this State that "one who signs a paper writing is under a duty to ascertain its contents," *Williams v. Williams*, 220 N.C. 806, 809, 18 S.E.2d 364, 366 (1942), and "in the absence of a showing that he was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained." *Id.* at 809–10, 18 S.E.2d at 366. Defendant Weiss does not bring forward any argument in his brief

that he was "willfully misled or misinformed" about the contents of the documents that comprised the transaction at issue, and suggests only in a footnote and without support that, because he "did not have a contract before him to read" during the five to ten minutes that he chose to spend signing between 25 to 35 signature pages of legal documents in the lobby of a law firm, the proposition that he is charged with knowledge of the contents of the contract at issue is misplaced. However, in the absence of any allegation that the contents of the Guaranty were "kept" from him in fraudulent opposition to his request, we find defendant Weiss's suggestion unpersuasive.

Accordingly, we hold that the trial court did not err when it concluded that it had personal jurisdiction over defendant Weiss "by virtue of the agreement in which [d]efendant Weiss expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina." Moreover, because we have determined that defendant Weiss consented to personal jurisdiction by agreement, we need not consider the arguments in his brief concerning whether the court correctly determined that he had sufficient contacts with North Carolina to allow the court to exercise personal jurisdiction over him in this matter. *See Retail Investors, Inc.*, 113 N.C. App. at 552, 439 S.E.2d at 198. Our disposition renders it unnecessary to consider defendant Weiss's remaining arguments on appeal and we decline to do so.

Affirmed.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF J.C.B.

No. COA13-1112

Filed 6 May 2014

1. Appeal and Error—standing—child abuse, dependency, and neglect

Respondent father's argument that the trial court erred by adjudicating R.R.N. an abused juvenile was dismissed because respondent lacked standing to appeal the adjudication of abuse. Respondent did not fall within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C.G.S. §§ 7B–1001 and 7B–1002.

2. Child Abuse, Dependency, and Neglect—substantial risk of abuse of neglect—insufficient findings of fact

The trial court erred by adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. The findings of fact did not support a conclusion that respondent father's conduct created a "substantial risk" that abuse or neglect of the juveniles might occur.

3. Appeal and Error—untimely notice of appeal—writ of certiorari denied—desire to pursue appeal

Respondent mother's argument that the trial court erred by entering a civil custody order transferring the cases of C.R.R. and H.F.R. to a Chapter 50 action was dismissed. Respondent failed to give proper notice of appeal from this order and her petition for writ of *certiorari* was denied where the Court of Appeals could not infer from her notice of appeal from the order of adjudication and disposition that she desired to pursue an appeal from the civil custody order.

Appeal by respondents from orders entered 22 July 2013 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 27 March 2014.

Stephen L. Beaman for petitioner-appellee Wilson County Department of Social Services.

Richard Croutharmel for respondent-appellant mother.

Michael E. Casterline for respondent-appellant father.

Parker, Poe, Adams & Bernstein, by Sarah F. Hutchins and Ashley A. Edwards, for guardian ad litem.

ELMORE, Judge.

Respondents, the parents of the juvenile J.C.B. and custodians of their nieces C.R.R. and H.F.R., appeal from orders entered 22 July 2013 adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. After careful review, we reverse in part, and dismiss, in part.

I. Facts

This case is related to *In The Matter of R.R.N.*, ___ N.C. App. ___, ___ S.E.2d ___ (COA13-947) (2014). R.R.N. is the step-daughter of respondent-father's cousin. On 30 November 2012, the Wilson County Department of Social Services ("DSS") filed a petition alleging that R.R.N. was an abused and neglected juvenile. DSS stated that it received a Child Protective Services report on 20 August 2012 claiming that R.R.N. had been sexually abused by respondent-father during an overnight visit to respondents' home on 18 August 2012. J.C.B., C.R.R., and H.F.R. were all present in the home at the time of the alleged sexual abuse. Accordingly, on 30 November 2012, DSS filed petitions alleging that J.C.B., C.R.R., and H.F.R. were neglected in that they lived in an environment injurious to their welfare because they resided in a home where another juvenile had been sexually abused.

DSS additionally alleged that C.R.R. and H.F.R. were dependent juveniles. C.R.R. and H.F.R. are respondents' nieces and respondents shared custody of the juveniles with the juveniles' maternal grandmother. C.R.R. and H.F.R. were residing with respondents and unable to return to their parents' home due to their parents' continuing issues with domestic violence and substance abuse. The plan at the time of the filing of the petitions was for C.R.R. and H.F.R. to move into the residence of their maternal grandmother.

Adjudicatory hearings were held on 13, 14, 15, and 29 March 2013. The trial court concluded that respondent-father abused R.R.N. and found that J.C.B., C.R.R., and H.F.R. resided in the home when the abuse occurred. Accordingly, on 22 July 2013, the trial court adjudicated J.C.B., C.R.R., and H.F.R. as neglected juveniles. The trial court declined to adjudicate C.R.R. and H.F.R dependent as alleged in the petitions. The trial court ordered that custody of J.C.B. remain with respondents while custody of C.R.R. and H.F.R. be granted to their maternal grandmother. Respondent-father was ordered to have no unsupervised

contact with C.R.R. and H.F.R. The trial court also entered a written order initiating a Chapter 50 civil custody action as to C.R.R. and H.F.R. Respondents appeal.

II. Analysis

[1] Respondent-father first argues that the trial court erred by adjudicating R.R.N. an abused juvenile. Respondent-father contends that the trial court failed to make appropriate findings of fact to support a conclusion that R.R.N. was the victim of a sexual offense. We decline, however, to review respondent-father's argument because he has no right to appeal the adjudication of abuse.

A juvenile matter based on Subchapter I, "Abuse, Neglect, Dependency" of General Statutes Chapter 7B may be appealed by the following parties:

> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B–601.
>
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B–601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A–1, Rule 17 for the juvenile for the purposes of that appeal.
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B–600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B–101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B–1002 (2013); *see* N.C. Gen. Stat. § 7B–1001 (2013). Respondent-father does not fall within any category of persons afforded a statutory right to appeal from a juvenile matter pursuant to N.C. Gen. Stat. §§ 7B–1001 and 7B–1002 (2013). Thus, he lacks standing to appeal the trial court's 22 July 2013 order adjudicating R.R.N. an abused juvenile.

[2] We next consider respondents' arguments that the trial court erred by adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles. Respondents both argue that the trial court erred in adjudicating J.C.B., C.R.R., and H.F.R. neglected juveniles because its findings are insufficient to support the conclusion that they were harmed by respondent-father's actions or exposed to a substantial risk of harm. We agree.

"The role of this Court in reviewing a trial court's adjudication of neglect [] is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted).

The statutory definition of neglect provides that "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B–101(15) (2013). This Court has acknowledged, however, that "the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated. *See, e.g.*, *In re C.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 801-02 (2009) (affirming adjudication of neglect based upon prior abuse of another child and a history of domestic violence between the parents); *In re A.S.*, 190 N.C. App. 679, 690-91, 661 S.E.2d 313, 320-21 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009) (affirming adjudication of neglect of a child based upon mother's act of intentionally burning another child's foot and falsely claiming that the burning was accidental); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and parent's lack of acceptance of responsibility).

Even if we assume *arguendo* that respondent-father abused R.R.N., a juvenile, in the home where J.C.B., C.R.R., H.F.R., and respondent-father lived, this fact alone does not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected. *In re N.G.*, *supra*. The trial court made virtually no findings of fact regarding J.C.B., C.R.R., or H.F.R., and wholly failed to make any finding of fact that J.C.B., C.R.R., and H.F.R. were either abused themselves or were aware of respondent-father's inappropriate relationship with R.R.N. Additionally, the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated. As a result, the findings of fact do not support a conclusion that respondent-father's conduct created a "substantial risk" that abuse or neglect of J.C.B., C.R.R.,

and H.F.R. might occur. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993) (citation omitted). Accordingly, we reverse the trial court's adjudications of neglect.

[3] Lastly, respondent-mother argues that the trial court erred by entering a Juvenile Court Order Initiating Civil Action For Custody (the civil custody order), transferring the cases of C.R.R. and H.F.R. to a Chapter 50 action. We note, however, that respondent-mother failed to give proper notice of appeal from this order and has filed a petition for writ of certiorari. She avers that we should grant the writ of certiorari because her untimely appeal from the civil custody order "stems from her court-appointed trial attorney's failure to do so and not because of any lack of desire on her part to appeal that order."

N.C. Appellate Procedure Rule 3.1(a) provides:

> Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina.

N.C.R. App. P. 3.1(a). Pursuant to N.C. Gen. Stat. § 7B-1001 (2013), "[n]otice of appeal and notice to preserve the right to appeal shall be given in writing . . . within 30 days after entry and service of the order[.]" An appellant's failure to give timely notice of appeal "is jurisdictional, and an untimely attempt to appeal must be dismissed." *In re I.T.P-L.*, 194 N.C. App. 453, 459, 670 S.E.2d 282, 285 (2008) (citation and quotations omitted). However, writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals[.]" N.C.R. App. P. 21. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when an appeal "has been lost because of a failure of his or her trial counsel to give proper notice of appeal." *State v. Gordon*, ___ N.C. App. ___, ___, 745 S.E.2d 361, 363 (2013), *review denied*, ___ N.C. ___, 749 S.E.2d 859 (2013). In such cases, the evidence indicated the appellant's "desire[] to pursue the appeal" despite the attorney's error. *I.T.P-L.*, 194 N.C. App. at 460, 670 S.E.2d at 285; *see In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) (granting writ of certiorari where appellant's notice of appeal incorrectly stated that it was from a January order but it was clear from the circumstances that appellant intended to appeal

from an April order); *see also State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012) ("[A] mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake[.]").

Here, respondent-mother concedes that she did not file timely notice of appeal from the civil custody order that transferred the cases of C.R.R. and H.F.R. to a Chapter 50 action. The only timely notice of appeal filed by respondent-mother was "from the Order of Adjudication and Disposition signed on 19 July 2013, filed on 22 July 2013." This notice of appeal was worded clearly and properly filed by her attorney. However, the notice of appeal makes no reference to the civil custody order nor does it describe any decision embodied in that order. Thus, we cannot infer from the notice of appeal that respondent-mother desired to pursue an appeal from the civil custody order. Accordingly, we deny her petition for writ of certiorari and dismiss this portion of her argument on appeal. *See In re H.S.F.*, 182 N.C. App. 739, 744, 645 S.E.2d 383, 386 (2007) (dismissing appellant's argument on appeal as to the trial court's error in a civil custody order because her notice of appeal was from the trial court's review order and not from the civil custody order itself).

III. Conclusion

In sum, we decline to address respondent-father's argument that the trial court erred by adjudicating R.R.N. an abused juvenile because he lacks standing to challenge this issue on appeal. We dismiss respondent-mother's argument pertaining to the alleged erroneous entry of the civil custody order because she failed to give proper notice of appeal. However, we reverse the trial court's adjudications of neglect because its findings of fact do not support its conclusion of law that J.C.B., C.R.R., and H.F.R. were neglected.

Reversed, in part; dismissed, in part.

Judge CALABRIA and Judge STEPHENS concur.

IN THE MATTER OF R.R.N.

No. COA13-947

Filed 6 May 2014

Child Abuse, Dependency, and Neglect—sexual assault—family member—perpetrator not the caretaker

The trial court erred by adjudicating a minor child as abused and neglected. The family member who sexually assaulted the minor child was not the minor child's caretaker, even though the child was under his temporary supervision. Further, not every child who is the victim of a crime where the perpetrator is a family member requires the protection of the Juvenile Code.

Appeal by respondent from order entered 22 July 2013 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 27 March 2014.

Stephen L. Beaman for petitioner-appellee Wilson County Department of Social Services.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.

ELMORE, Judge.

Respondent, the mother of the juvenile, appeals from an order adjudicating R.R.N. an abused and neglected juvenile. After careful review, we reverse.

I. Background

On 30 November 2012, the Wilson County Department of Social Services ("DSS") filed a petition alleging that R.R.N. was an abused and neglected juvenile. DSS amended the petition on 11 December 2012. DSS stated that it received a Child Protective Services report on 20 August 2012 claiming that R.R.N. had been sexually abused. R.R.N. had visited the home of her alleged abuser ["Mr. B."], who was her stepfather's cousin, on 18 August 2012. Following the visit, the juvenile disclosed to respondent that she had been having a relationship with Mr. B., which

included him fondling her breasts and kissing her. Respondent reported the alleged abuse to DSS. Subsequently, during an interview with a social worker, the juvenile stated that she had performed oral sex on Mr. B., he had digitally penetrated her, and she and Mr. B. had originally planned to have sexual intercourse during her visit on 18 August 2012. DSS alleged that Mr. B. and his wife had been "acting as caretakers for [R.R.N.] that evening and were providing care to her in their home." After the disclosure of the abuse, respondent and the juvenile's stepfather did not allow any further contact between R.R.N. and Mr. B. and sought counseling for the juvenile. R.R.N. underwent a Child Medical Evaluation on 10 September 2012. The juvenile's statements during the interview were consistent with the disclosures made to the social worker.

On 30 January 2013, respondent moved to dismiss DSS' petition pursuant to Rule 12(b)(6). Specifically, respondent argued that the Juvenile Code did not apply because Mr. B. was not a parent, guardian, custodian, or caretaker for the juvenile as defined by the Juvenile Code. The trial court denied the motion.

Adjudicatory hearings were held on 13, 14, 15, and 29 March 2013. The trial court found as fact that the juvenile had (1) performed oral sex on Mr. B., (2) they had engaged in kissing, (3) Mr. B. had touched the juvenile's breasts and digitally penetrated her, and (4) that Mr. B. acted as a caretaker for the juvenile on 18 August 2012. Accordingly, the trial court adjudicated R.R.N. as an abused and neglected juvenile. The court ordered that custody of R.R.N. should remain with respondent, closed the case and terminated further review. Respondent appeals.

II. Analysis

Respondent argues that R.R.N. was not an abused or neglected juvenile because Mr. B. was not a caretaker. More specifically, respondent contends that the trial court erred in finding that Mr. B. was "entrusted" with R.R.N.'s care as required by N.C. Gen. Stat. § 7B-101(3). We agree and note that this issue is one of first impression for our courts.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse [and dependency] is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (internal quotations and citation omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted). "The trial court's

'conclusions of law are reviewable *de novo* on appeal.' " *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006).

The Juvenile Code includes in its definition of abuse and neglect those juveniles who have been abused or neglected by a "caretaker." N.C. Gen. Stat. § 7B-101(1) (2013).

Caretaker is defined as:

> Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, [or] an adult relative entrusted with the juvenile's care[.]

N.C. Gen. Stat. § 7B-101(3) (2013).

The primary purpose of the "caretaker" statute, N.C. Gen. Stat. § 7B-101(3), is to protect the juvenile from abuse and neglect inflicted by an adult member of the juvenile's household. In addition, the statute serves to protect the juvenile from abuse and neglect inflicted by an adult relative who has been entrusted with responsibility for the health and welfare of the child. These relatives include persons related to the juvenile by blood as well as marriage, including step-parents and extended step-relatives.[1] The trial court must consider the totality of the circumstances to discern whether the relative has been "entrusted" with the juvenile's care under N.C. Gen. Stat. § 7B-101(3).

Generally, an adult relative is not "entrusted" with a juvenile's care for the purposes of being a caretaker unless an extended-care situation is in play. Such situations may include a prolonged visit by the juvenile to a relative's residence during which time the relative gains apparent or actual authority over the juvenile's health and welfare. Alternatively, a relative may inadvertently become entrusted with the child's care. For example, and assuming this issue was presented in *In re P.L.P.*, we would support a determination that P.L.P.'s uncle became her caretaker when P.L.P.'s mother left her in the uncle's care "for the night and had not returned for a few weeks." 173 N.C. App. 1, 3, 618 S.E.2d 241, 243 (2005) *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006). By the mother's extended absence, the uncle became entrusted with P.L.P.'s care. However, had

1. *See* North Carolina DSS On-line Manual, Chapter VIII: Protective Services 1407. http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1407-01.htm.

P.L.P.'s mother returned the following day, the uncle would have been responsible for P.L.P.'s temporary supervision.

Here, the basis of the petition filed by DSS was that Mr. B. satisfied the definition of "caretaker" because: (1) he was a step-cousin, and (2) he was entrusted with the juvenile's care when her parents permitted her to sleep over at his home on 18 August 2012. Specifically, the petition alleges that R.R.N. is an abused juvenile because her "parent, guardian or caretaker" "created or allowed to be created serious emotional damage" to the juvenile on 18 August 2012. The petition also alleges that R.R.N. is a neglected juvenile because she "lived" in an environment injurious to her welfare on 18 August 2012, the evening that R.R.N. slept at Mr. B.'s residence. The trial court concluded that Mr. B. was the juvenile's "caretaker," finding: (1) Mr. B. and the juvenile's stepfather were first cousins; (2) Mr. B. "acknowledged that he and his wife . . . were responsible for the care and supervision of [R.R.N.] when she was left with them overnight on August 18, 2012;" and (3) the sexual contact occurring between Mr. B. and the juvenile occurred at Mr. B.'s residence.

We disagree with the trial court's interpretation of the term "caretaker" on these facts. The situation before us did not come within the purview of the Juvenile Code until R.R.N. spent the night at Mr. B.'s residence. Had Mr. B. simply been the father of the juvenile's friend, the Juvenile Code would not apply. Alternatively, had the abuse occurred absent the sleepover situation, the Juvenile Code would similarly not apply. Regardless, and despite a familial relationship, Mr. B. was not R.R.N.'s caretaker because he was not "entrusted" with her care by virtue of supervising the sleepover.

When a parent or guardian allows a child to attend a sleepover, the parent does not relinquish responsibility over the child's health and welfare. This is evidenced by the following two situations. First, should R.R.N. have needed medical treatment during the night, it would be respondent, not Mr. B., who would have had the authority to make R.R.N.'s health-related decisions. Respondent was in town and could easily have been contacted by physicians or by Mr. B. Second, if R.R.N. became scared to sleep away from home, R.R.N. would likely have been returned to respondent's care that same evening. As such, and given the temporary nature of a sleepover, the adult supervisor, whether a relative or not, is not "entrusted" with the child's care as contemplated by N.C. Gen. Stat. § 7B-101(c). The adult supervisor must only attempt to ensure the visiting child's safety. Respondent, not Mr. B., was responsible for R.R.N.'s health and welfare on 18 August 2012.

In its petition, DSS does not allege that respondent or R.R.N.'s step-father, the two adults with whom R.R.N. resided, were aware of or contributed to R.R.N.'s abuse or neglect. In fact, the petition provides that respondent insured R.R.N.'s safety "by not allowing any further contact with Mr. and Mrs. [B.]" and by "making sure [R.R.N.] attends counseling on a consistent basis." Further, there is no indication that the trial court was concerned for R.R.N.'s safety in respondent's home. This is evidenced by the fact that the trial court released R.R.N. into respondent's custody after adjudicating her abused and neglected.

One intended purpose of juvenile proceedings for abuse, neglect, and dependency as expressed in N.C. Gen. Stat. § 7B-100(3), is "[t]o provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence[.]" In adjudicating R.R.N. abused and neglected on these facts, the trial court failed to account for the intention of the Juvenile Code to respect family autonomy. R.R.N.'s needs for safety, continuity, and permanence were at all relevant times sufficiently met by respondent.

III. Conclusion

In concluding that Mr. B. was R.R.N.'s caretaker, the trial court stretched N.C. Gen. Stat. § 7B-101(3) beyond its intended scope. Mr. B. was simply a relative who sexually assaulted R.R.N. while she was under his temporary supervision. At no time was Mr. B. responsible for R.R.N.'s health and welfare. Further, not every child who is the victim of a crime where the perpetrator is a family member requires the protection of the Juvenile Code. Our legal system has appropriate mechanisms in place to handle perpetrators of such crimes. In sum, the trial court erred in applying the Juvenile Code on these facts and in subsequently adjudicating R.R.N. abused and neglected. Accordingly, we reverse. Respondent's remaining argument is now moot.

Reversed.

Judges CALABRIA and STEPHENS concur.

INTEGON NATIONAL INSURANCE COMPANY, Plaintiff
v.
HELPING HANDS SPECIALIZED TRANSPORT, INC. and LESLIE TAYLOR, Executor of the Estate of MARY LEWIS FAGGART SMITH, Defendants

No. COA13-1266

Filed 6 May 2014

Insurance—automobile liability policy coverage—accident—causal connection—reformation—declaratory judgment

The trial court did not err in a declaratory judgment action by holding that plaintiff Integon's automobile liability policy provided coverage in the full amount of the policy limits to defendant Helping Hands for its liability, if any, with respect to the accident. There was a sufficient "causal connection" between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage. Nothing in the record showed that plaintiff argued reformation of the policy before the trial court.

Appeal by plaintiff from order entered 12 August 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 7 April 2014.

Bennett & Guthrie, P.L.L.C., by Roberta King Latham, for plaintiff-appellant.

Mills & Levine, by Michael J. Greer, for defendant-appellee Leslie Taylor.

MARTIN, Chief Judge.

Plaintiff Integon National Insurance Company filed this action seeking a declaration of its obligations to provide coverage pursuant to a business automobile liability insurance policy issued to defendant Helping Hands Specialized Transport, Inc. for the alleged personal injuries and death of Mary Lewis Faggart Smith which arose out of an incident on 24 May 2010. Defendant Leslie Taylor is Ms. Smith's niece and the executor of Ms. Smith's estate. Ms. Taylor, through counsel, accepted service of process and filed an answer. Helping Hands was served with process, but failed to answer or otherwise respond to the complaint, and its default was entered by the Clerk of Superior Court. After discovery, both Integon and Ms. Taylor filed motions for summary judgment.

The materials before the trial court at the summary judgment hearing tended to show that at the time of Ms. Smith's injury, Helping Hands had a business automobile insurance policy with Integon which insured against liability for damages "caused by an accident and resulting from the ownership, maintenance or use of a covered" vehicle.

The materials also disclosed that prior to 24 May 2010, Ms. Smith had been hospitalized at Carolinas Medical Center and her treating physician had determined that she was nearing the end of her life and recommended to Ms. Taylor that she arrange for palliative care for her aunt. Ms. Taylor contracted with Hospice of Cabarrus County to provide hospice care for Ms. Smith at Ms. Smith's home. Hospice arranged for Helping Hands to transport Ms. Smith from the hospital to her home on May 24th. A Helping Hands handicapped accessible van, driven by Helping Hands driver Robert Brennan, went to the hospital on that date. Ms. Smith, who was seated in a Geri-chair, was loaded into the van and Mr. Brennan transported her safely to her residence, where Ms. Taylor was waiting.

There was also evidence tending to show that prior to the van's arrival, Ms. Taylor had received two telephone calls asking whether a ramp would be needed to negotiate the steps to Ms. Smith's home, and she responded that a ramp would be needed. The record is unclear as to whether these inquiries were made by Helping Hands or Hospice. Nevertheless, when the van arrived with Ms. Smith, there was no ramp.

Mr. Brennan used the van's hydraulic lift to lower Ms. Smith, in the Geri-chair, from the van to the driveway and removed the Geri-chair from the van's lift. Shortly thereafter, it began to rain. Mr. Brennan rolled Ms. Smith up a sidewalk to the house's front steps. Although the Geri-chair had wheels, it was not appropriate for transporting Ms. Smith up the steps and into the house, so Mr. Brennan asked Ms. Taylor if she had a wheelchair. Ms. Taylor went into the house and rolled a wheelchair onto the porch and Mr. Brennan carried it down the steps. Ms. Smith was transferred from the Geri-chair to the wheelchair without sustaining any injury. Mr. Brennan then proceeded to ascend the steps backwards and pull the wheelchair, facing backwards, up the steps. After going up the first step, Ms. Smith started sliding out of the wheelchair; Ms. Taylor grabbed one of her legs to keep her from sliding out of the chair, and Mr. Brennan put his arm around Ms. Smith and pulled the wheelchair up the second step. Once they were on the porch, Ms. Taylor discovered that Ms. Smith had sustained a gash on her leg. Ms. Smith passed away two days later. Neither Ms. Taylor nor Mr. Brennan recall whether the van's engine was running while Ms. Smith was unloaded from the van,

transferred to the wheelchair, and taken up the porch steps. The series of events from the time Ms. Smith arrived at her home until the injury lasted approximately five minutes.

Ms. Taylor has filed an action seeking damages in Cabarrus County Superior Court entitled *Leslie Taylor, Executor of the Estate of Mary Lewis Faggart Smith v. Hospice of Cabarrus County, Inc. and Helping Hands Specialized Transport, Inc.*, 12 CVS 1741, asserting that the alleged negligence, on the part of the named defendants, proximately resulted in Ms. Smith's injuries and death.

The trial court denied Integon's motion for summary judgment and granted Ms. Taylor's motion for summary judgment, holding that Integon's policy provides coverage in the full amount of the policy limits to Helping Hands for its liability, if any, with respect to the incident, and that Integon is obligated to provide a defense to Helping Hands for the claim. Integon appeals.

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

> is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence.

Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

In this case, while there may be genuine issues of fact which are material to the issues of negligence and the liability of Helping Hands for the injuries and death of Ms. Smith, none of those factual issues are material to the issue of whether Integon's policy of insurance provides coverage to Helping Hands for any such liability. Thus, summary judgment is an appropriate procedure for the resolution of this declaratory judgment action. *See Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997).

While Integon's policy insured Helping Hands against liability for damages "caused by an accident and resulting from the ownership, maintenance or use of a covered" vehicle, N.C.G.S. § 20-279.21 requires that an automobile liability insurance policy provide coverage for damages "arising out of the ownership, maintenance or use of" the covered vehicle. N.C. Gen. Stat. § 20-279.21(b)(2) (2013). Our case law has established that this statute is written into every automobile liability policy. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E.2d 334 (1979).

In *Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mutual Insurance Co.*, 16 N.C. App. 194, 198–99, 192 S.E.2d 113, 117–18, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972), this Court defined the meaning of the language "arising out of the ownership, maintenance and use" of a vehicle as used in an automobile liability insurance policy. The Court stated:

> The policy provision in question speaks of liability "arising out of the ownership, maintenance or use" of the truck. The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the use of the automobile. The act of loading and unloading a truck is not an act separate and independent of the use and *is an act necessary to accomplish the purpose of using the truck.*
>
> The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile.

Id. (emphasis added) (citations omitted).

Citing the foregoing, the North Carolina Supreme Court, in *State Capital Insurance Co. v. Nationwide Insurance Co.*, 318 N.C. 534, 539–40, 350 S.E.2d 66, 69 (1986) stated: "In short, the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident."

In *State Capital*, two men traveled together in a pickup truck to survey some hunting land. *Id.* at 536, 350 S.E.2d at 67. The truck contained three guns, a rifle and shotgun in the gun rack and another rifle on the floor behind the seat. *Id.* The men stopped at a tract of land and got out of the truck to survey the area. *Id.* Thereafter, the passenger returned to the truck and, a short time later, the driver saw a deer and returned to the truck to retrieve his rifle. *Id.* As he moved the seat and reached for the rifle, it discharged, striking the passenger. *Id.* at 536, 350 S.E.2d at 68. The Supreme Court held that a causal connection existed between the use of the vehicle and the injury to the passenger because "the transportation and unloading of firearms are ordinary and customary uses of a motor vehicle" and the accident was a reasonable consequence of such use. *Id.* at 540, 350 S.E.2d at 70.

Since the decision in *State Capital*, this Court has been liberal in its application of the principle that a motor vehicle liability insurance policy will provide coverage if an injury is caused by an activity that is necessarily or ordinarily associated with the use of the insured vehicle. In *Nationwide Mutual Insurance Co. v. Davis*, 118 N.C. App. 494, 498, 455 S.E.2d 892, 895, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995), this Court held that an automobile liability policy provided coverage for injuries to a child who was struck by another motor vehicle after getting out of the insured vehicle, driven by her grandmother, and crossing a roadway to go to a store. The Court reasoned that the grandmother was "purposefully using" the insured vehicle to go to the store, so that the vehicle "was instrumental in the trip" to the store, and that because the grandmother had parked the van where the child had to cross a roadway to get to the store, there was a causal connection between its use and the child's injury. *Id.*

Also, in *Integon National Insurance Co. v. Ward ex rel. Perry*, 184 N.C. App. 532, 535, 646 S.E.2d 395, 397 (2007), this Court held that an automobile liability policy provided coverage to a minor child who had accompanied the owner of the insured vehicle to an automobile repair shop. While the insured vehicle was undergoing repairs, the child was struck by another vehicle in the shop. *Id.* This Court relied on *State*

Capital and *Davis* to hold that because the insured driver, accompanied by the child, used the insured vehicle to go to the repair shop so that the vehicle could be repaired, a sufficient causal connection existed between the vehicle's use and the child's injuries to require coverage for the child's injuries. *Id.* at 534–35, 646 S.E.2d at 397.

In the present case, the insured vehicle was intended for use, on the date of the occurrence of Ms. Smith's injury, to transport her from the hospital to her residence for palliative care. Because she was unable to ambulate, application of the logic contained in *Davis* and *Ward* leads to the inference that the use of the insured van included moving Ms. Smith into her residence as a part of the transport service. Since we are unable to draw any meaningful distinction between the *Davis* and *Ward* facts and the facts of the instant case, and even though we might believe that the extension of coverage in those cases goes beyond the common-sense application of the principles of a causal connection, we are bound to follow them and hold that there is a sufficient "causal connection" between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage.[1] Our decision is not to be construed as an indication that we express any opinion as to the liability of any party to the underlying civil action.

Finally, plaintiff argues that after the trial court found that the insurance policy covered Ms. Smith's injury, the trial court should have reformed the policy to require payment of only the statutorily mandated minimum coverage amount. We do not reach this argument.

North Carolina Rule of Appellate Procedure 10 requires:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Integon's complaint did not seek reformation of the insurance contract, only a declaration that its policy provided no coverage to Helping

1. Our Supreme Court has stated: "While we recognize that a panel of the Court of Appeals may disagree with . . . an opinion by a prior panel and may duly note its disagreement . . . in its opinion, the panel is bound by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004).

Hands for Ms. Smith's injuries. Nothing in the record before us shows affirmatively that plaintiff argued reformation of the policy before the trial court. Therefore, we will not review this argument because it was not properly preserved for appeal.

Also, to the extent that plaintiff asserts the reformation argument is part of the declaratory judgment action, that argument fails. "The purpose of the Declaratory Judgment Act is, to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (internal quotation marks omitted). While the Declaratory Judgment Act should be liberally construed the Act applies "only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise." *Id.* at 287, 134 S.E.2d at 656–57. Thus, a declaratory judgment action is appropriate when it will "alleviat[e] uncertainty in the interpretation of [a] written instrument[]." *Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Pub. Safety*, 213 N.C. App. 375, 382, 715 S.E.2d 176, 181 (2011). However, our courts have held that a declaratory judgment action is inappropriate when used as "a vehicle for the nullification of [written] instruments." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952).

While none of the previously cited cases directly address plaintiff's argument, they do provide a framework for when a declaratory judgment action is appropriate. Plaintiff seems to assert that the trial court should have reformed the terms of the automobile liability policy because the language of the policy was intended to apply to a narrower scope of causation than N.C.G.S. § 20-279.21, and therefore, plaintiff should have to pay only the statutorily mandated minimum coverage and not the minimum coverage stated in the policy. Plaintiff's argument asserts that this Court should change the terms of the policy based on the interaction between the language of the parties' agreement and the requirements of statutory law. The Declaratory Judgment Act, however, applies to the *interpretation* of written instruments. Therefore, we find that this type of determination is beyond the scope of the Declaratory Judgment Act.

For the reasons stated above we affirm.

Affirmed.

Judges McGEE and CALABRIA concur.

WILLIE B. JOHNSON, Employee, Plaintiff
v.
SOUTHERN TIRE SALES AND SERVICE, INC., Employer, and N.C. INSURANCE GUARANTY ASSOCIATION, Carrier, Defendants

No. COA13-1074

Filed 6 May 2014

1. Workers' Compensation—reinstatement of vocational rehabilitation efforts—disability not established

The Full Industrial Commission did not err in a workers' compensation case by declining to order reinstatement of vocational rehabilitation efforts for plaintiff. A disability must be shown before vocational rehabilitation services can be awarded or reinstated as part of a workers' compensation claim. Competent evidence supported the Full Commission's findings of fact, and those findings supported the conclusions of law, that plaintiff failed to carry the burden of establishing disability during the relevant time period.

2. Workers' Compensation—time-barred—further compensation

The Full Industrial Commission did not err in a workers' compensation case by ruling that plaintiff was time-barred by N.C.G.S. § 97-47 from seeking further compensation because the two-year limitation began upon receipt of final payment and had since run.

Appeal by plaintiff from opinion and award entered 21 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2014.

Oxner Thomas & Permar, PLLC, by John R. Landry, Jr., for plaintiff-appellant.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., for defendants-appellees.

HUNTER, Robert C., Judge.

Willie B. Johnson ("plaintiff") appeals from an opinion and award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission") denying his request to reinstate vocational rehabilitation efforts and ruling that plaintiff is time-barred from recovering any further compensation. On appeal, plaintiff argues that:

(1) he offered proof of his ongoing disability as the result of his compensable injury; (2) he has offered proof of his willingness to comply with vocational rehabilitation efforts; and (3) the Full Commission applied erroneous legal standards in its opinion and award.

After careful review, we affirm the Full Commission's opinion and award.

Background

The facts of this case have previously been addressed at length, twice by this Court and once by our Supreme Court. *See Johnson v. S. Tire Sales & Serv.*, 152 N.C. App. 323, 567 S.E.2d 773 (2002) ("*Johnson I*"), *rev'd*, 358 N.C. 701, 599 S.E.2d 508 (2004) ("*Johnson II*"); *Johnson v. S. Tire Sales & Serv.*, No. COA10-770, 2011 WL 2848842 (N.C. Ct. App. July 19, 2011) ("*Johnson III*"). We need not restate the full factual history here. The facts relevant to this appeal are as follows: Plaintiff was previously employed by Southern Tire Sales and Service, Inc. ("Southern Tire") as a shop mechanic, and he sustained a work-related back injury on 24 October 1996. Southern Tire was insured by Casualty Reciprocal Exchange at the time of plaintiff's injury but is now insured by North Carolina Insurance Guaranty Association (with Southern Tire, "defendants"). Defendants filed a Form 63 and paid plaintiff medical and indemnity compensation. Defendants later accepted liability for plaintiff's injury by failing to contest the compensability of plaintiff's claim or their liability therefor within the statutory period.

As part of the compensation, defendants provided vocational rehabilitation services to assist plaintiff in locating suitable employment. Ronald Alford ("Mr. Alford"), a Certified Rehabilitation Counselor, arranged multiple job interviews for plaintiff and registered him for the Johnston County Industries program, which provided potential jobs that comported with plaintiff's work restrictions. However, plaintiff refused to participate in the Johnston County Industries program and either failed to attend the interviews that Mr. Alford had scheduled or sabotaged them through "extreme pain behavior."

Effective 9 February 1999, former Deputy Commissioner Theresa B. Stephenson authorized defendants to suspend payment of compensation due to plaintiff's unjustified refusal to cooperate with the vocational rehabilitation program defendants had assigned. That decision was appealed to the Full Commission, which reversed Deputy Commissioner Stephenson's opinion and award and ordered defendants to pay temporary total disability compensation from 27 January 1997. The Full Commission's opinion and award was affirmed by this Court in *Johnson I*.

However, on discretionary review, the Supreme Court ruled that the Full Commission had erroneously operated under a presumption of continuing disability in plaintiff's favor and applied an incorrect legal standard in determining whether plaintiff had constructively refused suitable employment. *Johnson II*, 358 N.C. at 706, 709, 599 S.E.2d at 512, 514. Thus, the Supreme Court reversed the Court of Appeals decision in *Johnson I* and ordered remand back to the Commission for entry of findings regarding the existence and extent of plaintiff's disability and the suitability of alternative employment. *Id.* at 711, 599 S.E.2d at 515.

After the Supreme Court's ruling in *Johnson II*, there was an unexplained six-year delay in the proceedings.[1] Ultimately the Full Commission entered a revised opinion and award on 9 March 2010 ("the 9 March 2010 opinion and award"), in which it found that plaintiff was not permanently and totally disabled and concluded that plaintiff had failed to establish disability for any time after 9 February 1999 due to his unjustifiable refusal to cooperate with defendants' vocational rehabilitative efforts. It further ordered that defendants overpaid plaintiff for any compensation for disability paid after 9 February 1999 and were entitled to a credit to offset this overpayment. After appeal from both plaintiff and defendants, the *Johnson III* Court affirmed the 9 March 2010 opinion and award, holding in relevant part that there was no inconsistency in the Full Commission's conclusions as to disability. *See Johnson III*, at *9.

On 4 August 2011, plaintiff filed a Form 33, arguing that he was entitled to temporary total disability compensation from 9 February 1999 onward. Plaintiff then filed a motion to compel vocational rehabilitation on 1 September 2011. On 9 November 2012, Deputy Commissioner Mary C. Vilas entered an opinion and award allowing plaintiff's motion to compel vocational rehabilitation and ordering defendants to authorize vocational rehabilitation efforts for plaintiff. Defendants filed notice of appeal to the Full Commission on 26 November 2012. After a hearing on 1 May 2013, the Full Commission entered an opinion and award denying plaintiff's request for additional vocational rehabilitation services, denying plaintiff's request for a hearing to the extent that plaintiff

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1. As the *Johnson III* Court explained: "The record in this case is an oddity. There are copies of several letters written by counsel for the parties, addressed to the Commission and various representatives thereof. These letters contain references to various filings and occasionally contain requests to the Commission such as 'I would appreciate a ruling in this case.' However, there is nothing in the record . . . that informs this Court as to why the Commission delayed from 2004 until 2010 in making the additional findings ordered by the Supreme Court." *Johnson III*, at *5.

sought additional compensation, and awarding defendants a credit of $21,812.45 against any future indemnity compensation due plaintiff. The Full Commission entered the following relevant findings of fact:

> 31. With respect to job search efforts, Plaintiff acknowledged that the 11 employers listed in his responses to Defendants' 2010 Interrogatories were contacted at the time he was working with Mr. Alford, which was from 1997 through 1999. The only evidence Plaintiff provided that could be construed as job search efforts following 1999 was his testimony that, "I've talked with Stephanie. She's a — you know, finds jobs and stuff.... we're supposed to meet next week about some interviews for jobs."
>
> 32. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to produce any medical evidence that, since February 9, 1999, he has been unable to work as a result of his injury of October 24, 1996. Plaintiff has also failed to produce sufficient evidence that, since February 9, 1999, he has made a reasonable effort to find work, that it would have been futile for him to seek employment, or that he has returned to work earning lower wages than he was earning at the time of the aforementioned injury.

Based on these findings, the Full Commission entered the following conclusions of law:

> 2. No presumption of continuing disability is created when a Form 63 is executed followed by payments by the employer to the employee beyond the statutory time period contained in N.C. Gen. Stat. § 97-18(d) without contesting the compensability of or liability for a claim. As such, Plaintiff in the instant case bears the burden of proving the existence and degree of disability.
>
> 3. In order to meet this burden of proof, Plaintiff must prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by Plaintiff's injury. . . .
>
> 4. In its March 9, 2010 Opinion and Award on Remand, the Full Commission determined that Plaintiff met his burden of proving disability under the first prong of *Russell*

through April 23, 1997, and under the second prong of *Russell* until February 9, 1999. The Full Commission further determined that, as of February 9, 1999, Defendants had successfully rebutted Plaintiff's evidence of disability through the presentation of evidence that suitable work was available to Plaintiff, and that plaintiff was capable of obtaining a suitable job taking into account both his physical and vocational limitations.

5. . . . Following its analysis of the March 9, 2010 Opinion and Award on Remand, the [Court of Appeals] ultimately concluded that there was no inconsistency in the Full Commission's findings on disability and affirmed the Full Commission's March 9, 2010 Opinion and Award on Remand.

6. . . . Accordingly, the Court of Appeals'. determination that the Full Commission resolved the disability issue in its March 9, 2010 Opinion and Award on Remand is law of the case and is binding on the parties and the Commission going forward.

7. Plaintiff has failed to meet his burden of proving disability at any time on or after February 9, 1999. As such, plaintiff is not entitled to additional vocational rehabilitation services as he has not proven a period of disability which such services could serve to lessen.

8. Because Plaintiff filed his Industrial Commission Form 33 indicating he believed he was entitled to additional compensation on August 4, 2011, over two years since the final payment of compensation on April 27, 2000, Plaintiff is precluded from seeking additional compensation. N.C. Gen. Stat. § 97-47.

Plaintiff filed timely notice of appeal to this Court on 25 June 2013.

Discussion

I. Reinstitution of Vocational Rehabilitation Efforts

[1] Plaintiff's first argument on appeal is that the Full Commission erred by declining to order reinstatement of vocational rehabilitation efforts. We disagree.

The Commission has exclusive original jurisdiction over workers' compensation proceedings. *Thomason v. Red Bird Cab Co.*, 235 N.C.

602, 604, 70 S.E.2d 706, 708 (1952). It is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C. Gen. Stat. § 97-84 (2013). "The reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). "[F]indings 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." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citation and quotation marks omitted).

First, we affirm the Full Commission's legal conclusions that support its denial of plaintiff's request for reinstatement of vocational rehabilitation. Plaintiff argues that, in order for the Full Commission to address whether he is entitled to future disability compensation, defendants must be ordered to reinstate vocational rehabilitation efforts, after which point plaintiff will be given the opportunity to offer evidence of his substantial compliance. We disagree with plaintiff's analysis. Pursuant to N.C. Gen. Stat. § 97-25(a) (2013), "medical compensation shall be provided by the employer" under the Workers' Compensation Act. As defined in N.C. Gen. Stat. § 97-2(19) (2013), "medical compensation" includes "vocational rehabilitation." However, services only fall under the definition of "medical compensation" if they "effect a cure or give relief" or "will tend to lessen the period of disability." N.C. Gen. Stat. § 97-2(19). The Full Commission correctly reasoned that because vocational rehabilitation by its nature cannot effect a cure or give relief in a medical sense, it must lessen the period of disability in order to meet the statutory definition of medical compensation. "Under the . . . Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money." *Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E.2d 804, 806 (1972). To meet the standard of tending to lessen the period of disability, a vocational rehabilitation service must reduce "the period of [the employee's] diminished capacity to work." *Peeler v. State Highway Comm'n*, 48 N.C. App. 1, 6-7, 269 S.E.2d 153, 157 (1980). Thus, we agree with the Full Commission that a disability, or a "diminished capacity to earn money," must be shown before vocational rehabilitation services can be awarded or reinstated as part of a

worker's compensation claim. *See Powe v. Centerpoint Human Servs.*, __ N.C. App. __, __, 742 S.E.2d 218, 223 (2013) ("[T]he impact of an employee's refusal to cooperate with vocational rehabilitation services on that employee's right to indemnity compensation arises only after she has met her burden of establishing disability. . . . If the Commission determines that [p]laintiff has not met her burden of proving disability during the contested periods, then the issues regarding [p]laintiff's cooperation with vocational rehabilitation efforts will be moot.").

As the *Johnson II* Court noted in its opinion remanding for a determination as to the extent of plaintiff's disability, "a determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity." *Johnson II*, 358 N.C. at 707, 599 S.E.2d at 513. An employee may carry the burden of proving the existence of a disability by producing evidence of one of the following: (1) medical evidence that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but that he has, after a reasonable effort, been unsuccessful in his efforts to obtain employment; (3) evidence that he is capable of some work, but that it would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment; or (4) evidence that he has obtained other employment at wages less than his pre-injury wages. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Here, competent evidence supports the Full Commission's findings of fact, and those findings support the conclusions of law, that plaintiff has failed to carry the burden of establishing disability for any time after 9 February 1999. First, it is the law of the case that plaintiff failed to establish disability from 9 February 1999 through the entry of the 9 March 2010 opinion and award. "[O]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Prior v. Pruett*, 143 N.C. App. 612, 618, 550 S.E.2d 166, 170 (2001) (citation and quotation marks omitted). The *Johnson III* Court affirmed the Full Commission's 9 March 2010 opinion and award, which concluded that plaintiff only established disability through 9 February 1999 and after that date had failed to carry his burden of establishing disability. *Johnson III*, at *9. Thus, because the issue of whether plaintiff established disability was presented and affirmatively addressed by this Court, the law of the case doctrine applies, and we are bound to conclude that plaintiff failed to establish disability from 9 February 1999 through entry of the 9 March 2010 opinion and award.

Second, there is competent evidence to support the Full Commission's finding of fact that plaintiff failed to establish disability under *Russell* at any time after entry of the 9 March 2010 opinion and award. Plaintiff does not challenge the Full Commission's finding of fact that the only effort he put forth in attempting to find work after 9 February 1999 was talking to an individual named "Stephanie," with whom he was scheduled to meet after the 14 October 2011 hearing before Deputy Commissioner Vilas. Because this finding is unchallenged, it is presumed to be supported by competent evidence and is binding on appeal. *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156. This finding further supports the Full Commission's conclusion that plaintiff failed to put forth a "reasonable effort" to find employment, and therefore did not establish disability under the second prong of the *Russell* test. *See Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457. Furthermore, competent evidence supports the Full Commission's findings that plaintiff also fails to establish disability under the other three prongs of the *Russell* test. There is evidence to support, and plaintiff does not contest, that: (1) he is capable of some employment, albeit with physical limitations; (2) it would not be futile for plaintiff to return to work due to a preexisting condition such as age or lack of education; and (3) he has not taken employment that paid a lesser wage than he earned before his injury. *See id.*

Accordingly, because no period of disability existed when plaintiff filed his request to reinstate vocational rehabilitation, we affirm the Full Commission's denial of plaintiff's request, as those efforts could not serve to lessen a period of disability.

II. Section 97-47

[2] Plaintiff next argues that the Full Commission erred by ruling that he is time-barred by N.C. Gen. Stat. § 97-47 from seeking further compensation. We disagree and affirm the Full Commission's opinion and award.

First, plaintiff contends that the issue of whether he is time-barred by section 97-47 from seeking additional compensation was not properly presented to the Commission for determination, and therefore the portions of the opinion and award that address this argument must be vacated with leave for either party to raise such issues pursuant to a Form 33 request for a new hearing. We disagree. Here, Deputy Commissioner Vilas limited the issue for determination at the initial hearing solely to whether defendants should be ordered to reinstate vocational rehabilitation efforts for plaintiff. However, defendants filed motions to dismiss plaintiff's requests, arguing that plaintiff was time-barred by section 97-47

from receiving any further compensation. "[T]he [F]ull Commission has the duty and responsibility to decide all matters in controversy between the parties . . . even if those matters were not addressed by the deputy commissioner." *Perkins v. U.S. Airways*, 177 N.C. App. 205, 215, 628 S.E.2d 402, 408 (2006). "Thus, the mere fact that a particular issue was not raised before a deputy commissioner does not, standing alone, obviate the necessity for the Commission to consider that issue." *Bowman v. Scion*, __ N.C. App. __, __, 737 S.E.2d 384, 388 (2012). Here, given that plaintiff requested further compensation in his Form 33 and requested compensation in the form of vocational rehabilitation, we hold that it was proper for the Full Commission to consider whether plaintiff is time-barred by section 97-47 from receiving further compensation in its opinion and award.

Pursuant to section 97-47:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but *no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article*[.]

N.C. Gen. Stat. § 97-47 (emphasis added). "The time limitation [in section 97-47] commences to run from the date on which [the] employee received the last payment of compensation[.]" *Sharpe v. Rex Healthcare*, 179 N.C. App. 365, 372, 633 S.E.2d 702, 706 (2006).

Plaintiff and defendants are in disagreement as to the grounds upon which the Full Commission suspended plaintiff's compensation in the 9 March 2010 opinion and award, and both contend that this distinction is dispositive as to the applicability of the two-year limitation in section 97-47. Plaintiff argues that compensation was suspended under section 97-25 for his refusal to accept vocational rehabilitation. Thus, under *Scurlock v. Durham Cnty. Gen. Hosp.*, 136 N.C. App. 144, 147, 523 S.E.2d 439, 441 (1999), plaintiff contends the question of whether he is entitled to future benefits hinges on the opportunity to comply with further vocational rehabilitation efforts once they are provided by defendants, and section 97-47 is not implicated. *See id.* (concluding that

where a case was "pending under section 97-25," it was not a "change-of-condition case under section 97-47," and the two-year statute of limitation did not apply). Defendants, on the other hand, contend that compensation was suspended not under section 97-25, but under N.C. Gen. Stat. § 97-32 (2013), based on plaintiff's failure to accept suitable employment. *See* N.C. Gen. Stat. § 97-32 ("If an injured employee refuses suitable employment . . . the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified."). Citing *Sharpe*, defendants argue that plaintiff's failure to accept suitable employment under section 97-32 triggered the time-bar of section 97-47, and therefore the Full Commission properly determined that plaintiff is foreclosed from seeking further compensation. *See Sharpe*, 179 N.C. App. at 372-73, 633 S.E.2d at 706-07 (holding that where an employee's compensation was suspended for her unjustified refusal to return to suitable employment under section 97-32, the time-bar of section 97-47 ran upon last payment of compensation).

We agree with defendants that the Full Commission terminated compensation under section 97-32 because plaintiff refused suitable employment without justification. In *Johnson II*, the Supreme Court cited section 97-32 for the proposition that "[i]f the employer successfully rebuts the employee's evidence of disability by producing evidence that the employee has refused suitable employment without justification, compensation can be denied." *Johnson II*, 358 N.C. at 709, 599 S.E.2d at 514. It further noted that the Full Commission's previous opinion and award "should have contained specific findings as to what jobs plaintiff is capable of performing and whether jobs are reasonably available for which plaintiff would have been hired had he diligently sought them." *Id.* at 710, 599 S.E.2d at 514. On remand, the Full Commission cited section 97-32 and concluded that plaintiff "unjustifiably refused to cooperate with defendants' vocational rehabilitative efforts," and as a result, ordered that defendants "are entitled to suspend payment of compensation to plaintiff effective 9 February 1999." In his arguments before this Court in *Johnson III*, plaintiff himself characterized the 9 March 2010 opinion and award as a "decision to suspend [his] receipt of temporary total disability compensation pursuant to N.C. Gen. Stat. § 97-32 . . . ." *Johnson III*, at *3. Based on the foregoing, we conclude that compensation was suspended by the Full Commission in its 9 March 2010 opinion and award pursuant to section 97-32, not section 97-25. Accordingly, under *Sharpe*, the time limitation in section 97-47 began to run upon receipt of plaintiff's final payment of compensation on 27 April 2000. Because plaintiff requested additional compensation based on a

change of condition more than two years after the final payment of compensation, we affirm the Full Commission's conclusion of law that plaintiff is time-barred by section 97-47 from receiving such compensation.

Conclusion

Because plaintiff has failed to establish any period of disability after 9 February 1999, we affirm the Full Commission's denial of his request to reinstate vocational rehabilitation efforts. Furthermore, plaintiff is time-barred from seeking additional compensation under section 97-47 because the two-year limitation began upon receipt of final payment and has since run.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
GEOFFREY H. SIMMONS, Attorney, Defendant

No. COA13-1140

Filed 6 May 2014

1. **Attorneys—disciplinary action—embezzlement of client funds—sufficient evidence—knowingly and willfully**

   The State Bar did not fail to present clear, cogent, and convincing evidence that defendant knowingly and willfully misappropriated or embezzled client funds. There was substantial evidence in the record upon which the Disciplinary Hearing Commission could find that defendant intended to embezzle client funds.

2. **Attorneys—disciplinary action—embezzlement of client funds—conviction of crime not required**

   The Disciplinary Hearing Commission did not erroneously discipline defendant and impose disbarment from the practice of law as a sanction for defendant's embezzling client funds where defendant had not been convicted of embezzlement in criminal court. Conviction of a crime is not a necessary element in a disciplinary proceeding and defendant need only have committed the crime to be disciplined.

3. Attorneys—disciplinary action—disbarment—adequate factual support

The Disciplinary Hearing Commission's (DHC) order imposing disbarment as a sanction for defendant's misconduct conformed to the requirements of *N.C. State Bar v. Talford*, 356 N.C. 626. The DHC provided support for its decision by including adequate and specific findings that addressed the two key statutory considerations.

Appeal by defendant from order of discipline entered 19 April 2013 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 17 February 2014.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for plaintiff-appellee.

Poyner Spruill LLP, by M. Jillian DeCamp and Carrie V. McMillan, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Geoffrey H. Simmons ("Defendant") appeals from a final order of the Disciplinary Hearing Commission ("DHC") disbarring him from the practice of law for embezzling client funds. Defendant contends (1) that there was insufficient evidence before the DHC that he intended to embezzle client funds, (2) that the DHC could not impose discipline based on embezzlement without a criminal conviction, and (3) that the DHC's order failed to conform to the requirements of *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003), for disbarring attorneys. For the following reasons, we disagree and affirm the DHC's order.

I. Factual & Procedural History

Defendant was licensed to practice law by the North Carolina State Bar in 1977 and practiced law for over thirty years. Defendant's career was, in many respects, a decorated one. After graduating from Duke University School of Law, Defendant worked for the General Assembly and in the administration of former Governor James B. Hunt. Defendant engaged in significant pro bono work during his career. In 1987, the North Carolina Bar Association named Defendant the Pro Bono Lawyer of the year. In 1990, Defendant was elected the first black President of the Wake County Bar Association and the Tenth Judicial District Bar. During his career, Defendant established a reputation for good character, veracity, and truthfulness in both social and legal communities. Notwithstanding Defendant's accomplishments, however, the

allegations in the State Bar's complaint against Defendant are serious, and are based on the following facts gleaned from the record.

From 1985 until his disbarment, Defendant was a solo-practitioner focusing on criminal and personal injury work, with an office in Raleigh. The record reflects that Defendant had an assistant on his payroll, who performed paralegal work. During the course of his law practice, Defendant maintained a trust account on behalf of his clients.

In March 2012, a medical provider filed a complaint with the State Bar alleging that Defendant had not paid one of his client's bills. A subsequent audit of Defendant's trust account by the State Bar revealed disbursements made by Defendant from 2010–2012 to himself and his assistant for which Defendant had no supporting documentation. The investigation also revealed instances of insufficient client funds to cover disbursements to those clients and their medical providers.

As a result of the investigation, the State Bar filed a complaint alleging, *inter alia*, misappropriation of entrusted funds with respect to eight of Defendant's clients. On 15 March 2013, the DHC held a hearing to determine if Defendant's alleged misconduct warranted disciplinary action. At the hearing, documentary exhibits were received into evidence and testimony was heard from, among others, the State Bar's investigator, two of the eight clients who were named in the complaint, and Defendant.

The State Bar's investigator testified concerning Defendant's trust account activity and bookkeeping for the eight clients. His testimony, along with accompanying documentary exhibits, established undocumented disbursements to Defendant and Defendant's assistant, as well as occasions where disbursements were made from insufficient client funds. In those instances where Defendant disbursed funds from the trust account to himself and/or his assistant, a pattern was observed. Once Defendant received personal injury settlement proceeds on behalf of a client, Defendant deposited those proceeds into his trust account. Afterwards, Defendant withdrew his one-third contingency fee and paid the client a one-third share. The remaining funds were intended to satisfy medical liens and obligations. However, in addition to paying on the medical liens, Defendant wrote additional checks to himself and his assistant in varying amounts between $200 and $600. As a result, some medical providers with statutory liens against client funds were not paid in full for their share of the recovery. To cover shortfalls, Defendant used trust account funds belonging to others and not identified to the client to cover checks written to that client or the client's medical providers.

In his defense, Defendant admitted to poor record keeping practices but denied misappropriating client funds. Defendant attributed the undocumented disbursements to expenses, additional legal work, accounting mistakes, and, in some cases, Defendant claimed the disbursements were at the behest of his clients. Both clients who testified at the hearing indicated that Defendant did not tell them about any additional disbursements made from their account. One of the clients, after being contacted by the State Bar, filed a Client Security Fund Application against Defendant claiming he took an additional disbursement dishonestly.[1]

On 19 April 2013, the DHC entered a written order of discipline. The order's findings of fact recite the transactions made for each of the eight clients, including the disbursements at issue. After reciting each undocumented disbursement made to Defendant and his assistant, the DHC found that Defendant and his assistant were "not entitled" to the additional disbursements and concluded that Defendant "misappropriated" these funds. The DHC's order also concludes that Defendant misappropriated each disbursement made from insufficient funds and each disbursement made from funds owed to medical providers with statutory liens. Furthermore, the order states:

> 91. The misappropriations . . . were committed knowingly and willfully.
>
> 92. The misappropriations . . . were not authorized by the parties for whom [Defendant] was holding the funds in trust.
>
> 93. The Hearing Panel specifically finds that [Defendant's] testimony at this hearing was not credible. [Defendant's] testimony was inconsistent with other testimony of his at the hearing and at his deposition. [Defendant's] testimony was also inconsistent with the documentation and with the testimony given by the other witnesses at the hearing.

Based on its findings, the DHC concluded, *inter alia*, that Defendant "committed the crime of embezzlement" and was subject to discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) (2013). After making additional findings of fact and conclusions of law regarding discipline, the DHC ordered Defendant disbarred from the practice of law. Defendant filed timely notice of appeal.

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1. Defendant reimbursed the client during the pendency of the State Bar's investigation.

II. Jurisdiction

"There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h) (2013); *accord* N.C. Gen. Stat. § 7A-29(a) (2013). Thus, Defendant's appeal is properly before this Court.

III. Analysis

Defendant's appeal presents three questions for our review: (1) whether there was sufficient evidence upon which the DHC could find that Defendant intended to embezzle client funds; (2) whether the DHC could impose discipline based on the embezzlement of client funds without a criminal conviction; and (3) whether the DHC's order conforms to the requirements of *Talford* for imposing disbarment as a sanction for attorney misconduct. We address each in turn.

A. Sufficiency of the Evidence Regarding Intent

[1] Defendant challenges the sufficiency of the evidence regarding his intent to embezzle client funds. Specifically, Defendant contends that the State Bar failed to present "clear, cogent, and convincing" evidence that Defendant knowingly and willfully misappropriated or embezzled client funds.

By statute, our review of the DHC's disciplinary order is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h). In examining the record, we apply the whole record test. *N.C. State Bar v. Hunter*, ___ N.C. App. ___, ___, 719 S.E.2d 182, 188 (2011). "Under the whole record test there must be substantial evidence to support the findings, conclusions, and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* (quotation marks, citations, and alteration omitted); *see also Talford*, 356 N.C. at 632, 576 S.E.2d at 309–10 (describing this task as determining whether the DHC's decision "has a rational basis in the evidence" (quotation marks and citations omitted)). In engaging in this inquiry, we consider the evidence supporting the DHC's findings as well as evidence tending to contradict those findings. *Hunter*, ___ N.C. App. at ___, 719 S.E.2d at 188. However, "the mere presence of contradictory evidence does not eviscerate challenged findings, and [this Court] may not substitute its judgment for that of the [DHC]." *Id.* Moreover, the evidence used by the DHC to support its findings must rise to the standard of "clear, cogent, and convincing." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310.

In *Talford*, our Supreme Court set forth a three-step process to determine if the DHC's decision has a rational basis in the evidence:

> (1) Is there adequate evidence to support the order's expressed finding(s) of fact?
>
> (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and
>
> (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?

Id. at 634, 576 S.E.2d at 311. This three-step process "must be applied separately" to both the adjudicatory phase of the DHC's proceedings ("Did the defendant commit the offense or misconduct?") and to the dispositional phase of the DHC's proceedings ("What is the appropriate sanction for committing the offense or misconduct?"). *Id.*

With our standard of review precisely defined, we now consider Defendant's first argument on appeal.

As an initial matter, we note that in Defendant's principal brief to this Court, no specific findings of fact were referenced as being in error. Nevertheless, we agree with Defendant that assignments of error to specific findings of fact are not required to properly challenge those findings. "The scope of review on appeal is limited to issues so presented in the several briefs." N.C. R. App. P. 28(a). Accordingly, because Defendant's arguments concerning the sufficiency of the evidence address, in substance, the DHC's finding that Defendant "knowingly and willfully" misappropriated or embezzled client funds, we review the DHC's findings related to Defendant's intent.

The crime of embezzlement is defined by N.C. Gen. Stat. § 14-90 (2013) and requires a showing of the following four elements:

> (1) the defendant was the agent or fiduciary of the complainant;
>
> (2) pursuant to the terms of the defendant's engagement, he was to receive property of the complainant;
>
> (3) he did receive such property in the course of his engagement; and
>
> (4) *knowing the property was not his*, the defendant either converted it to his own use or fraudulently misapplied it.

State v. Tucker, ___ N.C. App. ___, ___, 743 S.E.2d 55, 59 (2013) (emphasis added). "The intent necessary to convict on a charge of embezzlement is an intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal for purposes for which the property is not held." *State v. Britt*, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987). "Such intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 702 (1935); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 660, 657 S.E.2d 378, 383 (2008). "In addition, a person who deposits funds into a personal account knowing that the money belongs to others is sufficient evidence to show embezzlement." *Ethridge*, 188 N.C. App. at 660, 657 S.E.2d at 383. Furthermore, "[t]he intent element for misappropriation is essentially the same as the crime of embezzlement." *Id.* Indeed, misappropriation is a synonym for embezzlement. *Id.* Thus, we examine the whole record to determine whether there is "substantial" or "clear, cogent, and convincing" evidence to support the finding that Defendant knowingly and willfully misappropriated client funds.

Our review of the record in this case reveals substantial evidence from which Defendant's intent to misappropriate client funds can be reasonably inferred.

First, Defendant knew the correct way to document and maintain his trust account yet failed to do so. Defendant testified that he had previously been on the Trust Account Committee of the State Bar, had attended Continuing Legal Education workshops regarding trust accounting, and had been audited by the State Bar on prior occasions.[2]

Second, Defendant made numerous disbursements from his trust account for which he had no supporting documentation.[3]

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2. The State Bar provides resources and support to ensure that lawyers manage trusts accounts properly. The *Lawyer's Trust Account Handbook* examines the Rules of Professional Conduct pertinent to trust accounting and contains best practices for North Carolina attorneys. *See Lawyer's Trust Account Handbook*, The North Carolina State Bar (Revised May 2011), http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf.

3. The *Lawyer's Trust Account Handbook* indicates that a client's file should contain documentation supporting disbursements and identifies poor bookkeeping as a means of concealing embezzlement of client funds. *Id.* at 48. As a best practice for bookkeeping, "[a] copy of the client's ledger card may be provided to the client as a written accounting of the receipt and disbursement of funds. When this is done, the client should sign and date the original to show that the client was given a written accounting of his or her funds . . . ." *Id.* at 30.

Third, both clients who testified at the hearing indicated that Defendant did not tell them about taking an additional disbursement from their account, and the clients were never informed concerning the amount of the disbursement or its purpose.

Fourth, one of these clients filed a Client Security Fund Application with the State Bar alleging that Defendant took an additional disbursement from his account dishonestly. Testimony revealed that Defendant reimbursed the client in question after learning that the client was going to be deposed in the State Bar's investigation "so that [the client] would have good feelings towards [him]."

Fifth, the additional disbursements were often made when Defendant was in financial need.

Sixth, Defendant's attribution of the additional disbursements to expenses, additional legal work, accounting mistakes, and compliance with client requests is inconsistent with the other record evidence. For example, for the first client named in the State Bar's complaint, Defendant took an additional disbursement of $250 on 12 March 2010. Defendant testified that this additional disbursement was for additional legal services, namely, drafting a complaint. However, the client testified that she was unaware of this additional fee and the memo line of the check indicated that the disbursement was for "Office Expenses Reimbursement."

Likewise, for the second client named in the State Bar's complaint, Defendant took an additional disbursement of $250 for himself and another $200 for his assistant on 14 and 19 January 2011, respectively. Defendant testified that his disbursement was for work on an unrelated criminal case the client asked Defendant to handle and that the disbursement to his assistant was made at the client's request. However, there was no evidence of the other criminal case in the record and the memo line on Defendant's disbursement check read "fee to collect MedPay." The memo line on the check to Defendant's assistant indicated that the check was for "office expenses."

As a final example, for the third client named in the State Bar's complaint, Defendant took an additional disbursement of $500 on 20 June 2011. Defendant testified that this disbursement was for travel expenses. Defendant also testified that the client consented to the payment. However, the client denied consenting to the payment and the memo line of the check indicates the additional disbursement was for "legal fees."

Based on the foregoing evidence, as well as the other record evidence presented to this Court, we hold that there was "substantial" or

"clear, cogent, and convincing" evidence to support the DHC's finding that Defendant knowingly and willfully misappropriated client funds. While Defendant points to his own testimony to negate this inference of intent, the DHC found that Defendant's testimony was not credible based on its inconsistency with other evidence presented at the hearing. Our review has confirmed those inconsistencies. Accordingly, Defendant's argument regarding the sufficiency of the evidence, on balance, lacks credibility.

B. The Absence of a Criminal Conviction

[2] Defendant's second argument on appeal challenges the DHC's decision to discipline Defendant and impose disbarment as a sanction for Defendant's misconduct without a criminal embezzlement conviction. Defendant contends that the State Bar's rules forbid the DHC from concluding that Defendant "committed" a felony without first being charged and convicted of a felony in criminal court.

Questions concerning the construction and interpretation of the State Bar's rules are questions of law that are reviewed *de novo* on appeal. *N.C. State Bar v. Brewer*, 183 N.C. App. 229, 233, 644 S.E.2d 573, 576 (2007). "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).

Here, the DHC's order concludes as a matter of law that "[Defendant] committed the crime of embezzlement." As a result of this conduct, the DHC concluded that Defendant was subject to discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2), which provides for attorney discipline when there has been a "violation of the Rules of Professional Conduct adopted and promulgated by the [State Bar] Council in effect at the time of the act." One of those rules, found to have been violated here, states "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." N.C. R. Prof'l Conduct 8.4(b). The official commentary to the rule states:

> The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the

> lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. *If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.*

Id. cmt. 3; *see also N.C. State Bar v. Rush*, 121 N.C. App. 488, 490, 466 S.E.2d 340, 341–42 (1996) ("The rule does not require a conviction, only that a criminal act be committed. . . . Therefore, conviction of a crime is not a necessary element in a disciplinary proceeding.").

Defendant does not call our attention to this rule, rather, Defendant cites 27 N.C. Admin. Code 1B.0114(w)(2)(D) (2012) to support his claim that a criminal conviction is required. That rule requires the DHC to consider disbarment as a possible sanction if the defendant is found to engage in the "commission of a felony." *Id.* Defendant argues that "the plain language of the State Bar's Rule contemplates a felony conviction." However, we cannot agree with Defendant's interpretation given the fact that the rule uses "commission" rather than "conviction" and given the clear mandate found in the State Bar's commentary and our caselaw interpreting N.C. R. Prof'l Conduct 8.4(b). The rationale for not requiring a criminal conviction under N.C. R. Prof'l Conduct 8.4(b) is equally persuasive when interpreting 27 N.C. Admin. Code 1B.0114(w)(2)(D). Thus, because clear, cogent, and convincing evidence supports the DHC's conclusion that Defendant committed the crime of embezzlement in violation of N.C. R. Prof'l Conduct 8.4(b), the DHC was required to consider disbarment as a possible sanction pursuant to 27 N.C. Admin. Code 1B.0114(w)(2)(D).[4] Defendant's second argument on appeal is without merit.

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4. Notably, the DHC also considered disbarment as a possible sanction pursuant to 27 N.C. Admin. Code 1B.0114(w)(2)(C), which states that "[d]isbarment shall be considered where the defendant is found to engage in: . . . (C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source." Like 27 N.C. Admin. Code 1B.0114(w)(2)(D), the plain language of this provision does not suggest that a criminal conviction is required.

C. The DHC's Order and *Talford*

Defendant's third argument on appeal is that the DHC's order failed to conform to the requirements of *Talford* for imposing disbarment as a sanction for attorney misconduct.

In *Talford*, our Supreme Court held that

> in order to merit the imposition of "suspension" or "disbarment," there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to [a client, the administration of justice, the profession, or members of the public], and there must be a clear showing of why "suspension" and "disbarment" are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question.

Talford, 356 N.C. at 638, 576 S.E.2d at 313. "Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations." *Id.*

Here, after concluding that Defendant's conduct warranted discipline in the adjudicative part of the order, the DHC reincorporated its previous findings of fact and made 16 additional findings of fact regarding discipline. Defendant has not challenged these additional findings with argument on appeal, we therefore consider them binding before this Court. *Hunter*, ___ N.C. App. at ___, 719 S.E.2d at 188–89. Moreover, because we have determined that the DHC's finding concerning Defendant's intent to misappropriate client funds is supported by substantial evidence, we consider that fact established as well.

With respect to the first inquiry, *i.e.*, whether the order clearly shows how Defendant's actions resulted in significant harm or potential significant harm, we hold that the DHC's order is sufficient. Implicit in the DHC's conclusion that Defendant violated N.C. R. Prof'l Conduct 8.4(b) and (c) "is a determination that his misconduct poses a *significant* potential harm to clients." *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 446, 632 S.E.2d 183, 191 (2006). Furthermore, we find the following findings of fact in the DHC's disciplinary order compelling:

> 2. Defendant put his own personal interests ahead of his clients' interests.
>
> . . . .

> 7. Defendant, by engaging in conduct involving misappropriation, misrepresentation and deceit over a number of years and by making false statements about his conduct, has shown himself to be untrustworthy.
>
> 8. Defendant, through his misappropriation, misrepresentation, and deceit, has caused harm to the standing of the legal profession, by undermining trust and confidence in lawyers and the legal system.
>
> 9. Defendant's misappropriation has caused significant harm to his clients and to third parties, namely the medical providers of his clients.
>
> 10. Defendant misappropriated funds for his own benefit that should have been used for the benefit of his clients, either by payment to the client or payment to the client's medical provider(s).
>
> . . . .
>
> 13. . . . [Defendant] has not otherwise made any restitution for amounts misappropriated from clients. [Defendant] has not rectified the deficit in his trust account.
>
> . . . .
>
> 15. Defendant has failed to acknowledge that he misappropriated client funds. Defendant has provided explanations that are not consistent with the evidence received at the hearing in this matter.

Based on these and other findings, the DHC concluded:

> 3. Defendant caused significant harm to his clients by misappropriating their funds.
>
> 4. Defendant caused significant harm to medical providers who should have received payments from funds Defendant misappropriated.
>
> 5. Defendant has caused significant harm and potential harm to clients whose funds he should have in his trust account but for whom he has insufficient funds in his trust account.
>
> 6. Defendant's repeated commission of criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer, his dishonest and deceitful conduct in

> placing false information on trust account checks to disguise his misappropriation, and the presentation of testimony that conflicted with the credible evidence received in the case caused significant harm to the legal profession by undermining trust and confidence in lawyers and the legal system.

We believe that in light of these findings and conclusions, the DHC's order clearly shows how Defendant's actions resulted in significant harm to his clients, the administration of justice, the profession, and members of the general public.

Likewise, with respect to the second inquiry, *i.e.*, whether the order contains a clear showing of why disbarment is the only sanction option that can adequately serve to protect the public, we hold that the DHC's order is sufficient. In addition to considering and reciting all applicable factors relevant to attorney discipline found in 27 N.C. Admin. Code 1B.0114(w)(1), (2), and (3), the DHC's order stated:

> 7. The Hearing Panel has considered lesser alternatives and finds that disbarment is the only sanction that can adequately protect the public. An attorney's duty to preserve funds entrusted to the attorney is one of the most sacred that an attorney undertakes. The attorney should never violate that duty of trust.
>
> 8. The Hearing Panel considered lesser alternatives and finds that suspension of Defendant's license or a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the actual and potential harm to his clients, the public, and the legal profession caused by Defendant's conduct, and the threat of potential significant harm Defendant poses to the public. The Hearing Panel has considered the evidence of Defendant's good character and pro bono service. However, given the repeated acts of dishonesty, misrepresentation, and deceit by [Defendant] established by the evidence presented at hearing and the significant harm and potential harm caused by [Defendant] established by the evidence . . . , the evidence of Defendant's good character and pro bono service does not warrant imposition of a lesser discipline.
>
> 9. The Hearing Panel has considered all lesser sanctions and finds that discipline short of disbarment would not adequately protect the public for the following reasons:

a. Defendant engaged in misconduct constituting felonies and violations of the trust of his clients and the public;

b. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State[.]

We believe these entries clearly establish that the DHC considered all lesser sanctions and explain why the DHC felt disbarment was the only adequate sanction in this case. Accordingly, we hold that the DHC's ultimate decision to disbar Defendant has a rational basis in the evidence and is consistent with our Supreme Court's decision in *Talford*.

IV. Conclusion

For the foregoing reasons, we affirm the order of discipline disbarring Defendant from the practice of law.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

RODNEY WILSON SOREY, Plaintiff
v.
MELISSA LYNN SOREY, Defendant

No. COA13-987

Filed 6 May 2014

1. Appeal and Error—interlocutory orders and appeals—denial of post-separation support—affects substantial right

Defendant's appeal from the denial of her request for post-separation support was heard on the merits. While orders for post-separation support are not immediately appealable, orders denying post-separation support affect a substantial right and are immediately appealable.

2. Divorce—post-separation support—abandonment—sufficient evidence

The trial court did not err by denying defendant's request for post-separation support because its finding that she abandoned her husband was supported by the evidence, as was its finding that plaintiff did not consent to defendant's abandonment. These findings support the trial court's conclusion that defendant had committed marital misconduct and its ultimate decision to deny defendant post-separation support.

Appeal by defendant from Order entered 13 May 2013 by Judge Darrell B. Cayton, Jr. in District Court, Beaufort County. Heard in the Court of Appeals 23 January 2014.

Hassell, Singleton, Mason & Jones, P.A., by Sid Hassell, Jr., for plaintiff-appellee.

Windy H. Rose, for defendant-appellant.

STROUD, Judge.

Melissa Sorey ("defendant") appeals from an order entered 13 May 2013 denying her request for post-separation support on the basis of marital misconduct. We affirm.

I. Background

Rodney Sorey ("plaintiff") and defendant were married on 11 July 1987 and separated on 27 August 2011. The parties have four adult children and one minor niece whom they have raised as one of their children. Plaintiff filed an action for absolute divorce in Beaufort County on 28 December 2012. Defendant answered and raised a counterclaim for post-separation support and alimony. Plaintiff then replied, alleging that defendant had committed marital misconduct prior to the date of separation in that she had "constructively abandoned the Plaintiff by dumping his clothes on the front porch of his son's residence and by repeated illicit liaisons with various men" and that she "has engaged in illicit sexual behavior during the marriage and before the separation with other men."

The trial court held a hearing on the issue of post-separation support on 29 April 2013. At the hearing, the trial court took evidence and heard testimony by the parties and two of their adult sons. By order entered 13 May 2013, the trial court denied defendant's request for post-separation

support because it found that defendant had committed two forms of marital misconduct: illicit sexual behavior and abandonment. Defendant filed written notice of appeal from the trial court's order on 17 May 2013.

II. Appellate Jurisdiction

[1] Defendant appeals from the trial court's denial of her motion for post-separation support. Post-separation support orders are interlocutory. *Stephenson v. Stephenson*, 55 N.C. App. 250, 251, 285 S.E.2d 281, 281 (1981). Although orders *allowing* post-separation support do not affect a substantial right, *see*, *e.g.*, *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998), that rule does not apply where the dependent spouse's request for post-separation support was *denied* by the trial court, *Mayer v. Mayer*, 66 N.C. App. 522, 525, 311 S.E.2d 659, 662, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984).

Here, the trial court denied defendant's request for post-separation support. Defendant asserts that the trial court's order affects a substantial right. Plaintiff does not contend otherwise. Under *Mayer*, we hold that the trial court's order affects a substantial right and that defendant's appeal is properly before this Court.

III. Post-separation Support

A. Standard of Review

[2] In reviewing an order concerning post-separation support we must consider "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (citation and quotation marks omitted). "The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359 (citations and quotation marks omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

B. Analysis

Defendant argues that the trial court erred in denying her request for post-separation support because its finding that she abandoned her husband was unsupported by the evidence. We disagree.

> Post-separation support is "spousal support to be paid until the earlier of either the date specified in the order

> of postseparation support, or an order awarding or denying alimony." N.C. Gen. Stat. § 50–16.1A(4) (2003). A depend[e]nt spouse is entitled to post-separation support if the court finds "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat. § 50–16.2A(c) (2003). Factors such as the parties' standard of living, income, income earning abilities, debt, living expenses and legal obligations to support other persons are considered in determining the financial needs of the parties. N.C. Gen. Stat. § 50–16.2A(b) (2003). In addition, the judge shall consider marital misconduct by the dependent spouse, occurring prior to or on the date of separation, and also any marital misconduct by the supporting spouse. N.C. Gen. Stat. § 50–16.2A(d) (2003). Acts of "marital misconduct" include sexual acts, N.C. Gen. Stat. § 14–27.1(4) (2003), voluntarily engaged in with someone other than a spouse, N.C. Gen. Stat. § 50–16.1A(3)(a) (2003) and "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C. Gen. Stat. § 50-16.1A(3)(f)(2003).

Evans v. Evans, 169 N.C. App. 358, 364-65, 610 S.E.2d 264, 270 (2005). If the trial court finds that the dependent spouse committed marital misconduct, that finding alone may be sufficient reason for the trial court to conclude the supporting spouse is not entitled to post-separation support and deny such a request. *Id.* at 365, 610 S.E.2d at 270.

One form of marital misconduct is abandonment. N.C. Gen. Stat. § 50-16.1A(3)(c) (2013). "Abandonment occurs where one spouse brings the cohabitation to an end (1) without justification, (2) without consent, and (3) without intention of renewing the marital relationship." *Hanley v. Hanley*, 128 N.C. App. 54, 56, 493 S.E.2d 337, 338 (1997).

Here, the trial court specifically found that defendant "abandoned the Plaintiff by discontinuing the marital cohabitation without just cause or excuse." The trial court based its ultimate finding on the following findings:

> 15. Some time prior to August 27, 2011 the Plaintiff advised the Defendant that she wanted them to move to the residence which she now occupies . . . and the Plaintiff told her that he did not wish the family to move to this location.

> 16. On August 27, 2011, while the Plaintiff was at work, the Defendant moved to [the residence she now occupies], and also moved the Plaintiff's clothes to the front porch and in the front yard of the residence [of the parties' son] . . . .
>
> 17. The Plaintiff learned of this move through a phone call from a friend which he received at work, and he returned to North Carolina the next day to find his clothes on the porch and in the front yard of the [son's] residence . . . .
>
> 18. The Defendant advised the Plaintiff by telephone that she had decided to move, that she had found someone else and that she did not want him anymore.
>
> 19. The Plaintiff did not provoke or condone the actions of the Defendant set forth above.

Defendant contends that the trial court's finding of abandonment was unsupported by competent evidence. She argues that the actual date she left the marital residence was in September 2011, after the date of separation, which the trial court found to be 27 August 2011. She also challenges finding 17 as unsupported by competent evidence. Finally, defendant contends that because she told plaintiff in advance that she was moving and plaintiff said he did not want to move with her, he consented to the separation.

"When an application is made for postseparation support, the court may base its award on a verified pleading, affidavit, or other competent evidence." N.C. Gen. Stat. § 50-16.8 (2013). "The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony." *Goodson v. Goodson*, 145 N.C. App. 356, 362, 551 S.E.2d 200, 205 (2001) (citation and quotation marks omitted). "It is elementary that the fact finder may believe all, none, or only part of a witness' testimony. *In re T.J.C.*, ___ N.C. App. ___, ___, 738 S.E.2d 759, 765 (citation, quotation marks, and brackets omitted), *disc. rev. denied*, ___ N.C. ___, 743 S.E.2d 194, 194, 642 (2013).

Each of the trial court's findings of fact was supported by plaintiff's testimony at the hearing. Plaintiff testified to the facts as recited by the trial court. Although there was conflicting evidence on a number of points and the evidence regarding the timing of these events was unclear, it is the trial court's duty to resolve such conflicts and ambiguity in its findings. "While contrary inferences might have been drawn from this same evidence, it was the trial judge's prerogative to determine

which inferences should be drawn and which inferences should not be." *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991). The inferences drawn here by the trial court were reasonable and supported by evidence introduced at the hearing.

We also disagree with defendant's assertion that the trial court's findings show that plaintiff consented to the separation. Defendant informed plaintiff that she was moving. Plaintiff responded that he did not want to move. As a result, defendant left the marital home, deposited plaintiff's belongings at their son's house, and told plaintiff that she did not want him anymore. The trial court clearly disbelieved defendant's testimony that plaintiff had been abusive, severely abused alcohol, had engaged in numerous adulterous relationships, or otherwise behaved in a manner which might justify defendant's abandonment of the marital home.

> Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. Nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving.
>
> . . . .
>
> The trial court's findings are conclusive if supported by any competent evidence, even when the record contains evidence to the contrary. Moreover, since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances.

Hanley, 128 N.C. App. at 57, 493 S.E.2d at 339 (citations and quotation marks omitted).

Plaintiff was under no obligation to explicitly protest defendant's decision to leave the marital home, and his failure to object does not necessarily constitute consent. Plaintiff testified, and the trial court found, that he only became aware that defendant was leaving the marital home while he was away on work. When he found out, he called her and she informed him that she no longer wanted him and that she had found someone else.

We conclude that the trial court's finding that defendant had abandoned the marital home was supported by competent evidence. We further conclude that the trial court's finding that plaintiff did not consent

to defendant's abandonment was supported by competent evidence. These findings support the trial court's conclusion that defendant had committed marital misconduct and its ultimate decision to deny defendant post-separation support. Accordingly, we affirm the trial court's order denying defendant's request for post-separation support.[1]

IV. Conclusion

We affirm the trial court's order denying defendant post-separation support because its findings on abandonment are supported by competent evidence, those findings support its conclusions of law, and its ultimate decision to deny defendant post-separation support.

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
SHAWN RONDEL BAILEY

No. COA13-132

Filed 6 May 2014

Firearms and Other Weapons—possession of firearm by felon—constructive possession—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon for insufficiency of the evidence. The State failed to produce circumstantial evidence that defendant constructively possessed the firearm.

Appeal by defendant from judgment entered 17 September 2013 by Judge Henry W. Hight, Jr. in Person County Superior Court. Heard in the Court of Appeals 18 March 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Winifred H. Dillon for defendant.

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1. As the findings on abandonment are sufficient to support the trial court's order, we need not address defendant's arguments regarding the findings on illicit sexual behavior.

HUNTER, Robert C., Judge.

Defendant Shawn Bailey appeals the judgment entered after a jury convicted him of possession of a firearm by a convicted felon. On appeal, defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

After careful review, because the State failed to produce circumstantial evidence that defendant constructively possessed the firearm, we reverse the order denying his motion to dismiss.

Background

On 25 November 2011, Deputy Dustin Harris ("Deputy Harris") and Deputy Adam Norris ("Deputy Norris") of the Person County Sheriff's office were standing outside the law enforcement center in Roxboro when they heard multiple, rapidly-fired gunshots coming from the Harris Gardens Apartments ("the apartments"). Deputies Harris and Norris responded to the scene of the gunshots. As Deputy Harris entered the apartment complex, he saw a dark-colored, four-door sedan leaving. A female was driving the car, and defendant was in the passenger seat. The driver was later identified as Sherika Torrain ("Ms. Torrain"), defendant's girlfriend. The car was registered to defendant. Deputy Harris turned his car around, followed the sedan briefly, and then stopped it. Deputy Harris asked if there were any weapons in the car; according to Deputy Harris, defendant replied "yes" and told him that there was a gun on the floor in the back. Deputy Norris saw the weapon, which was later identified as an AK-47 assault rifle ("the rifle"). The rifle was warm and had been recently fired, with the magazine still in the gun. Later, investigators determined that the rifle was registered to Ms. Torrain.

Corporal Pam Ferstenau ("Corp. Ferstenau") of the Roxboro Police Department also responded to the scene. When she arrived, she saw Deputy Harris and Deputy Norris with the sedan. Corp. Ferstenau took custody of the rifle and an empty magazine found on the center console of the car. Sergeant Will Dunkley ("Sgt. Dunkley"), a patrol supervisor with the Roxboro Police Department, also responded to the scene. Sgt. Dunkley, along with another officer, searched the road near the apartments for evidence and found a spent shell case. Sgt. Dunkley testified that the casing is known as an "SKS round or AK round" which could be used in either an SKS or AK weapon.

During an interview at the Roxboro Police Department, defendant told police that he and his girlfriend were at the apartment complex when they heard shots. Defendant claimed that they left after the shots,

but he denied possessing or firing the rifle. A gunshot residue test taken of defendant's hands was inconclusive.

Defendant testified in his own defense at trial. He claimed that he had spent the day at the apartment complex. After the shooting, he called Ms. Torrain to pick him up. She arrived, and defendant got in the passenger seat. Because he helped her buy the car, defendant admitted it was titled in his name; however, he contended that she was the one who used and controlled the vehicle.

According to defendant, after Deputy Harris stopped the car and asked if there were any weapons in it, Ms. Torrain said "yes." Defendant denied knowing there was a gun in the car and denied telling Deputy Harris where it was located.

Defendant was indicted for possession of a firearm by a felon ("possession of a firearm"), going armed to the terror of the people, and discharging a firearm within city limits. Defendant's trial began 16 September 2013. The jury convicted defendant of possession of a firearm and acquitted him on the other charges. The trial court sentenced defendant to a minimum term of twelve months to a maximum term of fifteen months imprisonment. Defendant timely appealed.

Argument

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the possession of a firearm charge for insufficiency of the evidence. Specifically, defendant contends that the State failed to present sufficient incriminating evidence that defendant constructively possessed the firearm. We agree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (internal quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Here, defendant was charged with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. Pursuant to section 14-415.1(a) (2013), it is "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[.]" Defendant does not challenge his status as a convicted felon; therefore, the only element of the offense we must consider on appeal is possession.

With regard to possession, our Supreme Court has noted that:

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the narcotics. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (internal citations and quotation marks omitted). Whether constructive possession exists is based on the totality of the circumstances. *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001).

In this case, it is undisputed that defendant did not actually possess the rifle nor was he the only occupant in the car where it was found. Therefore, he did not have "exclusive possession" of the car, *Matias*, 354 N.C. at 552, 656 S.E.2d at 270, and the mere fact that defendant was in the car where the firearm was found does not, by itself, establish constructive possession, *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976). Accordingly, the State was required to show "other incriminating circumstances" linking defendant to the rifle. *Matias*, 354 N.C. at 552, 556 S.E.2d at 271.

A review of decisions by this Court establishes that when evidence presented definitively links a defendant to a weapon, we have found that the circumstantial evidence of constructive possession was sufficient to withstand a defendant's motion to dismiss. For example, in *State*

v. Glasco, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262, this Court held that the trial court's denial of the defendant's motion to dismiss was proper where the evidence "tended to show" that the defendant had "discharged a gun." Specifically, the evidence showed that: (1) the defendant was seen jumping over a fence of a yard near the shooting; (2) the gun was recovered in that same yard; (3) the defendant was found carrying a bag with gunshot residue on it; and (4) the garbage bag had holes in it consistent with a firearm being fired inside the bag. *Id.*

Similarly, in *State v. Mitchell*, __ N.C. App. __, __, 735 S.E.2d 438, 440 (2012), *appeal dismissed*, __ N.C. __, 740 S.E.2d 466 (2013), police stopped the defendant, who was driving a rental car, for speeding. The defendant's girlfriend, Ms. Harris, was a passenger in the car. *Id.* The defendant "indicated" that there was a gun in the glove compartment. *Id.* Police found the gun inside Ms. Harris's purse which was being kept in the glove compartment. *Id.* Although the defendant denied telling the police about the gun, this Court found that the circumstances were sufficient to establish the defendant's constructive possession of the gun because the defendant was driving the vehicle—thus, he "controlled" it—and he was "aware" of the gun's presence in the glove compartment. *Id.* at ___, 735 S.E.2d at 443.

In contrast, however, this Court has found the evidence insufficient to go to the jury when there is no link between the defendant and the firearm besides mere presence. For example, in *State v. Alston*, 131 N.C. App. 514, 515, 508 S.E.2d 315, 316 (1998), the defendant was a passenger in a car driven by his wife. A handgun was found on the console of the automobile, with the defendant and his wife having equal access to it. *Id.* The handgun was registered to his wife, and the car was registered to the defendant's brother. *Id.* at 516, 508 S.E.2d at 317. Although a child in the car told police that "Daddy's got a gun[,]" this evidence was not admitted for the truth of the matter asserted, so the trial court could not consider it as substantive proof of possession. *Id.* Because the evidence showed no more than mere presence, this Court held that there was insufficient evidence to support an inference of possession. *Id.* at 519, 508 S.E.2d at 319.

We find the facts of this case closer to those of *Alston* than *Glasco* or *Mitchell*. Like *Alston*, the rifle was registered to Ms. Torrain, defendant's girlfriend, who was driving the car when the rifle was found. Defendant was a passenger in the vehicle, not the driver. Moreover, the rifle was found in a place where Ms. Torrain and defendant had equal access. In addition, unlike *Glasco*, there was no physical evidence tying defendant to the rifle. Specifically, defendant's fingerprints were not found on the rifle, the magazine on the console, or the spent casing on the road which

may have come from an AK firearm. Although the gun was warm and appeared to have been recently fired, there was no evidence that defendant had actually discharged the rifle because the gunshot residue test was inconclusive. Although it is undisputed that the sedan was registered to defendant, he was not driving it at the time. Therefore, despite having legal ownership of the vehicle, defendant exercised no control over the car at the time the rifle was found.

Finally, although defendant allegedly admitted he knew that the rifle was in the car to Deputy Harris, awareness of the weapon is not enough to establish constructive possession. In *Mitchell*, __ N.C. App. __, 735 S.E.2d at 443-43, awareness was one of the factors the Court noted; however, its conclusion that there was sufficient incriminating evidence to submit the issue to the jury was predicated on both the defendant's awareness of the gun and the fact that he was driving the vehicle, noting that because "[a] driver generally has power to control the vehicle he is driving[,]" the defendant had the "power to control" the vehicle. Unlike *Mitchell*, defendant was not driving and, thus, not "controlling" the vehicle where the rifle was found. Therefore, defendant's knowledge or awareness of the rifle in and of itself did not constitute sufficient incriminating evidence to submit the issue to the jury.

While the State argues that the fact that the rifle was registered to defendant's girlfriend constitutes substantial evidence of constructive possession, the *Alston* Court specifically rejected a similar argument, noting "we are not persuaded that the purchase and ownership of the handgun by [the] [d]efendant's wife is sufficient other incriminating evidence linking [the] [d]efendant to the handgun." *Alston*, 131 at 519, 508 S.E.2d at 319.

In summary, the only evidence linking defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat. Consequently, the State failed to present sufficient "other incriminating circumstances," *Matias*, 354 N.C. at 552, 556 S.E.2d at 271, from which the jury could infer constructive possession. Accordingly, we reverse the trial court's order denying his motion to dismiss for insufficiency of the evidence.

Conclusion

Because the State failed to present substantial evidence of constructive possession, we reverse the trial court's order denying defendant's motion to dismiss the charge of possession of a firearm by a felon.

REVERSED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
COREY DINAN

No. COA13-1022

Filed 6 May 2014

1. Appeal and Error—statement of grounds for appellate review

Appellate defense counsel violated N.C. R. App. P. 28(b) by failing to include a statement of the grounds for appellate review.

2. Appeal and Error—argument abandoned—no clear or reasoned argument

Defendant's argument that the trial court erred in a child abuse case by admitting testimony relating to his uncharged prior bad acts under Rule 404(b) was not addressed and was deemed abandoned. Defendant offered no clear or reasoned argument in support of his position as required by N.C. R. App. P. 28(b)(6).

3. Appeal and Error—preservation of issues—failure to object at trial—failure to allege plain error on appeal

Defendant failed to preserve for appellate review his argument that the trial court erred in a child abuse case by admitting unfavorable character evidence. Defendant failed to object to the evidence at trial and failed to specifically allege plain error on appeal.

4. Criminal Law—prosecutor's cross-examination—not inappropriate

Defendant's argument in a child abuse case that the prosecutor's improper cross-examination deprived him of a fair trial was without merit. The Court of Appeals was not persuaded that the prosecutor questioned defendant in an unreasonable manner.

5. Constitutional Law—effective assistance of counsel—dismissed without prejudice

Defendant's argument that he received ineffective assistance of counsel was dismissed without prejudice to defendant to bring these claims in post-conviction proceedings, rather than on direct appeal.

Appeal by defendant from judgments entered 8 March 2013 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 17 February 2014.

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

James Goldsmith, Jr. for defendant.

ELMORE, Judge.

Corey Dinan (defendant) appeals his convictions of intentional child abuse resulting in serious bodily injury under N.C. Gen. Stat. § 14-318.4(a3) and of assault on a child under the age of twelve in violation pursuant to N.C. Gen. Stat. § 14-33(c)(3). We hold that defendant received a trial free from error in part. Defendant's final issue is dismissed without prejudice and allows defendant the opportunity to file appropriate motions with the trial court.

I. Factual Background

Abby[1], the victim in this case, is the biological daughter of defendant and Sarah F., defendant's now ex-wife. Abby was born 17 February 2010 and was approximately six-weeks-old at the time of the requisite child-abuse incident. At defendant's trial, Ms. F. testified that on 4 April 2010, defendant gave Abby her early-morning bottle. When Ms. F. woke, she went to the family room and saw Abby in her "princess swing" and defendant sitting "Indian style" on the floor. Abby was struggling to breathe. Ms. F. asked, "what's wrong with my baby?" Defendant responded, "I don't know. I don't know. She's been like that all morning." Ms. F. demanded that they take Abby to Onslow Memorial Hospital (Onslow). Abby was kept over-night at Onslow before being transferred to Pitt Memorial Hospital (now Vidant) for additional treatment.

Dr. Coral Steffey (Dr. Steffey), pediatrician and expert in the field of pediatrics and child abuse, testified that on 5 April 2010 she was called to Vidant to consult on Abby's condition. She testified that Abby was transferred from Onslow to Vidant for additional treatment after physicians discovered that Abby's oxygen saturations were low, that she was having difficulty breathing, that she was dehydrated, and that x-rays showed multiple rib fractures and a hemothorax. In fact, Abby had 24 identifiable rib fractures, both new and healing. X-rays taken of Abby's ribs 17 days prior did not reveal any rib fractures. Accordingly, Dr. Steffey opined that between 18 March and 4 April 2010, someone injured

1. Pseudonyms are used throughout the opinion to protect the identities of minors and other persons involved in this action.

Abby on at least two occasions to the point that she sustained multiple rib fractures. Dr. Steffey read the opinion from her medical report into the record, as follows: "There is no medical explanation for Abby's constellation of injuries, which include healing and acute rib fractures with hemothorax, intra-cranial hemorrhage, subconjunctival hemorrhages and bruising to her ankle. No history of trauma has been provided to explain Abby's injuries. The constellation of inexplicable injuries is consistent with a diagnosis of child physical abuse with inflicted injuries, on more than one occasion."

Elizabeth Pogroszewski, social worker for Onslow County Department of Social Services, testified that on 4 April 2010 she asked defendant his opinion as to what contributed to Abby's injuries. He responded, "[I] must have held her too tight." Additionally, four officers with the Jacksonville Police Department testified at trial. Officer Timothy Sawyer testified that defendant made a written statement in which he admitted to holding Abby too tight. Detective Anthony Ramirez testified that defendant demonstrated for him how he picked up Abby and held her with his elbows locked. Detective Trudy Allen testified that when she asked defendant how Abby was injured, he made "a shaking motion, just as if he would shake up the contents of a canister." At that point, she arrested defendant for felony child abuse. Officer Jason Lagana testified that defendant made the following spontaneous statement to him: "I guess you get charged for holding your kid too tight."

At trial, defendant sought to exclude the testimony of Brent Cross, defendant's friend and fellow Marine, and Megan Dinan, defendant's former ex-wife. After *voir dire*, the trial court denied defendant's motions *in limine*, finding that the proffered testimony was relevant as it went to the issue of "knowledge, absence of mistake and intent." Further, the trial court found that the probative value of the 404(b) testimony was not substantially outweighed by its prejudicial effect.

Brent Cross testified that in 2006 he was helping defendant with a home-improvement project when defendant's then wife, Megan Dinan, left the couple's napping infant son in defendant's care. When the baby woke crying, Mr. Cross testified that defendant became "agitated." Defendant went to the baby's room and, through the monitor, told Mr. Cross, "I got the baby now. You can go ahead and shut the baby monitor off. I got it." Mr. Cross had an "instinct" to keep the monitor on. When the baby was picked up, Mr. Cross testified that he heard the baby's cry become "hysterical" and he heard defendant's tone change from "upset" to "just anger."

Megan Dinan testified that she and defendant had two biological sons together, Ian and Sam. However, after divorcing, defendant relinquished his parental rights. She testified that when Ian was approximately eight-weeks old, he woke one morning with “one tiny little bruise” on his chest. Defendant was responsible for feeding Ian during the night. The following morning, Ian woke “covered in bruises, head to toe. He was so bruised that his earlobes were bruised.” Ian was hospitalized and diagnosed as having a virus, which doctors thought could account for his severe bruising. After Ian was released from the hospital, Ms. Dinan noted subsequent bruising in the shape of finger prints on Ian. Ms. Dinan testified that when she confronted defendant, he responded, “it is my handprint, [] I was holding him last night and I think I held him too tight.”

Defendant testified on his own behalf at trial. He alleged that he never “mistreated” Abby on 4 April 2010 or any time prior. He admitted to accidentally treating her like a one-year old instead of a six-week old. After the defense rested, the jury found defendant guilty of intentional child abuse resulting in serious bodily injury and of assault on a child under the age of twelve. The trial court sentenced defendant on 8 March 2013 to a term of 73 months to 97 months imprisonment, plus 60 days.

II. Analysis

A. Rule Violation

[1] Initially, we direct defense counsel’s attention to Rule 28 of the North Carolina Rules of Appellate Procedure. Rule 28(b)(4) requires counsel to include “a statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review.” N.C.R. App. P. 28(b)(4). In his brief, defense counsel provides:

> This Court is called upon to determine whether [defendant] was deprived of his fundamental right to a fair trial where evidence of uncharged prior bad acts were introduced to establish criminal propensity, and where the trial court failed to make a determination that the probative value outweighed any prejudice. . . . Further, this Court is called upon to determine whether [defendant] received ineffective assistance of counsel[.]

Defense counsel has violated Rule 28(b)(4). The above “statement” fails to reference any statute which would allow for appellate review—defense counsel has merely reiterated the issues he raises on appeal. Here, defense counsel is licensed in Florida. Nevertheless,

we urge defense counsel and all counsel to be mindful of our Rules of Appellate Procedure.

[2] Defendant first argues that the trial court erred in admitting testimony relating to his "uncharged prior bad acts" under Rule 404(b). We are unable to address the merits of this issue because defendant offers no clear or reasoned argument in support of his position as required by Rule 28(b)(6). *See* N.C.R. App. P. 28(b)(6). Specifically, in defendant's first issue he fails to direct us to the testimony that he argues it was error for the trial court to admit. We assume that defendant challenges the testimony of Mr. Cross and Ms. Dinan pursuant to Rules 404(b) and 403, as these witnesses are referenced in this issue. Further, defendant's argument is presented in a nonsensical manner. At the very least, defendant is required to direct us to the challenged testimony—it is not this Court's duty to craft defendant's argument for him. Accordingly, defendant's first argument is abandoned on appeal pursuant to Rule 28(b)(6).

B. Admission of 404(b) Evidence

[3] Alternatively, based on defendant's recitation of the facts and a review of the transcript, we assume *arguendo* that in his first issue, defendant is objecting to the admission of the unfavorable character evidence offered by Mr. Cross and Ms. Dinan. Nevertheless, we remain unable to address the merits as defendant has failed to preserve this issue for our review.

"[T]o preserve for appellate review a trial court's decision to admit testimony, objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and quotations marks omitted). At trial, defendant did not object to the admission of what we believe constitutes the challenged testimony of Mr. Cross and Ms. Dinan. Therefore, he did not preserve the issue of the admissibility of this testimony for our review. *Id.*

Failure to properly preserve an argument restricts this Court's review on appeal to plain error. However, Rule 10(a)(4) states that such review is only available "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). In his brief, defendant does not ask this Court to review the issue under the plain error standard. When the State noted defendant's failure to argue plain error in the State's brief, defendant attempted to cure this deficiency by mentioning plain error in defendant's reply brief. However, a reply brief is not an avenue to correct the deficiencies contained in

the original brief. *See* N.C.R. App. P. 28(b)(6); *see also State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) ("[B]ecause [d]efendant did not 'specifically and distinctly' allege plain error as required by [our appellate rules], [d]efendant is not entitled to plain error review of this issue.").

C. Scope of Prosecutor's Cross-Examination

[3] Defendant next contends that the prosecutor's improper cross-examination deprived him of a fair trial. We are not persuaded that the prosecutor questioned defendant in an unreasonable manner.

Generally, "[t]he scope of cross-examination . . . is within the sound discretion of the trial court, and its ruling thereon will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (citation omitted). However, here defendant argues that we should review this issue under the plain error standard of review. We agree. As such, defendant "must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jurys finding that the defendant was guilty." *Id.* (citation and quotation omitted).

In the instant case, defendant takes issue with the prosecutor's line of questioning in three specific instances[2]. First, he contends that the prosecutor inappropriately tried to "place him at odds" with Sarah F. by asking, "[y]ou don't believe Sarah caused these injuries at all, do you?" and "[d]o you believe that Sarah F. caused these injuries to Abby?" Second, defendant argues that it was error for the prosecutor to "challenge[] defendant to call [Detective Allen] a liar[.]" We assume that defendant is referencing the following question: "So Detective Allen, then, is lying about you [showing her how you shook Abby]?" Defendant replied, "I wouldn't say lie, just changing facts about who said what." Third, defendant argues that it was inappropriate for the prosecutor to ask, "how long are you going to wait with that infant before you begin holding him or her too tightly?" However, as to this last question, the record shows that the trial judge sustained defense counsel's objection to the question and instructed the jury to disregard it. In addition, the prosecutor withdrew the question. Thus, defendant's argument as to this question is moot.

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2. Defendant also argues that the prosecutor improperly questioned Megan Dinan. However, we cannot address the merits of this argument as counsel's argument lacks sufficient specificity.

Further, defendant makes no argument as to how he was prejudiced by these questions; he merely contends that he was "highly prejudiced by this impossible questioning[.]" Without a showing of prejudice, defendant cannot establish that any alleged error was a fundamental error. *See State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001) ("[An] empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule."). Therefore, defendant's argument must be overruled. Assuming *arguendo* that defendant made a showing of prejudice, defendant has not convinced this Court that absent the prosecutor's questions, the jury probably would have reached a different verdict. The record contains additional evidence of defendant's guilt.

D. Ineffective Assistance of Counsel

[5] Lastly, defendant contends that defense counsel was ineffective because he 1) completely misapprehended the law with respect to the element of "intent," 2) elicited damaging testimony from the State's witnesses and defendant, and 3) permitted "prosecutorial misconduct" by failing to object to the prosecutor's questions. Given our conclusion in section "C," defendant's third contention moot. We dismiss defendant's remaining arguments without prejudice to defendant's right to file appropriate motions in the trial court.

When raising claims of ineffective assistance of counsel, the "accepted practice" is to bring these claims in post-conviction proceedings, rather than on direct appeal. *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985). Here, defendant has "prematurely asserted his ineffective assistance of counsel claim" by directly appealing to this Court. *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001) (quotation and citation omitted).

Defendant raises potential questions regarding defense counsel's trial strategy. However, it is unclear from defendant's brief what specific conduct he challenges as being ineffective. As such, we are unable to address the merits of defendant's argument. To best resolve this issue, an evidentiary hearing available through a motion for appropriate relief is our suggested mechanism. *Id.*; *see also State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal where the issues could not be determined from the record and concluding that "[t]o properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A–1415[ ] and G.S. 15A-1420[ ]"). "Upon the filing of a motion for appropriate relief, the trial court will

determine the motion and make appropriate findings of fact." *Ware*, 125 N.C. App. at 697, 482 S.E.2d at 16.

III. Conclusion

In sum, we deem defendant's first issue abandoned on appeal. Assuming *arguendo* that it is not abandoned, defendant failed to properly preserve it for our review. We overrule defendant's second issue that he was prejudiced by the prosecutor's line of questioning. Finally, defendant's ineffective assistance of counsel claim is dismissed without prejudice so that he may file appropriate motions in the trial court.

No error in part; dismissed in part.

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

STATE OF NORTH CAROLINA
v.
NICHOLAS JAMES JACOBS

No. COA13-1159

Filed 6 May 2014

Constitutional Law—right to counsel—waiver—knowing, voluntary, and intelligent—not established

The trial court erred in a probation violation hearing by allowing defendant to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C.G.S. § 15A-1242.

On a writ of certiorari by defendant from judgment entered 8 May 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 17 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Edward Eldred for defendant.

ELMORE, Judge.

On 15 November 2013, Nicholas James Jacobs (defendant) filed a petition for writ of certiorari in this Court, seeking review of the trial court's order revoking his probation and activating his prison sentence. This case arose after defendant pled guilty to five counts of obtaining property by false pretenses and five counts of breaking or entering a motor vehicle, which were consolidated into five sentences. This Court will hear defendant's appeal pursuant to his petition for writ of certiorari for the purpose of reviewing the criminal judgment. After careful consideration, we reverse the trial court's judgment and remand for further action consistent with this opinion.

I. Factual Background

On 25 April 2012, defendant pled guilty to the above mentioned offenses. Pursuant to defendant's plea, the trial court sentenced defendant to one term of 6 to 8 months active time; four consecutive, suspended 8 to 10 months sentences; and probation for 36 months. On 4 January 2012, defendant's probation officer filed notices of probation violations against defendant in Columbus County. The notices alleged that defendant failed (1) to attend a scheduled appointment, (2) to make required payments to the Clerk of Superior Court, (3) to obtain approval before moving, (4) to remain within the jurisdiction of the court, (5) attend TASC (Treatment Accountability for Safer Communities), and (6) was charged with criminal offenses that could result in probation violations.

On 8 May 2013, a probation violation hearing was held in Columbus County Superior Court. Defendant proceeded *pro se* at the hearing. The trial court revoked defendant's probation and activated his sentences. That same day, defendant filed a written notice of appeal. However, the record shows that defendant's notice of appeal was defective. Accordingly, defendant's appeal is before us on writ of certiorari.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by allowing him to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C. Gen. Stat. § 15A-1242. We agree.

"It is well[-]settled that an accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001), *cert. denied*, 535 U.S. 934, 122 S Ct. 1312, 152 L. Ed. 2d 221 (2002).

Specifically, a defendant is entitled to be represented by counsel at a probation revocation hearing and, if indigent, to have counsel appointed for him. N.C. Gen. Stat. § 15A-1345(e) (2013). A defendant also has the right to refuse the assistance of counsel and proceed *pro se*. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981).

"Before a defendant is allowed to waive in-court representation by counsel, the trial court must insure [sic] that constitutional and statutory standards are satisfied." *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994) (citation omitted). To satisfy the trial court, a defendant must first " 'clearly and unequivocally' waive his right to counsel and instead elect to proceed *pro se*." *Id.* Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* "A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242[.]" *State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005) (internal citation omitted).

N.C. Gen. Stat. § 15A-1242 allows a defendant to proceed without counsel if the trial judge makes a thorough inquiry and is satisfied that defendant:

> 1. Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> 2. Understands and appreciates the consequences of this decision; and
>
> 3. Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In the instant case, defendant's appointed counsel withdrew at the outset of defendant's revocation hearing due to a conflict in representation. In an attempt to appoint defendant new counsel, the trial judge asked the clerk, "[h]ow about Mr. Bill Gore?" Before the clerk responded, defendant interrupted and the following colloquy occurred:

> DEFENDANT: This case has been continued since January. It's the fourth—this will be the fifth time it's [sic] been continued. I'm not happy about that. I have numerous co-defendants in this case.
>
> . . .

THE COURT: You understand if you want a lawyer, I will be happy to appoint another for you, you understand. If you go forward with it today without an attorney, you are held to the same standard. The Court can't walk you through it, you are held to the same standard and I assume the State is seeking revocation.

. . .

P.O.: Yes, your Honor.

THE COURT: You understand they are going to ask me to put you in prison on this, so it may be you will want to wait at this point and have it continued for another 30 days and have a lawyer come in and help out on it as opposed to doing it yourself.

DEFENDANT: If they're going to violate me, they're going to violate me anyway with a lawyer or without a lawyer.

THE COURT: If you are in violation, the Court could find that and there's a chance you might be violated anyway. What's the underlying sentence?

THE STATE: There's four, boxcar(ed), eight to ten.

THE COURT: If he takes care of it himself today and admits and I take one of those boxcar(ed) and consolidate it with the rest, which would be a pretty good offer.

. . .

THE STATE: If he would want to accept that today and be done with it, the State wouldn't object.

THE COURT: The State wouldn't object.

DEFENDANT: I'm not going to–if y'all are going to give it to me, you're going to have to give it to me because I'm not going to ask that my probation be revoked.

THE COURT: Okay, and I don't have to give you one day off, you understand that.

DEFENDANT: I understand.

(the hearing began and defendant's parole officer began testifying)

> THE COURT: One moment. Let's get a waiver in the file. You indicated you didn't want an attorney, I'm going to let you sign a waiver that you don't want an attorney.

This exchange reveals that the trial judge made no inquiry as to whether defendant understood the "range of permissible punishments" pursuant to N.C. Gen. Stat. § 15A-1242(3). The State contends that defendant understood the range of permissible punishments because "the probation officer told the court that the State was seeking probation revocation." This is insufficient to satisfy N.C. Gen. Stat. § 15A–1242(3). As to defendant's underlying sentence, defendant was told only that, "[t]here's four, boxcar(ed), eight to ten." The trial judge then made defendant the "good offer" of having "one of those boxcar(ed)" consolidated. However, there was no discussion pertaining to the specific range of punishment.

We cannot assume that defendant understood the legal jargon "boxcared" and "eight to ten" as it related to his sentence. The phrase "eight to ten" is uncertain–is it in reference to eight to ten days, weeks, months, or years? Further, the trial judge had an unequivocal duty to ask defendant whether he understood the nature of the charges and proceedings and disclose the range of permissible punishments. *State v. Pruitt*, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988) (citations omitted). He neglected to do so. The foregoing is clearly inadequate to constitute the "thorough inquiry" necessary to satisfy N.C. Gen. Stat. § 15A–1242(3). *See State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (holding that the trial court failed to properly inform the defendant regarding the range of permissible punishments when it correctly informed defendant of the maximum 60–day imprisonment penalty, but failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges).

Although we recognize that defendant signed a written waiver of his right to assistance of counsel, the trial court was not abrogated of its responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 were fulfilled. *Whitfield*, *supra*. We need not discern whether the first two subparts of the statute were satisfied—all three must be met to ensure that a defendant's waiver was made knowingly, intelligently, and voluntarily. Accordingly, we reverse the trial court's judgment revoking defendant's probation and remand for a new probation revocation hearing.

Reversed and remanded.

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

STATE OF NORTH CAROLINA
v.
LAURENCE ALVIN LOVETTE, Defendant

No. COA13-991

Filed 6 May 2014

1. Sentencing—first-degree murder—resentencing under new statute—motion for appropriate relief—due process

The trial court did not err in a first-degree murder case by overruling defendant's objection to resentencing under the new sentencing statute in N.C.G.S. § 15A-1340.19A *et. seq*. Defendant requested the very relief as to resentencing he was granted in his motion for appropriate relief. Thus, the Court of Appeals' prior opinion was the law of the case and defendant could not challenge his resentencing on the grounds of due process. To the extent defendant raised a facial challenge to the new sentencing statute, he failed to cite any authority in support of this argument.

2. Homicide—first-degree murder—findings of fact—sufficiency of evidence

The trial court did not err in a first-degree murder case by its findings of fact 3, 4, and 6. Capital sentencing statutes had no application in the context of this case. Further, the challenged findings of fact were supported by competent evidence.

3. Sentencing—life imprisonment without parole—failure to show abuse of discretion

The trial court did not err in a first-degree murder case by sentencing defendant to a term of life imprisonment without parole. Defendant failed to demonstrate an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed all the circumstances of the offenses in light of them.

Appeal by defendant from judgment entered on or about 3 June 2013 by Judge R. Allen Baddour, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 6 February 2014.

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

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

This is defendant's second appeal to this Court arising from his conviction for the first degree murder of Eve Carson. Defendant was originally sentenced, as required by North Carolina law at that time, to life in prison without parole. In defendant's first appeal and based upon his motion for appropriate relief, this Court vacated defendant's sentence of life imprisonment without parole and sent his case back to the trial court for resentencing based upon North Carolina General Statute § 15A-1340.19A *et. seq.*, which is a new sentencing statute enacted by the North Carolina General Assembly in response to the United States Supreme Court's 2012 ruling in *Miller v. Alabama*, 567 U.S. ___, ___, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing, at which defendant presented evidence. The trial court then resentenced defendant under the new sentencing statute to life imprisonment without parole after making extensive findings of fact as to any potential mitigating factors revealed by the evidence. In this second appeal, defendant raises arguments as to the constitutionality of the new sentencing statute and as to the trial court's findings supporting its sentencing decision. We find no error, for the reasons as set forth more fully below.

I. Background

The facts of this case may be found in *State v. Lovette*, ___ N.C. App. ___, 737 S.E.2d 432 (2013) ("*Lovette I*"), and we will not repeat them in detail. In summary, defendant and/or his cohort kidnapped a young woman, Eve Carson, in the night, held her as a hostage in her own car with a gun to her head, fondled her as she screamed, robbed her, remained unmoved as she begged for her life, shot her multiple times, left her body in the street, and then used her bank card. *Lovette I* at ___, 737 S.E.2d at 434-35. In *Lovette I*, this Court found no error in defendant's trial, at which the jury convicted him of first degree murder, first degree kidnapping, felonious larceny, felonious possession of stolen goods, and robbery with a dangerous weapon, but vacated defendant's sentence for first degree murder and remanded for a resentencing hearing based upon North Carolina General Statute § 15A–1340.19A *et seq.* *See id.* at ___, 737 S.E.2d at 436-42.

After a rehearing, the trial court entered judgment sentencing defendant to life imprisonment without parole. The trial court made "additional findings pursuant to N.C.G.S. Sect. 15A-1340.19C, which . . . [were] incorporated as part of the judgment" (footnote omitted):

1. The defendant was born November 17, 1990, and therefore was seventeen years, three months old at the time of the commission of these offenses.
2. Dr. James Hilkey (hereinafter, "Hilkey") could identify no evidence that the defendant was irretrievably corrupted.
3. The defendant was, and is, immature, but not in any way substantially different from other teens.
4. Though adopted, the defendant's home life and family dynamics were not extremely unusual. He was adept at taking advantage of an overly permissive father and avoiding consequences from either his father or his mother, who was the more authoritarian parent. He was raised in a middle class household and did not lack resources.
5. Defendant's intelligence is above average. He excelled at school until about age 12. His father passed when defendant was 13, and his grades and attendance at school faltered significantly.
6. Defendant appears to have been influenced by his peers but not to an unusual degree.
7. Defendant suffered from no psychosis or other mental disorder.
8. There is no evidence that defendant failed to appreciate the risks or consequences of his actions.
9. Defendant suffered from no dependency on alcohol or illegal drugs.
10. After preparing his psychological profile of defendant, Hilkey concluded that there exists the possibility of rehabilitation for him, but could offer no certain prognosis.
11. Defendant has a lengthy juvenile record that exhibits a pattern of escalation of criminal activity.
12. In the events surrounding this conviction, defendant was an active participant in all phases, from procuring the vehicle used to drive to Chapel Hill, to the commission of the murder itself. Defendant appears

to have led his older co-defendant, Demario Atwater, through the commission of the crimes.

13. The active participation of the defendant in the act of murder in this case stands in stark contrast to the two juveniles in the *Miller* and *Jackson* cases, in which might be characterized as botched robberies in which the defendant either was not an active participant in the murder or was acting under the influence of impairing substances, among other distinctions. See Miller v. Alabama, 567 U.S. ___, 123 S. Ct. 2455, 183 L.Ed.2d 407 (2012).

14. This court has considered youth as a factor in assessing the proportionality of the punishment it imposes, and in an exercise of its informed discretion determines that any mitigating factors found above are substantially outweighed by the overwhelming absence of mitigating factors as well as the other factors found above. Based on that determination, the court concludes that the appropriate sentence in this case is life in prison without the possibility of parole.

15. Consistent with its prior orders, Court's Exhibit 1 (the pre-sentence investigation report), as well as Defendant's Exhibit 2 (Sentencing Memorandum of Hilkey) and Defendant's Exhibit 3 (raw data produced by Hilkey) shall be preserved under seal, to be opened only by order of the Court. Defendant's Exhibit 1 (Hilkey's CV) shall be made part of the file.

Defendant appeals.

II. Sentencing Statute

[1] When defendant's first appeal, addressed in *Lovette I*, was pending before this Court, defendant filed a motion for appropriate relief ("MAR") specifically requesting a resentencing hearing based upon the change in the law which had occurred since his trial:

> Our General Assembly has enacted a remedy to address the Supreme Court's ruling in *Miller v. Alabama* in Senate Bill 635, "An Act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*, which was signed into law

by the Governor on July 12, 2012. S.L. 2012-148 (amending N.C. Gen. Stat. § 15A-1477(a)(1)).

In *Lovette I*, this Court discussed the United States Supreme Court's opinion in *Miller* and the North Carolina General Assembly's response:

> In his MAR, Defendant seeks a new sentencing hearing, citing *Miller*. In *Miller*, which was decided after Defendant was sentenced, the United States Supreme Court held that imposition of a mandatory sentence of life without the possibility of parole for a defendant who was under the age of eighteen when he committed his crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at ___, 132 S.Ct. at 2460, 183 L.Ed.2d at 414–15. After noting scientific studies that reveal differences in brain function and other psychological and emotional factors between adults and juveniles, the Court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at ___, ___, 132 S.Ct. at 2475, 183 L.Ed.2d at 418–19, 430.
>
> In response to the *Miller* decision, our General Assembly enacted N.C. Gen.Stat. § 15A–1476 *et seq.* ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*." N.C. Sess. Law 2012–148.[1]

Id. at ___, 737 S.E.2d at 441.

This Court then discussed the details of the new statutory sentencing scheme and its retroactive application to defendant:

> The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen.Stat. § 15A–1340.19A. Section 15A–1340.19B(a) provides that if the defendant was convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen.Stat. § 15A–1340.19B(a)(1) (2012). In

1. As noted by footnote in *Lovette I*, "[t]he Act became effective when passed on 12 July 2012. N.C. Sess. Law 2012–148, Section 3. Session Law 2012–148 designated this Act as sections 15A–1476 *et seq.*, but the Act was later redesignated and renumbered at the direction of the Revisor of Statutes and is now found at N.C. Gen.Stat. § 15A–1340.19A *et seq. Lovette I* at ___, 737 S.E.2d at 441.

> all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen.Stat. §§ 15A–1340.19B, 15A–1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen.Stat. §§ 15A–1340.19B(a)(2), 15A–1340.19C (a). "[N]ew rules of criminal procedure [such as the Act] must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final.' " *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649, 661 (1987)).
>
> Here, as conceded by the State, the Act applies to Defendant, who was seventeen years old at the time of Eve Carson's murder and whose case was pending on direct appeal when the Act became law. In addition, Defendant's jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation, as well as the felony murder rule. Accordingly, we must vacate Defendant's sentence of life imprisonment without parole and remand to the trial court for resentencing as provided in the Act. Following a resentencing hearing, the trial court shall, in its discretion, determine the appropriate sentence for Defendant and make findings of fact in support thereof.

Id. at ___, 737 S.E.2d at 441-42 (footnote omitted). On remand the trial court then did just as defendant requested in his MAR and as this Court instructed in *Lovette I* when it sentenced defendant.

A. Due Process

Upon remand, at the resentencing hearing, defendant for the first time raised an objection to being sentenced under the new sentencing statute based upon a claim of denial of due process. Defendant now contends that "the court erred when it overruled the defendant's objection to resentencing under the *new* sentencing statute because its application to the defendant violated the constitutional guarantees of due process and the law of the land." (Emphasis added.) (Original in all caps.) The

State counters, *inter alia*, that defendant has waived his constitutional arguments by failure to raise them in his first appeal or in the MAR.

Despite the fact that defendant obtained the relief he requested in his prior appeal and MAR, in which he requested re-sentencing under what is now codified as North Carolina General Statute § 15A–1340.19A *et seq.*, defendant now argues that he was denied due process because during his trial, he was unaware of the new sentencing statute which did not yet exist. Defendant argues that when he was tried for first degree murder, the State proceeded upon theories of felony murder *and* murder with premeditation and deliberation; under the "old" sentencing statute, which was in effect when defendant was originally sentenced, a guilty verdict on either of those bases would inevitably lead to a sentence of life imprisonment without parole. However, according to defendant, under the "new" sentencing statute, if defendant had been convicted for first degree murder *only* upon a predicate felony, and not upon premeditation and deliberation, he would have been sentenced to life imprisonment with parole.[2] If defendant had known this, he argues he might have conceded guilt of his underlying felonies that served as the predicate felonies for the theory of felony murder and focused his efforts more heavily on defending against premeditation and deliberation as a basis for the murder, because if the jury believed him on this issue, he might have been convicted on the basis of felony murder only and not on the basis of murder with premeditation and deliberation, thus giving him the eligibility for parole.

Based upon defendant's speculation and arguments which seek to apply legal standards used in capital punishment cases to this non-capital case, defendant contends the "lack of notice resulted in a denial of procedural due process, and the State cannot show the error harmless beyond a reasonable doubt." Defendant proposes two possible remedies to this violation, both premised upon cases which address capital sentencing. Analogizing from *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976), defendant claims that as the only sentence permitted

> by law at the time of the crime and trial in Mr. Lovette's case has been held unconstitutional and because the new statute cannot be applied retroactively consistent with the notice required by the federal Due Process Clause and the state Law of the Land Clause, U.S. Const., amend. XIV;

2. North Carolina General Statute § 15A-1340.19A provides that "'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (2012).

> N.C. Const., art. I, § 19, the only sentence that was constitutionally possible to be imposed upon him for homicide with malice at the time of his trial was "a sentence authorized upon conviction of the lesser included offense of second degree murder committed on 5 March 2008."

In the alternative, defendant proposes this Court remand to the trial court again "with instructions to impose a sentence of life imprisonment with parole consistent with N.C. Gen. Stat. § 15A-1340.19B(a)(1)(2012), where 'life imprisonment with parole' means that he "shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.' N.C. Gen. Stat. § 15A-1340.[19]A (2012)."

Defendant's arguments are based upon a series of speculations and assumptions about potential trial strategies and hindsight, which is reputed to be 20/20, although in this instance even hindsight is a bit blurry since there are so many unknowns. Essentially, defendant argues that *if* defendant had known, he *may* have actually conceded guilt of his felonies upon which the theory of felony murder were predicated, argued more strenuously regarding murder with premeditation and deliberation, and the jury *may* not have convicted him on the grounds of murder with premeditation and deliberation,[3] and then he *could* have had the possibility of parole. We cannot base our decision on such speculation.

Defendant actually requested the very relief as to resentencing he was granted in his MAR to this Court. Even if defendant's speculative argument could have possibly had any legal merit, he could have raised it in his MAR. In other words, in his MAR in the prior appeal defendant argued that he should be sentenced under the new sentencing statute, but he could have also argued, although he did not, that even then sentencing him under the new sentencing statute would violate his constitutional due process rights because he was not aware of the new sentencing statute as the applicable law at the time of his trial, thus affecting his trial strategy. Defendant could have made an argument based on hindsight and speculation of this nature just as easily in the first appeal as this one as it is not dependent upon any findings or conclusions made by the trial court on remand. We conclude that because defendant did not challenge this Court's opinion granting him the relief sought in his MAR, this Court's prior opinion is the law of the case and defendant may not challenge his resentencing under the new sentencing

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3. We note that there was overwhelming evidence regarding defendant's premeditation and deliberation, and defendant did not challenge his conviction on the basis of error in the jury's determination of this issue in his first appeal. *See Lovette I.*

statute on the grounds of due process now. *See generally Wellons v. White*, ___ N.C. App. ___, ___, 748 S.E.2d 709, 720 (2013) ("The law of the case doctrine provides that when a party fails to appeal that order, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." (citation, quotation marks, and brackets omitted)). We overrule this argument.

B. Discretion of Trial Court in Sentencing

In *Lovette I*, we noted that under the new sentencing statute

> the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A–1340.19B, 15A–1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole.

Lovette I at ___, 737 S.E.2d at 441. At the resentencing hearing, as directed by this Court as a result of *Lovette I*, the trial court heard evidence and made findings of fact.

Defendant argues that

> the sentence of life without parole for an offender who committed his offense before reaching the age of 18 is "likened" to the death penalty itself, *see Miller*, ___ U.S. at ___, 132 S. Ct. at 2463, 183 L. Ed. 2d 407; *cf. Graham*, 560 U.S. at ___, 130 S. Ct. at 2027, 176 L. Ed. 825. Thus, just as the guarantees of freedom from cruel and unusual punishment and due process, U.S. Const., amend. VIII, XIV; N.C. Const., art. I, §§ 19, 27, require provisions for "individualized sentencing" in death penalty cases for adults, *Woodson*, 428 U.S. at 304, 96 S. Ct. at 2991, 49 L. Ed. 2d 944 (1976) (Eight Amendment requires individualized sentencing, rather than mandatory sentencing, in death penalty proceedings), so *Miller* ultimately ruled against mandatory life imprisonment without parole for offenders convicted of homicide committed when under age 18.

Defendant then engages in a comparison of the new sentencing statute with capital punishment statutory sentencing, citing § 15A-2000, and concludes that "the new sentencing regime provides less guidance

for the exercise of discretion in sentencing a minor in jeopardy of life imprisonment without parole . . . than our State provides for an adult burglar or even a Class I felon." But our capital sentencing statutes have no application here. Although there is some common constitutional ground between adult capital sentencing and sentencing a juvenile to life imprisonment without parole, these similarities do not mean the United States Supreme Court has directed or even encouraged the states to treat cases such as this under an adult capital sentencing scheme.

Because the new sentencing statute grants the trial court more discretion than the capital sentencing statute, defendant argues that the new sentencing statute "unconstitutionally vests the sentencing judge with unbridled discretion, providing no standards for its exercise in violation of the constitutional guarantees of freedom from cruel and unusual punishment and of due process and the law of the land." (Original in all caps.) As in defendant's previous argument regarding due process, defendant had the opportunity to raise a facial challenge in his first appeal to the constitutionality of North Carolina General Statute § 15A-1340.19A *et. seq.* on the grounds that it fails to provide sufficient guidance for the exercise of the trial court's discretion, but he failed to do so. Again, in his first appeal, defendant requested that he be sentenced under the new sentencing statute without making any arguments that it was unconstitutional. This Court then granted defendant's request and defendant made no motions seeking relief from either this Court or our Supreme Court. The trial court followed the instructions provided by this Court in resentencing defendant pursuant to the new sentencing statute. We therefore conclude that defendant may not raise a facial constitutional challenge to North Carolina General Statute § 15A-1340.19A *et. seq.* at this point.

Although defendant does not make an as-applied constitutional argument in his brief, at oral argument and in his reply brief, defendant's counsel noted that defendant could not have made an as-applied constitutional challenge to the new sentencing statute before he was resentenced, since the statute had not yet been applied to him. We agree with defendant that he could not have made an as-applied challenge to the new sentencing statute before he was resentenced. Yet defendant's arguments are actually facial constitutional challenges, not as-applied challenges. Defendant contends that the new sentencing statute is erroneous as written because it "vests the sentencing judge with unbridled discretion providing no standards[.]" Thus, according to defendant's argument, no matter how the trial court applied the new sentencing statute, its discretion would be "unbridled" due to the lack of "standards"

provided by the legislature within the statute; this is a facial challenge because defendant is arguing that no matter what the trial court's ultimate determination was, the new sentencing statute is unconstitutional because of the amount of discretion given to the trial court in making its determination. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) ("An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." (citation, quotation marks, and brackets omitted)). Defendant does not argue that the trial court abused its discretion in either how it weighed or applied any mitigating factors as compared to each other or in light of the other facts of the case in coming to its ultimate decision to sentence defendant to life imprisonment without parole. Thus, to the extent defendant has raised a facial challenge to the new sentencing statute, he has failed to cite any authority in support of this argument. This argument is overruled.

III. Findings of Fact

[2] Defendant next challenges findings of fact 3, 4, and 6 based on sufficiency of the evidence to support the findings of fact.

A. Standard of Review

Defendant attempts to frame this argument under the standards of review applicable in capital sentencing of adults. Defendant argues that

> [b]ecause the sentence of life without parole for an offender who committed his offense before reaching the age of 18 is "likened" to the death penalty itself, *see Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012) ("*Graham* further likened life without parole for juveniles to the death penalty itself"); *cf. Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010) ("life without parole sentences share some characteristics with death sentences that are shared by no other sentences"), the Defendant respectfully contends that, on analogy with our Supreme Court's review of a death penalty, this Court shall overturn the greater sentence of life without parole and impose in lieu thereof the lesser authorized sentence of life with parole "upon a finding that the record does not support the [trial court's] findings of any . . . circumstance or circumstances upon which the sentencing court based its sentence of [life without parole]." N.C. Gen. Stat. § 15A-2000(d)(2) (2012).

But again, capital sentencing statutes have no application in the context of this case. We see no reason to depart from our body of case law which has established that we review challenged findings of fact for competent evidence to support the finding. *See State v. Peterson*, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997) ("[F]indings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (citation and quotation marks omitted). Accordingly, we review each challenged finding of fact to see if it is supported by competent evidence; if so, such findings of fact "are conclusive on appeal[.]" *Id.*

B. Findings of Fact 3, 4 and 6

Finding of fact 3 stated, "The defendant was, and is, immature, but not in any way substantially different from other teens." Dr. James Hilkey, an expert in forensic psychology, testified that defendant's immaturity was "typical for his age[.]" The challenged portion of finding of fact 4 stated, "Though adopted, the defendant's home life and family dynamics were not extremely unusual." While Dr. Hilkey did state that defendant was perhaps "spoiled[,]" even to an "extreme[,]" and that his parents relationship may have been "highly dysfunctional" to an "extreme[,]" he did not testify that defendant's "home life" or "family dynamics" were "extremely unusual[,]" but rather that a particular area or two of defendant's "home life and family dynamics" were extreme. Defendant's argument takes certain words used by Dr. Hilkey out of context. Overall, Dr. Hilkey's testimony supported a finding that defendant's "home life and family dynamics" were not extremely unusual. Defendant grew up in a middle-class home with two parents, until his father died. Defendant's father had strongly disagreed with his mother on how to best care for him, with his father taking the route of "spoiler" and his mother that of "enforcer." Dr. Hilkey's testimony indicated that defendant's home life was not "perfect" but that is not unusual, as no one leads a perfect home life. Finding of fact 6 stated, "Defendant appears to have been influenced by his peers but not to an unusual degree." Dr. Hilkey testified that "*Like a lot of juveniles*, Mr. Lovett was quite and continues to be quite influenced by his peer group[,]" and "Mr. Lovett, *like many adolescents*, are highly susceptible to the influence of peers[.]" (Emphasis added.) We conclude that the challenged findings of fact were supported by competent evidence and overrule this argument.

IV. Findings as to "Irretrievable Corruption" and "Possibility of His Rehabilitation"

[3] Lastly, defendant contends that

> the court erred when it sentenced the defendant to a term of imprisonment for life without parole, in violation of the constitutional guarantees against cruel and unusual punishment,

> when the unrebutted evidence presented to the court did not show that the defendant was irretrievably corrupt and did show that the possibility of his rehabilitation existed.

(Original in all caps.) Defendant does not contend that a finding that he "was irretrievably corrupt" or had no "possibility of . . . rehabilitation" is required by the new sentencing statute for the trial court to sentence him to life imprisonment without parole, and in fact it is not. *See* N.C. Gen. Stat. §§ 15A-1340.19B; -1340.19C (2012) (stating that the trial court "shall consider any mitigating factors" but not providing that any particular factor beyond those defendant chooses to present are required for consideration by the trial court). But, defendant's argument read as a whole does seem to contend that without findings of irretrievable corruption and no possibility of rehabilitation the trial court should not have sentenced him to life imprisonment without parole. Thus, we consider *de novo* if the trial court's findings of fact, which we have already concluded are supported by competent evidence, support its conclusion of law. *See Peterson*, 347 N.C. at 255, 491 S.E.2d at 224 ("Conclusions of law that are correct in light of the findings are also binding on appeal.") (citations and quotation marks omitted); *State v. Simmons*, 201 N.C. App. 698, 701, 688 S.E.2d 28, 30 (2010) ("The trial court's conclusions of law are subject to *de novo* review on appeal.").

It is true that the trial court made findings regarding defendant *not* being "irretrievably corrupt" and the "possibility of [defendant's] rehabilitation[,]" but these findings of fact did not ultimately require the trial court to sentence defendant to a lesser sentence than life imprisonment without parole as the trial court could consider all of the factors and determine "whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a). Defendant has not demonstrated an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed "all the circumstances of the offenses" in light of them. *See id.*

Defendant relies on *Miller v. Alabama* in arguing, "[T]he Supreme Court proceeded to make it clear that [life imprisonment without parole] should be 'uncommon' because of the difficulty of determining 'irreparable corruption' at a young age[.]" Defendant then quotes *Miller*:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions

> for sentencing juveniles to this *harshest penalty will be uncommon*. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare juvenile offender whose crime reflects irreparable corruption*." *Roper*, 543 U.S. at 573, 125 S. Ct. 1183; *Graham*, 560 U.S. at ___, 130 S. Ct. at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469, 183 L.Ed. 2d 407.

(Emphasis added.)

Defendant's argument takes the statement regarding "irreparable corruption" out of context and seemingly elevates it to a required finding, but this is simply one of the factors a trial court may consider. The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of "irreparable corruption" is not required, although it certainly may be a finding that a trial court might make, it did not in this case. What the Supreme Court actually required in *Miller* was that the trial court consider a defendant's age and its "hallmark features" and the circumstances of each case:

> To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 567 U.S. at ___, 183 L.Ed. 2d at 423 (citations omitted).

Here, the trial court made findings of fact which are either not challenged on appeal, or which we have found to be supported by the evidence, as to each of the "hallmark features" noted by the Supreme Court. *Id.* Our only consideration is whether the findings support the trial court's conclusion of law that defendant should be sentenced to life imprisonment without possibility of parole. In *Miller*, in contrasting the cases of the two 14-year-old juveniles under consideration with juveniles in prior cases, the Supreme Court contrasted some of these characteristics of juveniles:

> In light of *Graham*'s reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.
>
> . . . .
>
> Both cases before us illustrate the problem. Take Jackson's [in *Graham*] first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that we ain't playin, rather than told his friends that I thought you all was playin. To be sure, Jackson learned on the way to the video store that

> his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.
>
> That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of second-degree criminal mischief. That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

Miller, 567 U.S. at ___, 183 L.Ed. 2d at 422-24 (citations, quotation marks, brackets, and footnote omitted). In this comparison, the Supreme Court demonstrates how a court might weigh the "hallmark features" in sentencing juveniles. *Id.* at ___, 183 L.Ed. 2d at 422-24. Here, the trial court, particularly in findings of fact 12 and 13, reflects that it was guided by this analysis in weighing the factors presented by defendant.

Defendant has not demonstrated that the trial court abused its discretion in weighing the factors regarding his characteristics or the circumstances of the case. *See State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 ("We also decline to hold that the trial judge abused his discretion in imposing the sentence in this case. The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. It is not the role of an appellate court to substitute its judgment for that of the sentencing judge as to the appropriate length of the sentence. [S]o long as the punishment rendered is within

the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. Furthermore, when the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. (citations omitted)), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

As noted by *Miller*, the "harshest penalty will be uncommon[,]" but this case is uncommon. *Miller*, 567 U.S. at ___, 183 L.E. 2d at 424. The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middle-class home, defendant chose to take the life of another for a small amount of money. Defendant was 17 years old, of a typical maturity level for his age, and had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record, and thus had already had the advantage of any rehabilitative programs offered by the juvenile court, to no avail, as his criminal activity had continued to escalate. Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards. *Miller* at ___, 183 L.Ed. 2d at 422 ("Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability."). The trial court's findings fully support its conclusion, and this argument is overruled.

V. Conclusion

For the reasons as stated above, we find no error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JERRY DENARD POSEY, II

No. COA13-1342

Filed 6 May 2014

1. Criminal Law—restraints—defendant wore shackles at trial

The trial court did not abuse its discretion in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case by requiring defendant to wear restraints at trial. The shackles were not visible to the jury.

2. Appeal and Error—preservation of issues—failure to make offer of proof

Although defendant argued in a second-degree murder, possession of a firearm by a felon, and carrying a concealed gun case that the trial court abused its discretion by precluding him from cross-examining the medical examiner regarding her preliminary report of death, defendant failed to preserve this issue for appellate review by failing to make an offer of proof.

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

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. The State's evidence, including the testimony of the officer, was sufficient to convince a rational trier of fact that there was no quarrel or altercation between the victim and defendant prior to the shooting, and that defendant did not act in self-defense.

Appeal by Defendant from judgments entered 30 May 2013 by Judge William Z. Wood in Superior Court, Forsyth County. Heard in the Court of Appeals 7 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

Sharon L. Smith for Defendant.

McGEE, Judge.

Jerry Denard Posey, II ("Defendant") was indicted on 10 December 2012 for first-degree murder of Terrance Murchison ("Mr. Murchison"), possession of a firearm by a felon, and carrying a concealed gun. A jury found Defendant guilty of second-degree murder, possession of a firearm by a felon, and carrying a concealed gun. The facts relevant to the issues on appeal are discussed in the analysis section of this opinion. Defendant appeals.

I. Physical Restraints

[1] Defendant first argues the trial court abused its discretion in requiring Defendant to wear restraints at trial. We disagree.

A. Standard of Review

"We review the trial court's decision of whether to place [d]efendant in physical restraints for abuse of discretion." *State v. Stanley*, 213 N.C. App. 545, 548, 713 S.E.2d 196, 199 (2011). "A review for abuse of discretion requires the reviewing court to determine whether the decision of the trial court is manifestly unsupported by reason, or so arbitrary that it cannot be the result of a reasoned decision." *Id.*

B. Analysis

A defendant may be "physically restrained during his trial when restraint is necessary to maintain order, prevent the defendant's escape, or protect the public." *State v. Wright*, 82 N.C. App. 450, 451, 346 S.E.2d 510, 511 (1986). "What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial." *Id.* In deciding whether restraints are appropriate, a trial court may consider, among other things, the following circumstances:

> "the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies."

Stanley, 213 N.C. App. at 550, 713 S.E.2d at 200 (quoting *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353, 368 (1976)). "However, the ultimate

decision must remain with the trial judge, who may not resign his exercise of discretion to that of his advisors." *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368.

The record in the present case shows Defendant objected to having to wear a "stiff knee brace[.]" At Defendant's request, the trial court held a hearing to determine whether Defendant should wear the knee brace during trial. A deputy testified that it was "standard operating procedure to place any inmate" being tried for "a murder offense in some sort of restraint at any time when [the inmate was] out of [the sheriff's] custody." Defendant contends that the trial court's ruling "was nothing more than an accommodation of Sheriff's Department policy[.]"

However, the trial court did not base its decision upon this testimony alone. The trial court considered Defendant's past convictions for common law robbery, misdemeanor possession of stolen goods, misdemeanor larceny, and two counts of assault on a female, along with Defendant's three failures to appear in 2012 and two failures to appear in 2011, which the trial court commented tended to show "some failure to comply with the [c]ourt orders[.]" The trial court also considered Defendant's pending charge for simple assault that arose while Defendant was in custody.

As in *State v. Simpson*, the trial court "was in the better position to observe [] [D]efendant, to know the security available in the courtroom and at the courthouse, to be aware of other relevant facts and circumstances, and to make a reasoned decision, in light of those factors, that restraint was necessary or unnecessary." *State v. Simpson*, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002). Furthermore, where the "record fails to disclose that a defendant's shackles were visible to the jury, 'the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors,' and the defendant will not be entitled to a new trial[.]" *Id.* at 809-10, 571 S.E.2d at 276 (quoting *State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 163 (2002)).

In the present case, counsel for Defendant acknowledged that the restraint was "not visible" and, when the trial court commented that it "couldn't hear any jingling[,]" counsel for Defendant agreed. The trial court observed that the knee brace did not make noise or jingle and that the knee brace could not be seen by jurors or potential jurors. When Defendant later walked back into the courtroom, the trial court observed that Defendant "seems to be moving well." The trial court noticed "no problems, no sign of anything." Counsel for Defendant replied that he did not dispute the trial court's observations, but that the knee brace still

constituted a restraint. Furthermore, the trial court allowed Defendant to walk to the witness stand out of the sight of the jury.

The present case is analogous to *Simpson* and *Holmes*, in which the shackles were not visible to the jury. Holmes, 355 N.C. at 729, 565 S.E.2d at 163; *Simpson*, 153 N.C. App. at 809, 571 S.E.2d at 276. We conclude that the trial court did not abuse its discretion on this basis.

II. Cross-Examination of Medical Examiner

[2] Defendant next argues the trial court abused its discretion by "precluding [Defendant] from cross-examining medical examiner McLemore regarding her preliminary report of death[.]" However, in "order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010). Our Supreme Court also held that "the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.* "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *Id.* at 818, 689 S.E.2d at 861-62.

At trial, the State objected when counsel for Defendant approached the witness with "a document called a preliminary report of death[.]" After the jury exited the courtroom, the State argued that the handwritten note on the report that read "fighting in a club earlier" constituted hearsay. Following a brief *voir dire* examination of the witness, counsel for Defendant argued to the trial court that "it's admissible under the expert rules of testimony." It appears that counsel for Defendant was referring to the preliminary report of death. The trial court stated: "I think under Rule 403 it would be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Defendant made no offer of proof as to the questions Defendant's counsel would have asked of the medical examiner. Defendant also made no offer of proof as to what the medical examiner's response to the questions would have been. Defendant "has failed to preserve this issue for appellate review under the standard set forth in" N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2013). *State v. Braxton*, 352 N.C. 158, 184, 531 S.E.2d 428, 443 (2000).

III. Sufficiency of the Evidence of Second-Degree Murder

[3] Defendant next argues the trial court erred in denying Defendant's motion to dismiss the charge of second-degree murder. Defendant

contends there was insufficient evidence that Defendant acted with malice and not in self-defense.

A. Standard of Review

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The "trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

The "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Id.* at 92, 728 S.E.2d at 347. "All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

B. Analysis

Defendant presents two different arguments in this section. First, as to malice, the "intentional use of a deadly weapon proximately causing death gives rise to the presumption that (1) the killing was unlawful, and (2) the killing was done with malice." *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). "Evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, leaving only a permissible inference which the jury may accept or reject." *State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 907-08 (1988) (internal quotation marks omitted).

If "there is any evidence of heat of passion on sudden provocation, either in the State's evidence or offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury." *Id.* at 173, 367 S.E.2d at 908. In the present case, the trial court did submit the charge of voluntary manslaughter to the jury. Defendant has not shown error on this basis.

Second, Defendant argues that the State failed to show that Defendant did not act in self-defense. "A person who kills another is not guilty of murder if the killing was an act of self-defense." *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985). To survive a motion to dismiss, the State must present "evidence which, when

taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that [the] defendant did not act in self-defense." *Id.*

Officer Geddings testified that he was monitoring the crowds exiting from a club shortly after 2:00 a.m. when he noticed "a muzzle flash of a gun" and heard a gunshot. He looked in the direction of the gunshot and saw Defendant lower a gun. Officer Geddings was about twenty to twenty-five yards away from Defendant. Officer Geddings saw no fight or altercation before the gunshot. He did not see anyone running or hear any yelling before the gunshot. Officer Geddings allowed Defendant to make calls from his cell phone while in the back seat of the patrol vehicle. Defendant told his mother on the phone that he "shot somebody." When his mother asked why, Defendant answered: "Disrespect." Officer Geddings also did not find any other firearms in the parking lot.

Tommy Murchison, the brother of Mr. Murchison, testified that he and his brother went to the club with their girlfriends. Tommy Murchison exited the club at 2:00 a.m., with his brother behind him, but he was parted from his brother on the way to the vehicle. Tommy Murchison testified that he heard a gunshot and later saw his brother lying on the ground. At that time, Tommy Murchison thought his brother was on the ground because he was simply intoxicated. An officer helped Mr. Murchison into the vehicle. Tommy Murchison testified that they went to get something for his brother to eat. He then noticed that his brother was injured and went directly to a hospital. Tommy Murchison testified that he did not see his brother with a gun that night, nor did he see a weapon in the vehicle.

Tiara Stowe ("Ms. Stowe"), the driver of the vehicle, also testified that no one in her vehicle had a gun. Mr. Murchison's shirt and pants were "fitted tight on him, so you would be able to see" if there was a weapon in his pockets. Ms. Stowe testified that, from her position in the club, she kept an eye on her group. She saw "a little fight break out" near Mr. Murchison around closing time, but Mr. Murchison was not involved in the fight.

Officer Bullard testified that he was about seventy-five feet away from where he thought he heard the gunshot originate. When he approached, he saw an individual staggering and falling to his knees. The individual told Officer Bullard that he had been shot. Officer Bullard testified that he called an ambulance, and that the individual would not speak further to him. Officer Bullard saw no weapon on the individual.

Dedrick Springs ("Mr. Springs") testified for Defendant that he saw "one guy" approach Defendant and say "something like, I'm going to get

you after the club." He further testified that this individual and Defendant were "in each other's faces." When Mr. Springs exited the club at closing time, he saw the same individual "pull his gun out on" Defendant. Mr. Springs testified that the individual pulled the gun from his pocket.

Defendant testified that, as he walked to the bathroom, Mr. Murchison asked him "what the f--- [Defendant] was looking at." Defendant further testified that Mr. Murchison approached him aggressively, and Tommy Murchison pulled Mr. Murchison away. When Defendant exited the club at closing time, Mr. Murchison walked up to Defendant, "looked [Defendant] in the eyes, g[a]ve [him] a[n] evil look and said he was going to f---ing kill [Defendant]." Defendant testified that he kept walking, trying to avoid Mr. Murchison, but Mr. Murchison came toward him again and pulled a weapon. Defendant testified that he shot at the ground to scare Mr. Murchison, but when he shot, "the gun lifted up, like recoiled like that[.]"

Although Defendant contends on appeal that "[a]ll of the evidence in the record supported a finding that the shooting occurred during a sudden quarrel between" Mr. Murchison and Defendant, the transcript belies this assertion. Officer Geddings testified that he was outside the club to provide security, and he testified that he saw no fight or altercation before the gunshot.

As previously stated, the "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Bradshaw*, 366 N.C. at 92, 728 S.E.2d at 347. "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* at 93, 728 S.E.2d at 347 (internal citations and quotation marks omitted).

The State's evidence in the present case, particularly the testimony of Officer Geddings, is sufficient to convince a rational trier of fact that there was no quarrel or altercation between Mr. Murchison and Defendant prior to the shooting, and that Defendant did not act in self-defense. The discrepancy between the testimony of Officer Geddings and the testimony of Defendant presented a conflict in the evidence, which was for the jury to resolve. *Hamilton*, 77 N.C. App. at 514, 335 S.E.2d at 511. The trial court did not err in denying Defendant's motion to dismiss and in submitting the charge of second-degree murder, along with the charge of voluntary manslaughter, to the jury.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE v. STERLING

[233 N.C. App. 730 (2014)]

STATE OF NORTH CAROLINA
v.
CHAUNCEY LAJARVIS STERLING, Defendant

No. COA13-1191

Filed 6 May 2014

1. Evidence—photographs—no plain error

The trial court did not commit plain error in a first-degree murder and attempted robbery with a dangerous weapon case by allowing the State to introduce and publish photos of defendant and his friends when they were juveniles posing for Facebook photos. None of the photos had a probable impact on the jury's finding that the defendant was guilty.

2. Homicide—first-degree murder—denial of requested second-degree murder instruction

The trial court did not err in a first-degree murder case by denying defendant's request for a second-degree murder instruction. Defendant's testimony alone established the elements of attempted robbery, and his further testimony that he then shot the victim twice, whether he had changed his mind about committing the robbery or not, established the elements of first-degree murder.

3. Sentencing—life imprisonment without parole—defendant's developmental age

The trial court did not err in a first-degree murder case by failing to consider defendant's developmental age before imposing a life sentence without parole. Defendant's age fell past the bright line drawn by *Miller*, which applied only to those who committed crimes prior to the age of 18.

Appeal by defendant from judgments entered 13 June 2013 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 20 February 2014.

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

Marilyn G. Ozer, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions of first degree murder and attempted robbery with a dangerous weapon. For the following reasons, we find no error.

I. Background

Defendant was indicted for murder and attempted robbery with a dangerous weapon. During defendant's trial he testified that on 22 April 2011, he "got the feeling" that he "need[ed] money." Defendant had spent the night in his sister's apartment and after she had left for work he went into her room and got her gun. Defendant left the apartment and saw Mr. Robert Barber leave a coffee shop. Defendant followed Mr. Barber thinking he could "try to take some money from him." Defendant then pulled out his gun. According to defendant, Mr. Barber attempted to take the gun away from him. Defendant then shot Mr. Barber twice. Mr. Barber died from a gunshot wound to the chest. The jury found defendant guilty of first degree murder based upon the felony murder rule and attempted robbery with a firearm. The trial court entered judgment sentencing defendant to life imprisonment without parole for the conviction of first degree murder and arrested judgment on the conviction for attempted robbery with a dangerous weapon. Defendant appeals.

II. Photographs

[1] Defendant turned 18 years old on 22 March 2011, a month before the crimes committed in this case. During defendant's trial, the State admitted photos of defendant and/or his friends which defendant claims portray him as a juvenile "pretending to be [a] rapper[.]" Defendant argues the photos were irrelevant and used only to create an impression in the jury that defendant was a gang member. Defendant did not object to the photos at trial but now argues that "the trial court committed plain error by allowing the State to introduce and publish photos of the defendant and his friends when they were juveniles posing for Facebook photos." (Original in all caps.)

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted). We have reviewed the photos portraying defendant and others making various hand gestures that the State questioned defendant about regarding gang activity. Although we are uncertain of the relevance of these photos, in light of defendant's own testimony that he pulled a gun on Mr. Barber because he wanted to "try to take some money from him" and then shot Mr. Barber twice, we do not believe any of the photos we have viewed of defendant or his friends "had a probable impact on the jury's finding that the defendant was guilty." *Id.*; *see generally State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632 (noting that "[t]he two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense"), *cert. denied*, 516 U.S. 846, 133 L.Ed. 2d 83 (1995); *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993) (noting that "felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon"), *cert. denied*, 512 U.S. 1246, 129 L.Ed. 2d 881 (1994). This argument is overruled.

III. Second Degree Murder Instruction

[2] Defendant requested the trial court to instruct the jury on second degree murder, which the trial court denied. Defendant contends that "the trial court erred by denying [his] request to instruct on second degree murder including lesser offenses." (Original in all caps.)

> An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. The trial court should refrain from indiscriminately or automatically instructing on lesser included offenses. Such restraint ensures that the jury's discretion is channelled so that it may convict a defendant of only those crimes fairly supported by the evidence.
>
> The standard for determining whether the trial court must instruct on second-degree murder as a lesser included offense of first-degree murder is as follows:
>
>> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . .

> > and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.
>
> Stated differently, the trial court must determine whether the State's evidence is positive as to each element of first-degree murder and whether there is any conflicting evidence relating to any of these elements.

State v. Taylor, 362 N.C. 514, 530-31, 669 S.E.2d 239, 256 (2008) (citations, quotation marks, ellipses, and brackets omitted), *cert. denied*, 558 U.S. 851, 175 L.Ed. 2d 84 (2009).

"First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *Gibbs*, 335 N.C at 51, 436 S.E.2d at 350. Defendant's underlying felony to the murder was attempted robbery with a dangerous weapon.

> The two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. Thus, an attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.

Davis, 340 N.C. at 12, 455 S.E.2d at 632 (citations, quotation marks, and brackets omitted).

Defendant contends that his testimony established that he changed his mind about committing the robbery and thus there was evidence contradicting the underlying felony of his murder conviction. But defendant admitted that he had an intent to commit robbery when he confessed his goal was to "try to take some money from [Mr. Barber]." Defendant also admitted to an overt act when he stated that he pulled out the gun in furtherance of his intent to rob Mr. Barber. Thus, defendant's testimony alone establishes the elements of attempted robbery, *see id.*, and his further testimony that he then shot Mr. Barber twice, whether he had

changed his mind about committing the robbery or not, establishes the elements of first degree murder. *See Gibbs*, 335 N.C. at 51, 436 S.E.2d at 350. The State's evidence satisfied the requirements for an instruction on first degree murder, according to *Taylor*:

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Taylor, 362 N.C. at 530-31, 669 S.E.2d at 256. As such, the trial court did not err in not instructing the jury on the charge of second degree murder, and this argument is overruled.

IV. Sentencing

[3] Lastly, defendant contends that the trial court committed error because of the trial court's "failure to consider the defendant's developmental age before imposition of a sentence of life without parole violates a defendant's constitutional right to freedom from cruel and unusual punishment." (Original in all caps.) Defendant bases his argument on the United States Supreme Court case of *Miller v. Alabama*, 567 U.S. ___, 183 L.Ed.2d 407 (2012), which determines that a sentencing court must take into consideration a juvenile defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" before imposing a sentence of life imprisonment without the possibility of parole. *Id.*, 567 U.S. at ___, 183 L.Ed. 2d at 423. But the holding in *Miller* has no application to a person who has attained the age of 18 when the crime is committed: "We therefore hold that mandatory life without parole for those *under the age of 18 at the time of their crimes* violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Id.* at ___, 183 L.Ed. 2d at 414-15 (emphasis added) (quotation marks omitted). Defendant's argument is based on common sense but not on the law, since it is true that there was likely not a substantial difference between defendant's level of maturity and understanding on the day before his 18th birthday as compared to one month later, when he committed these crimes.

Yet the law must draw bright-line distinctions based on age in many areas. We find it instructive that the same age-based bright line applies to capital punishment. *See State v. Garcell*, 363 N.C. 10, 678 S.E.2d 618, *cert. denied*, 558 U.S. 999, 175 L.Ed. 2d 362 (2009). Where a defendant

who was just five months beyond his 18th birthday when he committed murder argued that he should not be subject to capital punishment based on *Roper v. Simmons*, our Supreme Court rejected this argument and noted that

> [d]efendant's reliance on *Roper v. Simmons* is misplaced. The Supreme Court of the United States held in *Roper* that the Eighth and Fourteenth Amendments to the United States Constitution forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The Court created a bright line, categorical rule. Furthermore, the Court was very clear that the issue before it concerned a defendant's age at the time he committed a capital crime, not when his case was tried and he was sentenced.

Id. at 53, 678 S.E.2d at 645. Defendant's age falls past the bright line drawn by *Miller*, which applies only to those who commit crimes prior to the age of 18. *Miller* at ___, 183 L.Ed. 2d at 414-15. Accordingly, this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

THOMAS v. THOMAS

[233 N.C. App. 736 (2014)]

JOEL W. THOMAS, Plaintiff
v.
HERLENE THOMAS, Defendant

No. COA13-655

Filed 6 May 2014

1. Child Custody and Support—custody modification—substantial change in circumstances

The trial court did not err in a child custody modification case by concluding that there had been a substantial change in circumstances affecting the parties' minor child, thereby warranting a modification of the 2006 and 2007 California custody orders. Although the trial court's finding of fact regarding the parties' stipulation to a substantial change in circumstances was invalid and ineffective, the trial court's findings were adequate to support its conclusion of law.

2. Child Custody and Support—custody modification—best interests of child

The trial court did not err in a child custody modification case by making conclusion of law number 6. It was based on findings that illustrated that it would be in the best interest of the minor child for the parties to successfully co-parent and that plaintiff was the party most likely to facilitate a relationship between the minor child and the other parent based on defendant's past interference with the minor child and plaintiff's relationship.

3. Child Custody and Support—custody modification—parenting coordinator

The trial court did not err in a child custody modification case by failing to appoint a parenting coordinator. N.C.G.S. § 50-91 governs what findings must be made only if the trial court, in its discretion, appoints a parenting coordinator. There was no authority imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one was not appointed.

Appeal by defendant from order entered 17 December 2012 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 6 January 2014.

Gailor, Hunt, Jenkins, Davis, & Taylor, P.L.L.C., by Cathy C. Hunt and Jonathan S. Melton, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant.

McCULLOUGH, Judge.

Defendant Herlene Thomas seeks review of a child custody order, granting plaintiff Joel W. Thomas and defendant joint legal custody, granting plaintiff primary physical custody, and granting defendant secondary physical custody of their minor child. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Plaintiff Joel W. Thomas and defendant Herlene Thomas were married on 31 August 2001 and divorced on 31 July 2007. One child was born of their marriage in 2004 (hereinafter "minor child").

The parties' first custody order was entered in California on 27 April 2006 ("the 2006 Order") and a second, supplementary order was entered in California on 18 July 2007 ("the 2007 Order"). Both orders were registered in North Carolina on 21 October 2010 and 19 May 2011, respectively.

On 14 July 2011, plaintiff filed a "Motion to Modify Custody Order, Motion for Psychological Evaluation and Motion for Custody Evaluation Pursuant to N.C. Gen. Stat. § 50-13.1 et seq.; Rule 35." Plaintiff alleged that since the entry of the 2006 Order, defendant had "refused to facilitate the minor child's visitation with Plaintiff," resulting in a substantial change in circumstances affecting the best interest and welfare of the minor child. Furthermore, plaintiff alleged that "[d]efendant has shown an unwillingness to take reasonable measures to foster a feeling of affection between the minor child and Plaintiff and not to estrange the child from Plaintiff or impair the [minor] child's regard for Plaintiff."

On 10 October 2011, the trial court entered an "Order For Custody Evaluation And Clarification of Existing Child Custody Order." The trial court found that "[g]iven the currently [SIC] level of acrimony between the parties, the Court finds that a good cause exists for ordering a custody evaluation."

On 14 November 2011, defendant filed a "Motion to Modify Custody; Motion for Contempt; Motion in the Cause for Attorney's Fees; Motion to Appoint Parenting Coordinator." Defendant argued that since the 2006 Order, a substantial change in circumstances affecting the welfare of the minor child had occurred and that modification of custody served

the minor child's best interest. Defendant alleged, *inter alia*, that plaintiff fails to communicate with defendant in a collaborative way that promotes the best interest of the minor child, plaintiff makes false or empty promises to the minor child, plaintiff and his current wife demean and disparage defendant in the presence of the minor child, and that the terms of the 2006 Order and the 2007 Order were "vague, ambiguous, confusing, and did not serve the minor child's best interest[.]"

Following a hearing held from 11 until 17 October 2012 on each party's motion to modify custody and several other motions filed by both parties, the trial court entered a custody order on 17 December 2012. The custody order included 226 findings of fact. The trial court concluded that there had been a substantial change in circumstances affecting the minor child, warranting a modification of the 2006 and 2007 Orders. The trial court further concluded that it would be in the best interest of the minor child and would best promote the interest and general welfare of the minor child if the parties had joint legal custody, with plaintiff "having final decision making authority if the parties are unable to timely agree as to a decision, and with [p]laintiff exercising primary physical custody of the minor child, and with [d]efendant exercising secondary physical custody[.]"

Defendant appeals.

II. Standard of Review

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact.

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

"The trial court is vested with broad discretion in child custody cases, and thus, the trial court's order should not be set aside absent an abuse of discretion." *Dixon v. Gordon*, __ N.C. App. __, __, 734 S.E.2d 299, 304 (2012) (citation omitted).

III. Discussion

Defendant presents the following issues on appeal: whether the trial court (A) failed to make sufficient findings of fact to support its

conclusion of law that a substantial change in circumstances had occurred; (B) erred in concluding that it was in the best interest of the minor child to modify custody; and (C) erred in denying the motion to appoint a parenting coordinator.

A. Substantial Change in Circumstances

[1] Defendant argues that the trial court erred by failing to make sufficient findings of fact to support its conclusion of law that there had been substantial change in circumstances affecting the minor child, thereby warranting a modification of the 2006 and 2007 California custody orders. Specifically, defendant contends that (i) the parties' stipulation to a substantial change in circumstances was invalid and ineffective, and (ii) the trial court failed to make specific findings about what circumstances had changed and what effect, if any, such changed circumstances had on the minor child. We address each argument in turn.

i. Stipulation as to "Substantial Change in Circumstances"

Defendant argues that the trial court erred by making the following finding of fact: "[t]he parties stipulate that there has been a substantial change of circumstances since entry of the California Orders for custody on April 27, 2006 and July 18, 2007."

At the beginning of the hearing, the following exchange occurred:

> THE COURT: All right. Thank you. Um, before we get started, since each party has a Motion to Modified [sic] Custody on the calendar, are you interested in just having a stipulation that there has been a substantial change in circumstances that would warrant a modification, such that I can focus my energies on best interests as opposed to, um, keeping tabs on whether there's evidence of a substantial change?
>
> [Plaintiff:] We would stipulate to that, Your Honor.
>
> [Defendant:] Uh, yes, Your Honor, I think it's clear.
>
> THE COURT: All right. All right. And I'm certain we'll identify what those changes are.

It is well established that a "determination of whether changed circumstances exist is a conclusion of law." *Head v. Mosier*, 197 N.C. App. 328, 334, 677 S.E.2d 191, 196 (2009) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 289, 515 S.E.2d 234, 237 (1999)). Our Court has held that "[s]tipulations as to questions of law are generally held invalid and

ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, __ N.C. App. __, __, 745 S.E.2d 7, 9 (2013) (citation omitted).

Based on the foregoing, we agree with defendant's contention that the parties' stipulation as to a substantial change in circumstances was invalid and ineffective.

ii. Findings to Support a Substantial Change in Circumstances

Next, defendant argues that the trial court failed to make sufficient findings of fact to support its conclusion that "[t]here has been a substantial change in circumstances affecting the minor child which warrants a modification of the 2006 and 2007 California Custody Orders." We are not persuaded by defendant's arguments.

"It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a 'substantial change of circumstances affecting the welfare of the child' warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (citations omitted). The modification of a custody decree must be supported by findings of fact reflecting the fulfillment of this burden. *See Tucker v. Tucker*, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975). "[T]he evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 (citation omitted).

> In determining whether a substantial change in circumstances has occurred[, c]ourts must consider and weigh all evidence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon a child and those which will have adverse effects upon the child.

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citations and quotation marks omitted).

In the present case, the primary disputed issues regarding the minor child's welfare were plaintiff's allegation that defendant was refusing to facilitate the minor child's visitation with plaintiff, plaintiff's allegation that defendant was unwilling to take reasonable measures to foster a feeling of affection between the minor child and plaintiff, defendant's allegation that plaintiff failed to communicate with defendant in a collaborative way, defendant's allegations that plaintiff makes empty promises

to the minor child and makes disparaging comments about defendant in the presence of the minor child, and defendant's allegation that the terms of the 2006 Order and the 2007 Order were confusing and ambiguous. Upon a review of the 226 unchallenged findings of fact made by the trial court, which are binding on appeal, we find that the trial court sufficiently resolved the issues at hand and demonstrated the existence of a substantial change in circumstances and its effect on the minor child, with those findings including the following:

> 78. For the most part, from 2006 until 2010, Defendant consulted with Plaintiff and kept Plaintiff informed about education and healthcare issues. Plaintiff did not question Defendant's decisions as to these issues, and he deferred to her about decisions in these areas.
>
> 79. However, after Plaintiff married Katrina [in November 2009], Defendant's ability to emotionally divorce herself from Plaintiff became a barrier in Plaintiff's attempts to communicate with [the minor child]. For the first few months following Plaintiff's marriage to Katrina, Plaintiff could not get in touch with [the minor child].
>
> 80. While the parties' relationship had been dysfunctional for years, Defendant's refusal to follow through on the Christmas 2009 visit with Plaintiff and Plaintiff's marriage to Katrina marked the beginning of a pattern of disruption in Plaintiff and the minor child's relationship.
>
> . . . .
>
> 105. Following Social Services involvement with the family [in 2011], Defendant engaged in a pattern of vindictive behavior with Plaintiff.
>
> 106. On February 4, 2011, Defendant was willfully hours late in having [the minor child] available for pick-up, and her communication with Plaintiff about this was spiteful and vindictive. Due to Defendant's purposeful tardiness to the custody exchange, Plaintiff was unable to exercise visitation with the minor child.
>
> 107. On March 18, 2011, Plaintiff let Defendant know that he would be about 20 minutes late for a pick-up, but Defendant did not have [the minor child] there for a

late pickup. Although Defendant told Plaintiff that she took [the minor child] to church, this was not true. Again, due to Defendant's behavior Plaintiff was unable to exercise visitation with the minor child.

. . . .

110. Defendant has called Katrina a "b**ch" in front of [the minor child] . . . . Defendant lets her negative feelings toward Katrina interfere with [the minor child's] relationship with Plaintiff and Katrina. . . .

. . . .

112. Defendant has created the situation for a hostile relationship between [the minor child] and Katrina.

. . . .

121. By the terms of the 2011 [Order for Custody Evaluation and Clarification of Existing Child Custody Order], the Court sought to reduce conflict between the parties, especially conflict in front of the minor child.

. . . .

126. Despite the "clarifying" North Carolina custody order, Defendant continued to interfere with Plaintiff's custodial time with [the minor child] throughout 2012.

. . . .

137. Defendant has put a premium on the minor child's activities to the detriment of Plaintiff's relationship with the minor child. Defendant has used things such as a "pumpkin picking" trip at school as an excuse to limit Plaintiff's visitation with [the minor child]. She has conditioned visits, requiring Plaintiff to agree to take [the minor child] to work with him during a visit instead of [the minor child] being allowed to stay at Plaintiff's home with Katrina. . . .

. . . .

150. Defendant's interference with [the minor child's] contact with Plaintiff is having a detrimental impact on [the minor child] evidenced by the difficulties at custodial exchanges.

. . . .

155. Defendant either intentionally ignores the plain language of a Court Order or she is not capable of understanding plain language in a Court Order.

. . . .

196. [The minor child] can be very manipulative. He has likely developed this personality trait as a response to the intense negative emotions that his mother feels toward his father and that his father feels toward his mother. He does not feel that he can express love for a parent except directly to that parent.

. . . .

199. Defendant has, either intentionally or inadvertently, engaged in conduct that is alienating [the minor child] from Plaintiff. . . .

. . . .

215. Defendant's feelings of hurt and anger toward Plaintiff interfere with her ability to effectively co-parent with Plaintiff. The level of acrimony between the parties has interfered in their ability to co-parent [the minor child].

These numerous findings illustrate the fact that since the entry of the 2006 Order and the 2007 Order, plaintiff's marriage to Katrina in 2009 has marked the beginning of a "pattern of disruptive behavior" by defendant involving the relationship between plaintiff and the minor child, significantly interfering with the parties' ability to co-parent, and detrimentally affecting the welfare of the minor child.

Accordingly, we hold that although the trial court's finding of fact regarding the parties' stipulation to a substantial change in circumstances was invalid and ineffective, the trial court's findings of fact were adequate to support its conclusion of law that a substantial change in circumstances affecting the minor child warranted a modification of the 2006 Order and the 2007 Order.

B. Best Interest of the Minor Child

[2] Next, defendant challenges the trial court's conclusion of law number 6:

> 6. It is in the best interest of the minor child, and would best promote the interest and general welfare of the minor child, that the parties have joint legal custody, with Plaintiff having final decision making authority if the parties are unable to timely agree as to a decision, and with Plaintiff exercising primary physical custody of the minor child, and with Defendant exercising secondary physical custody with the minor child as set out hereinafter with more specificity.

Specifically, defendant argues that the foregoing conclusion of law is not supported by the findings of fact. We disagree.

Once the trial court concludes that there has been a substantial change in circumstances affecting the minor child "it may modify the order if the alteration is in the best interests of the child." *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734.

> [A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Carpenter v. Carpenter, __ N.C. App. __, __, 737 S.E.2d 783, 787 (2013) (citing *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted)). Findings of fact "may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

After thoroughly reviewing the trial court's 17 December 2012 Custody Order, we observe that the following pertinent findings of fact allow our Court to determine whether a change in custody is in the best interest of the minor child, and adequately support the trial court's conclusion of law number 6:

> 111. It would be in [the minor child's] best interest for Plaintiff, Defendant, and Katrina to positively co-parent [the minor child]

. . . .

150. Defendant's interference with [the minor child's] contact with Plaintiff is having a detrimental impact on [the minor child] as evidenced by the difficulties at custodial exchanges.

. . . .

154. Defendant is in need of therapy to address deep seated, long-term unresolved issues arising from her relationship with Plaintiff and her failure to emotionally divorce herself from this relationship, and it is in [the minor child's] best interest for Defendant to engage in such therapy.

. . . .

181. It would not be in [the minor child's] best interest for either parent to exit [the minor child's] life. However, neither is maintaining the status quo in [minor child's] best interest.

182. If [the minor child] were to live primarily with Plaintiff, [the minor child] would be moving to Suffolk, Virginia, where Plaintiff has lived since 2010. Plaintiff is established in this community and has an appropriate home for [the minor child]. [The minor child] is comfortable in this home. . . .

. . . .

184. If [the minor child] were to live primarily with Plaintiff, Katrina would assist with [the minor child's] care if Plaintiff was away for his military duties. Plaintiff's parents are also in close proximity to Plaintiff.

. . . .

188. Plaintiff would likely facilitate an ongoing relationship between [the minor child] and Defendant, but the extent of Plaintiff's efforts would depend on whether Defendant was engaged in therapy.

. . . .

204. Plaintiff is the parent most likely to encourage and support a relationship between [minor child] and the other parent.

. . . .

207. If [the minor child] is left in Defendant's primary care, it is unlikely that the dynamics between Plaintiff and Defendant, between Defendant and Katrina, or between Plaintiff and [the minor child] will change, and it is possible that Plaintiff, in an effort to shield [the minor child] from the conflict, will sever his ties to [the minor child], which would likely be devastating to [the minor child's] emotional development. . . .

. . . .

216. Given the parties' dysfunctional relationship history and the current level of conflict between the parties, unless one parent is given final decision making authority on important issues, joint legal custody is not in [the minor child's] best interest in light of the risk of delay in making timely decisions[.]

Thus, we hold that the trial court's conclusion number 6 is based on findings that clearly illustrate that it would be in the best interest of the minor child for the parties to successfully co-parent and that plaintiff is the party most likely to facilitate a relationship between the minor child and the other parent based on defendant's past interference with the minor child and plaintiff's relationship. Accordingly, we uphold the conclusion of the trial court.

C. Motion to Appoint a Parenting Coordinator

[3] In her last argument, defendant argues that the trial court erred by failing to appoint a parenting coordinator. Defendant's argument is based on the assumption that the trial court "had the responsibility to require the parties to produce evidence of their ability to pay a parenting coordinator if that would be in the best interests of the child." We disagree.

On 14 November 2011, defendant filed a motion to appoint a parenting coordinator arguing that the current custody action constituted a "high conflict" case pursuant to N.C. Gen. Stat. § 50-90(1), which defines a high-conflict case as:

> [a] child custody action involving minor children brought under Article 1 of this Chapter where the parties demonstrate an ongoing pattern of any of the following:

> a. Excessive litigation.
>
> b. Anger and distrust.
>
> c. Verbal abuse.
>
> d. Physical aggression or threats of physical aggression.
>
> e. Difficulty communicating about and cooperating in the care of the minor children.
>
> f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

N.C. Gen. Stat. § 50-90(1) (2013). Pursuant to section 50-91 of the North Carolina General Statutes, a parenting coordinator may be appointed only if

> the [trial] court . . . makes specific findings [1] that the action is a high-conflict case, [2] that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and [3] that the parties are able to pay for the cost of the parenting coordinator.

N.C. Gen. Stat. § 50-91(b) (2013).

On 17 December 2012, the trial court denied defendant's motion, finding the following: "[t]his is a high conflict custody action. However, there was insufficient evidence concerning the parties' present ability to pay a parenting coordinator."

Our review reveals that N.C. Gen. Stat. § 50-91 governs what findings must be made *only* if the trial court, in its discretion, *appoints* a parenting coordinator. In the case before us, the trial court did not appoint a parenting coordinator and defendant does not cite to any authority, nor can we find any, imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one is not appointed.

Furthermore, unchallenged findings suggest that the parties more than likely lacked the ability to pay for a coordinator. Particularly, the trial court found that plaintiff had not been able to pay his attorneys' fees on his own and owed in excess of $70,000.00 toward his attorneys' fees. Defendant, unable to afford paying her legal fees, received funds from a church in excess of $90,000.00.

IV. Conclusion

Because we hold that the trial court made sufficient findings of fact to support its conclusions of law that a substantial change in circumstances had occurred, that modification of custody was in the best interest of the minor child, and that the trial court did not err by denying defendant's motion to appoint a parenting coordinator, we affirm the 17 December 2012 Custody Order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

SANTOS TINAJERO, Employee, Plaintiff
v.
BALFOUR BEATTY INFRASTRUCTURE, INC., Employer, ZURICH AMERICAN INSURANCE COMPANY, Carrier, Defendants

No. COA13-9

Filed 6 May 2014

1. Appeal and Error—workers' compensation—intermediate opinion and award—appeal timely

Defendants' appeal from an opinion and award in a workers' compensation case was timely under N.C.G.S. § 1-278 where defendant timely objected to the order; the order was interlocutory and not immediately appealable; and the order involved the merits and necessarily affected the final judgment.

2. Workers' Compensation—rental cost—handicapped accessible housing—required

The Full Industrial Commission did not err in a workers' compensation case by requiring defendants to pay the rental cost of reasonable handicapped accessible housing for plaintiff. The Commission acted within its authority as set out in *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, and *Espinosa v. Tradesource, Inc.*, 752 S.E.2d 153, in determining that because defendants had previously been willing to pay the full cost for plaintiff's housing in a skilled nursing facility, which was not in plaintiff's medical best interests, they were

obligated to pay the rental cost of reasonable handicapped accessible housing, which was in plaintiff's medical best interests.

3. Workers' Compensation—introduction of new evidence—opportunity to rebut evidence—deposition

The Full Industrial Commission erred in a workers' compensation case by refusing to allow plaintiff to depose the individual who submitted a life care plan to the court at defendants' expense and upon which the Commission based its ruling. Where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence. The Commission did not err by denying plaintiff's request to take a deposition of an individual for the sole purpose of asking the Commission to reconsider a prior ruling. However, the decision was without prejudice to plaintiff filing a new motion to take the deposition following remand of the case.

4. Workers' Compensation—adaptive transportation—defendants not required to purchase vehicle

The Full Industrial Commission did not err in a workers' compensation case by refusing to order defendants to provide plaintiff with the use of an adaptive van. The Commission's finding that plaintiff's access to transportation was satisfactory at the time was supported by competent evidence and under *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, the Commission was not required to mandate that defendants purchase a vehicle for plaintiff.

5. Workers' Compensation—attorneys' fees—costs

The Full Commission erred in a workers' compensation case by determining that plaintiff was not entitled to attorneys' fees under N.C.G.S. § 97-88.1. On remand, following the taking of a certain deposition, the Commission must revisit whether such an award is appropriate and, if so, what the amount of any award should be. Furthermore, following that deposition, the Commission must revisit whether a previous life care plan report constituted a valid rehabilitative service and whether defendants should pay for the cost of the preparation of that report. Finally, plaintiff's argument that defendants should be assessed attorneys' fees for pursuing the prior interlocutory appeal was without merit where the Court of Appeals had already implicitly denied that request.

Judge DILLON concurring in part and dissenting in part.

Appeal by plaintiff and defendants from opinions and awards entered by the North Carolina Industrial Commission on 13 September 2010 and 16 October 2012. Heard in the Court of Appeals 9 May 2013.

R. James Lore, Attorney at Law, by R. James Lore, for plaintiff.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., for defendants.

GEER, Judge.

Plaintiff Santos Tinajero and defendants Balfour Beatty Infrastructure, Inc. and Zurich American Insurance Company each appeal from opinions and awards entered by the North Carolina Industrial Commission arising out of Mr. Tinajero's admittedly compensable injury by accident that resulted in Mr. Tinajero's being a quadriplegic. The primary issue on appeal is whether the Commission properly required defendants to pay the rental cost of reasonable handicapped accessible housing for Mr. Tinajero.

Applying *Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), and *Espinosa v. Tradesource, Inc.*, ___ N.C. App. ___, 752 S.E.2d 153 (2013), we hold that the Commission did not abuse its discretion in making this award given that (1) Mr. Tinajero had no dwelling of his own that could be renovated to provide handicapped accessible housing, (2) defendants had continuously paid the full cost of housing for Mr. Tinajero since his injury by accident so long as he resided in a skilled nursing home or long-term care facility, and (3) the Commission found that living in such facilities was not in Mr. Tinajero's medical best interest. The Commission was free to conclude that defendants should not be allowed to condition their payment of Mr. Tinajero's housing costs on his agreeing to live in a facility that the Commission had found, based on competent evidence, was harmful to him physically and mentally and not in his medical best interests.

Facts

On 11 August 2008, Mr. Tinajero, an undocumented worker from Mexico, was employed by Balfour Beatty Infrastructure, Inc. While Mr. Tinajero was working on a barge, a crane cable broke and knocked him into the water. Immediately following the accident, Mr. Tinajero was transported to Pitt County Memorial Hospital where he was treated

surgically for his injuries. Mr. Tinajero, who was 26 years old at the time of the hearing before the deputy commissioner, had suffered a C4-5 fracture dislocation, leaving him an ASIA A-B quadriplegic.

On 15 August 2008, Mr. Tinajero was transferred to Shepherd Center in Atlanta, Georgia for continuing treatment and rehabilitation. The Shepherd Center provides rehabilitative services for patients with significant neurologic injuries and illnesses, predominately spinal cord and brain injuries. Mr. Tinajero's condition required attendant care 24 hours per day, seven days per week.

Mr. Tinajero remained at the Shepherd Center until 5 December 2008. Mr. Tinajero's nurse case manager was unable to locate an appropriate apartment, but recommended against Mr. Tinajero's being placed in a nursing home upon his discharge from Shepherd Center because, in her experience, such a setting reinforces a "sick" mentality and leads to depression. A subsequent nurse case manager ultimately found one assisted living facility willing to accept someone his age, Briarcliff Haven. Mr. Tinajero was then placed in the sub acute rehabilitation unit at Briarcliff Haven beginning on 5 December 2008.

On 27 February 2009, Mr. Tinajero filed an "Emergency Motion for Medical Treatment" with the Commission. In the motion, Mr. Tinajero asserted that his placement at Briarcliff Haven was not a suitable living environment and that any delay in relocating him would unjustifiably jeopardize his health. Mr. Tinajero requested that the Commission order defendants to pay for his placement in a suitable apartment with 24-hour attendant care.

In response to Mr. Tinajero's motion, the Commission issued an order on 20 March 2009 in which it referred the case to the regular docket for an expedited evidentiary hearing. Before the scheduled hearing date, the parties submitted a "Pre–Trial Agreement guided by Rule 16 of the North Carolina Rules of Civil Procedure." In the pre-trial agreement, the parties set forth a number of issues to be determined at the subsequent hearing. Included among these issues, Mr. Tinajero requested a determination whether defendants were obligated to provide adaptive housing, as well as what type of housing and attendant care were required. On 10 April 2010, Mr. Tinajero, on his own, located an apartment across the street from Shepherd Center and moved into that apartment.

In the hearing before the deputy commissioner, Mr. Tinajero submitted a life care plan created by Michael Fryar. After reviewing Mr. Fryar's credentials, experience, and life care plan, the deputy commissioner

determined that the report prepared by Mr. Fryar was not an objective and unbiased assessment of Mr. Tinajero's needs.

The deputy commissioner concluded that Mr. Tinajero was entitled to lifetime workers' compensation benefits. However, the deputy commissioner also determined that "[d]efendants [were] not obligated to purchase, construct or lease adaptive housing for [Mr. Tinajero] . . . ." According to the deputy commissioner, defendants were already providing Mr. Tinajero with suitable housing at Briarcliff Haven, and the medical evidence presented at the hearing failed to establish that it was necessary for Mr. Tinajero to leave the Briarcliff Haven facility.

Mr. Tinajero appealed to the Full Commission. On 13 September 2010, the Commission entered an opinion and award affirming in part, reversing in part, and modifying in part the deputy commissioner's opinion and award. With respect to Mr. Tinajero's housing, the Full Commission determined that Mr. Tinajero's placement at Briarcliff Haven was not appropriate in that it endangered his physical and psychological health.[1] The Full Commission found that the evidence supported Mr. Tinajero's concerns about infections due to inadequate medical care, including medical orders not being followed regarding the timeliness of required intermittent catheterizations. Because of Briarcliff Haven's inability to assure that they could properly follow Mr. Tinajero's medical orders and timely perform the catheterizations, defendants had to contract with outside nurses to provide necessary nursing care.

The Full Commission further found that the greater weight of the lay and medical evidence established that living in Briarcliff Haven was having a negative impact on Mr. Tinajero's mental health. Based on the medical evidence, the Full Commission found that "it was in plaintiff's medical best interest for defendants to provide housing suitable for the maximum possible level of independence, which means someplace other than a skilled nursing home or long-term care facility."

The Full Commission found that at the time of his injury by accident, Mr. Tinajero did not own a dwelling, but rather shared a rented apartment with two other people in New Bern, North Carolina. Mr. Tinajero, therefore, owned no property that could be made handicapped accessible for

1. The Commission found that Mr. Tinajero's nurse case manager had specifically advised defendants that she did not recommend a nursing home because it would not optimize his learning and rehabilitation, would expose him to infections, and leads to depression. The Commission further noted that the case manager, when deposed, expressed her expert opinion that the best housing environment for plaintiff would be an apartment with 24-hour caregivers.

use by him in his post-injury condition. The Full Commission noted, however, that a 27 May 2010 progress report by his nurse case manager indicated he was living in an apartment. The Full Commission observed that defendants contended "that they provided suitable accommodations for plaintiff at Briarcliff Haven and that they are not obligated to pay for the lease of plaintiff's handicapped accessible apartment," but pointed out "*that for many years defendants have in effect paid for the entire cost of plaintiff's housing at both Shepherd Center and Briarcliff Haven*." (Emphasis added.)

The Full Commission, therefore, found:

> [B]ecause plaintiff has no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. In this case, the greater weight of the evidence shows that plaintiff should be placed in housing that will allow him to have as much independence as possible. Reasonable handicapped accessible housing for plaintiff at this time is an apartment which can accommodate the necessary 24-hour daily attendant care for plaintiff. Although defendants are obligated to pay for the lease of such apartment, the selection of an apartment must be reasonable under the circumstances. An assessment by a certified life care planner of plaintiff's current living quarters is necessary to ascertain whether the apartment is appropriate handicapped accessible housing to accommodate plaintiff's physical needs.

With respect to Mr. Tinajero's request that defendants be required to provide adaptive transportation, the Full Commission found that Mr. Tinajero had never possessed a driver's license or owned a motor vehicle. Since his discharge from Shepherd Center, defendants had provided transportation through a private company for medical visits, therapy, recreation at the Shepherd Center, and social activities. In addition, defendants had assisted Mr. Tinajero in obtaining a pass for the public transportation system in Atlanta. The Full Commission found that two of Mr. Tinajero's doctors considered these transportation options to be reasonable for Mr. Tinajero. The Full Commission, therefore, determined that "[d]efendants are not obligated to purchase a vehicle for plaintiff, but would be obligated to modify any vehicle plaintiff purchases for his own transportation to make it accessible to plaintiff's needs. The Full Commission finds that the transportation services currently being provided plaintiff by defendants are reasonable."

Based on the findings of fact, the Full Commission concluded that Mr. Tinajero was totally disabled and entitled to total disability compensation as well as medical treatment for his lifetime. The Full Commission also ordered that Mr. Tinajero receive attendant care 24 hours per day, seven days per week to be provided by qualified nursing personnel.

With respect to housing, the Full Commission concluded, citing *Derebery* and *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, 473 S.E.2d 356 (1996), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997) (*Timmons I*):

> In this case, because plaintiff owns no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. While the case law has held that the provision of ordinary housing is an expense of daily life to be paid from an injured worker's disability compensation, the additional cost of renting handicapped accessible housing is not an ordinary expense and should be borne by defendants, *who have up to this point continuously provided accommodated housing for plaintiff at Shepherd Center and Briarcliff Haven since plaintiff's compensable injury by accident*. Therefore, defendants shall pay the rental cost of reasonable handicapped accessible housing for plaintiff, which at this time is an apartment which can accommodate the necessary 24-hour daily attendant care for plaintiff.

(Emphasis added.)

The Full Commission concluded that "[d]efendants are not required to purchase or lease adaptive transportation for plaintiff or for his use. *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985)." Instead, the Full Commission concluded that defendants had already provided reasonable transportation, although if Mr. Tinajero purchased a vehicle, defendants were obligated to modify it to accommodate his disability.

The Full Commission agreed with the deputy commissioner that the "life care plan prepared by Michael Fryar in this case was not an unbiased, objective, fair, and balanced assessment." The Full Commission concluded that defendants were not required to pay for Mr. Fryar's report because it did not constitute a valid " 'rehabilitative service' " within the meaning of N.C. Gen. Stat. § 97-2(19). The Full Commission concluded,

however, that Mr. Tinajero was entitled to have defendants pay for the preparation of a life care plan "by a well-qualified and certified life care planner with long-standing experience dealing with catastrophic life care planning. Plaintiff is also entitled to an assessment by the life care planner of his current housing arrangements and whether the apartment is appropriate to accommodate plaintiff's physical needs."

Finally, the Full Commission concluded that "[d]efendants did not defend this claim in an unreasonable manner or without reasonable grounds and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1; *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982)."

Defendants filed notice of appeal from the opinion and award of the Full Commission, and Mr. Tinajero cross-appealed. This Court dismissed the appeal as interlocutory since complete resolution of the medical issues in the case required, as the Full Commission had concluded, completion of a satisfactory life care plan for Mr. Tinajero. *See Tinajero v. Balfour Beatty Infrastructure, Inc.*, 214 N.C. App. 563, 714 S.E.2d 867, 2011 N.C. App. LEXIS 1832, 2011 WL 3570046 (2011) (unpublished).

On remand, the parties agreed to have Susan Caston assess Mr. Tinajero's needs although she was not a certified life care planner. Ms. Caston completed her report on 21 May 2012. Ms. Caston's rehabilitation plan addressed Mr. Tinajero's housing, transportation, and vocational/employment status. Mr. Tinajero filed a motion to depose Ms. Caston on 28 June 2012.

Mr. Tinajero also sought to take the deposition of V. Robert May, III, Chief Executive Officer of the International Commission on Health Care Certification, the international organization that provides accreditation for life care planners. Mr. Tinajero asserted that after the Full Commission had found that Mr. Fryar's life care plan did not conform to industry standards, that life care plan had been submitted to the International Commission on Health Care certification for peer review. According to the motion, the blind evaluation of Mr. Fryar's plan had resulted in its being used as " 'one of our preferred examples' " in Mr. May's presentations. Mr. Tinajero sought Mr. May's deposition for the limited purpose of authenticating the report reviewing Mr. Fryar's life care plan. The Full Commission denied Mr. Tinajero's motion to depose Ms. Caston and Mr. May in its opinion and award entered on 16 October 2012.

Pertinent to this appeal, the Full Commission's 16 October 2012 opinion and award found, based on Ms. Caston's evaluation, that "the

geographical location of [Mr. Tinajero's] current apartment adequately [met] his needs to access the community." With respect to parking, the Commission found that "[i]nasmuch as plaintiff cannot legally drive in the United States and does not now own a handicap-accessible vehicle, it is presently irrelevant whether his apartment provides a parking space for him."

As for Mr. Tinajero's housing, the Full Commission found:

> Placing plaintiff in a position which maximizes his independence is a goal repeatedly expressed throughout the medical evidence in this case. While plaintiff's current living situation is preferable to a skilled nursing home or long-term care facility, plaintiff cannot reach the maximum possible level of independence in a housing situation in which he cannot maneuver or fully access the kitchen, bathroom, and laundry room. Therefore, it is reasonable and medically necessary that an occupational therapist with experience in addressing accessibility issues for the catastrophically injured be consulted to identify and make recommendations to the parties regarding accessibility options for plaintiff given his current functional status.

Mr. Tinajero filed a notice of appeal of the 16 October 2012 opinion and award on 18 October 2012 and of the interim 13 September 2010 order in a supplemental notice of appeal on 19 November 2012. Defendants filed notice of appeal of the 16 October 2012 order on 30 October 2012, and supplemental notice of appeal of the 13 September 2010 order on 30 November 2012.

<u>Discussion</u>

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). As the fact-finding body, " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)).

I. Defendants' Appeal

A. Timeliness of Appeal

[1] As a preliminary matter, we address Mr. Tinajero's contention that defendants did not timely appeal the entry of the 13 September 2010 opinion and award and, therefore, this Court lacks jurisdiction to consider defendants' arguments regarding the Commission's requirement that they pay for Mr. Tinajero's housing. Mr. Tinajero points out that defendants' 30 October 2012 notice of appeal stated only that defendants were appealing from the 16 October 2012 opinion and award.

Defendants' timely first notice of appeal did not mention the 13 September 2010 opinion and award. Defendants' supplemental notice of appeal, indicating that they were also appealing the 13 September 2010 opinion and award, was filed more than 30 days after defendants' receipt of the final opinion and award of the Commission. *See* N.C.R. App. P. 3(c)(1), (2) (providing that in order to be timely, notice of appeal must be filed either within 30 days of entry of judgment if the judgment was served with three days, or within 30 days of service to a party if service was not effected within three days).

We note that while Rule 3(d) of the Rules of Appellate Procedure provides that the notice of appeal "shall designate the judgment or order from which appeal is taken," N.C. Gen. Stat. § 1-278 (2013) provides: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

Here, defendants immediately objected to the 13 September 2010 opinion and award by appealing it. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 139, 716 S.E.2d 661, 665 (2011) (holding, in workers' compensation case, that claim in reply brief that Commission's prior ruling was in error was sufficient objection to meet first requirement of N.C. Gen. Stat. § 1-278). In addition, this Court already concluded, when dismissing defendants' appeal, that the order was interlocutory and not immediately appealable. *Tinajero*, 214 N.C. App. 563, 714 S.E.2d 867, 2011 N.C. App. LEXIS 1832, 2011 WL 3570046 (2011).

Finally, the 13 September 2010 opinion and award involved the merits and necessarily affected the final opinion and award because the 13 September 2010 opinion and award substantially decided the primary issues in contention, including Mr. Tinajero's housing and transportation. Since defendants' appeal of the 13 September 2010 opinion and award meets the requirements of N.C. Gen. Stat. § 1-278, this Court has jurisdiction to consider defendants' arguments. *See, e.g.*, *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008) (holding that even though notice of appeal referenced only final judgment and post-trial order denying motion for new trial, Court had jurisdiction to review denial of motion for directed verdict under N.C. Gen. Stat. § 1-278 when defendant objected at trial and denial of directed verdict involved merits and affected final judgment); *Brooks*, 139 N.C. App. at 642-43, 535 S.E.2d at 59 (finding requisites of N.C. Gen. Stat. § 1-278 satisfied when directed verdict dismissing all counterclaims against co-defendants was objected to at trial, was implicated by motion specifically appealed, was interlocutory, and order deprived defendant of potential claims).

B. <u>Commission's Requirement that Defendants Pay for Plaintiff's Housing</u>

[2] Defendants first contend that the Commission erred in ordering that defendants "provide handicapped accessible housing for [Mr. Tinajero], which at [that] time [was] a handicapped accessible apartment that [could] accommodate the necessary 24-hour daily attendant care for plaintiff. Defendants shall pay for the lease of such apartment, but the selection of an apartment must be reasonable under the circumstances." Defendants contend that rent is an ordinary expense of life required to be paid from wages.

Because Mr. Tinajero is totally and permanently disabled, N.C. Gen. Stat. § 97-29 (2007) controls, and "compensation, including medical compensation, shall be paid for by the employer during the lifetime of the injured employee." Medical compensation, in turn, was defined in N.C. Gen. Stat. § 97-2(19) (2007) as:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel and *other treatment*, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . .

(Emphasis added.)

In *Derebery*, our Supreme Court, in applying a prior version of N.C. Gen. Stat. § 97-29, construed what compensation falls within the scope of "other treatment." 318 N.C. at 199-200, 347 S.E.2d at 819. The plaintiff in *Derebery* had presented evidence that he had lived with his parents in their rented home and that the owner of the home refused to allow the plaintiff's family to modify the house structurally to accommodate the plaintiff's wheelchair. *Id.* at 198, 347 S.E.2d at 818. The Commission had ordered the defendants, pursuant to N.C. Gen. Stat. § 97-29, to provide the plaintiff with a wheelchair-accessible place to live. *Id.* at 195-96, 347 S.E.2d at 816-17.

This Court reversed, holding that the provision requiring payment for " 'other treatment or care' " could not "be reasonably interpreted to extend the employer's liability to provide a residence for an injured employee." *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, 72, 332 S.E.2d 94, 97 (1985). The Supreme Court reversed this Court, holding "that the employer's obligation to furnish 'other treatment or care' may include the duty to furnish alternate, wheelchair accessible housing." 318 N.C. at 203-04, 347 S.E.2d at 821. Specifically, "an employer must furnish alternate, wheelchair accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable." *Id.* at 203, 347 S.E.2d at 821.

Defendants, in this case, however, urge this Court to follow Justice Billings' dissent in *Derebery*, in which she concluded that housing is an ordinary necessity of life that the employee is required to pay for out of his disability compensation. *Id.* at 205-06, 347 S.E.2d at 822 (Billings, J., dissenting). Defendants contend that this Court previously adopted that dissent in *Timmons I*.

The plaintiff in *Timmons I* was a paraplegic who initially lived with his parents. 123 N.C. App. at 458, 473 S.E.2d at 357. The defendant paid to modify the plaintiff's parents' home to make it accessible for the plaintiff's use. *Id.* Subsequently, the plaintiff moved to a handicapped-accessible apartment where he lived for approximately eight and a half years. *Id.* When the rent increased, the plaintiff moved back to his parents' home. *Id.* Ultimately, however, unlike the plaintiff in *Derebery* or Mr. Tinajero in this case, the plaintiff in *Timmons I* returned to full-time employment with the defendant. *Id.* He was able to purchase land and requested that the Commission order the defendant to finance the construction of a new, handicapped-accessible home on that land. *Id.* at 458-59, 473 S.E.2d at 357-58. The Commission, however, refused to order that the defendant pay for the construction of a new house, but rather

ordered only that the defendant pay the expense of making the plaintiff's new home handicapped accessible. *Id.* at 459, 473 S.E.2d at 358.

Both the plaintiff and the defendant appealed to this Court. On appeal, the defendant argued that it should not be required to provide any assistance in constructing the plaintiff's residence. *Id.* at 460, 473 S.E.2d at 358. The plaintiff in turn contended that the defendant should be required to bear the entire cost of constructing his residence. *Id.* This Court affirmed the Commission, concluding based on *Derebery*, that "the Commission's finding that the accommodations at plaintiff's parents' home are no longer suitable supports its conclusion that plaintiff is entitled to have defendant pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities." *Id.* at 461, 473 S.E.2d at 359 (internal quotation marks omitted).

However, the Court rejected the plaintiff's argument that *Derebery* required the defendant to pay the entire cost of constructing the plaintiff's residence:

> As pointed out by Justice (later Chief Justice) Billings in her dissent in *Derebery*, the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Worker's Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the plaintiff in this case, is not an ordinary expense of life for which the statutory substitute wage is intended as compensation. Such extraordinary and unusual expenses are, in our view, properly embraced in the "other treatment" language of G.S. § 97-25, which the basic costs of acquisition or construction of the housing is not.

Id. at 461-62, 473 S.E.2d at 359. Accordingly, the Court affirmed the Commission's opinion and award that defendant only " 'pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities.' " *Id.* at 462, 473 S.E.2d at 359.

From that unanimous decision of this Court, the defendant filed a petition for discretionary review, asking the Supreme Court to consider "[w]hether an employer [was] required by G.S. 97-25 to pay the cost of construction of a house, in whole or in part, for an employee who is a paraplegic due to a work related injury where the employee has returned to full-time employment and the employer has previously modified one

house for employee's use." After the Supreme Court allowed the petition, *Timmons v. N.C. Dep't. of Transp.*, 344 N.C. 739, 478 S.E.2d 13 (1996), the defendant urged the Court to overturn *Derebery* or to "consider the well reasoned dissent of Justice Billings in *Derebery* and perhaps now adopt it as the rule of law." The plaintiff, however, argued that *Derebery* mandated payment for the cost of the entirety of the construction of his home.

The Supreme Court affirmed this Court's order in a per curiam decision. *Timmons v. N.C. Dep't of Transp.*, 346 N.C. 173, 484 S.E.2d 551 (1997). " '*Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written.' " *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 195 N.C. App. 378, 386, 673 S.E.2d 137, 143 (2009) (quoting *Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E.2d 548, 549 (1931)). Although defendants urge us to adopt a reading of *Timmons* by which Justice Billings' dissent in that case has been adopted as the governing rule of law in North Carolina, our Supreme Court's rejection of that argument on discretionary review in *Timmons I* precludes such a reading of the case.

This Court has since addressed both *Derebery* and *Timmons I* in a case in which the parties both made arguments nearly identical to those in this case:

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

2. This Court noted in *Espinosa* that *Derebery*'s construction of the phrase "other treatment" applies equally to cases under N.C. Gen. Stat. § 97-29 and to cases under N.C. Gen. Stat. § 97-25. ___ N.C. App. at ___ n.6, 752 S.E.2d at 159 n.6

> under those statutes, not entirely new rules to be followed in place of or in addition to the statutes created by our legislature.

Espinosa, ___ N.C. App. at ___, 752 S.E.2d at 160-61.

In *Espinosa*, the Commission had determined that the defendants should pay the pro rata difference between the rent required for the plaintiff's new, handicapped-accessible home and the rent the plaintiff had to pay as an ordinary expense of life before his injury. *Id.* at ___, 752 S.E.2d at 161. In upholding the Commission's decision, this Court explained:

> The Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer. Because Plaintiff did not own his own home in this case, he was required to find new rental accommodations that would meet his needs. In this factual circumstance, it was appropriate for the Commission to require the employer to pay the difference between the two.
>
> While circumstances may occur in which an employer is required to pay the entire cost of the employee's adaptive housing, neither the Supreme Court's opinion in *Derebery* nor our holding in *Timmons* support Plaintiff's assertion that such a requirement is necessary *whenever* an injured worker does not own property or a home. Such a ruling would reach too far.

Id. at ___, 752 S.E.2d at 161.

In this case, in contrast, the Commission concluded that defendants should pay the full cost of Mr. Tinajero's adaptive house. Consistent with *Derebery*, *Timmons I*, and *Espinosa*, the Commission noted first that "because plaintiff owns no dwelling that can be renovated to provide handicapped accessible housing, defendants are responsible for providing handicapped accessible housing for plaintiff. While the case law has held that the provision of ordinary housing is an expense of daily life to be paid from an injured worker's disability compensation, the additional cost of renting handicapped accessible housing is not an ordinary expense . . . ."

While defendants urge that they should only have to pay that portion of the rent that exceeds the amount Mr. Tinajero was paying prior to his injury -- the approach adopted by the Commission in *Espinosa* -- the Commission, in this case, although acknowledging that Mr. Tinajero, prior to his injury, had shared the cost of an apartment with two other people, rejected defendants' contention. The Commission pointed out that defendants were fully willing to pay "for many years . . . the entire cost of plaintiff's housing at both Shepherd Center and Briarcliff Haven." Moreover, while Mr. Tinajero was housed at Briarcliff Haven, defendants also had to pay for outside nursing care to supplement the care provided by the facility because the facility was consistently unable to "properly follow plaintiff's medical orders and timely perform his intermittent catheterizations." Thus, as the Commission found, defendants were completely willing to pay the cost of a skilled nursing home or long-term care facility, even if they had to also pay for additional outside nursing care, but they were unwilling to pay the cost of leasing an apartment.

The Commission expressly found that the housing chosen by defendants, Briarcliff Haven, was not suitable in that (1) living in that facility was "having a negative impact on [Mr. Tinajero's] mental health"; (2) the medical care he was receiving in the facility was inadequate; and (3) moving Mr. Tinajero from the nursing facility to an apartment served the interests of the repeatedly stated medical priority of "[p]lacing [Mr. Tinajero] in a position to maximize his independence . . . ." Although defendants argue with the Commission's findings that Mr. Tinajero needed to leave Briarcliff Haven, those findings are supported by ample evidence in the record.

Consequently, defendants' position before the Commission was that they would pay fully for housing that the Commission determined was not in Mr. Tinajero's best medical interests and was not suitable, but they would not pay for housing -- in the form of an apartment with attendant care -- that the Commission found, based on competent evidence, was in Mr. Tinajero's best medical interests. In other words, defendants conditioned their full payment of housing costs on Mr. Tinajero's accepting housing contrary to his medical interests.

Under the particular circumstances of this case, we hold that the Commission properly exercised its discretion in concluding that defendants should not be allowed to force such a choice on an injured employee. Rather, under the circumstances found by the Commission, the Commission acted within its authority as set out in *Derebery*, *Timmons I*, and *Espinosa*, in determining that because defendants had

previously been willing to pay the full cost for Mr. Tinajero's housing in a skilled nursing facility, which was not in Mr. Tinajero's medical best interests, they were obligated to "pay the rental cost of reasonable handicapped accessible housing," which was in Mr. Tinajero's medical best interests. We, therefore, affirm the Commission's ruling on Mr. Tinajero's housing.[3]

II. Plaintiff's Appeal

A. Denial of Mr. Tinajero's Request for Depositions

[3] Mr. Tinajero contends that the Commission erred in refusing to allow him to depose Ms. Caston and Mr. May. Under N.C. Gen. Stat. § 97-85(a) (2013), the Full Commission may, upon application by a party, "receive further evidence." However, a party "does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown." *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 65-66, 546 S.E.2d 133, 141 (2001). " '[T]he question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion.' " *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999) (quoting *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E.2d 56, 65 (1980)).

1. Susan Caston

With respect to Ms. Caston, Mr. Tinajero argues more specifically that his due process rights and the Rules of the Industrial Commission were violated when the Full Commission admitted Ms. Caston's report, but denied Mr. Tinajero's motion to depose Ms. Caston. Our courts have long held, based on principles of due process and court procedure, that "[w]here the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 134-35, 535 S.E.2d 602, 605-06 (2000).

In *Allen v. K-Mart*, 137 N.C. App. 298, 302, 528 S.E.2d 60, 63 (2000), the defendants argued that the Commission had abused its discretion in

3. Defendants also argue that Mr. Tinajero could not lawfully lease an apartment in Atlanta because he is undocumented. Defendants contend that they cannot legally pay rent for an apartment that Mr. Tinajero cannot lawfully lease. Defendants cite no legal authority for this position and, therefore, we do not address it.

considering two independent medical examinations as evidence without permitting the defendants to depose or cross-examine either physician. This Court agreed, holding that "[d]efendants should have been allowed the opportunity to discredit the doctors' reports." *Id.*

This Court observed that "[t]he opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system." *Id.* at 304, 528 S.E.2d at 64. Based on these principles, the Court "agree[d] with defendants that the Commission manifestly abused its discretion by allowing significant new evidence to be admitted but denying defendants the opportunity to depose or cross-examine the physicians, or requiring plaintiff to be examined by experts chosen by defendants." *Id.* The Court, therefore held "that where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence." *Id.*, 528 S.E.2d at 64-65.

Here, the Commission specifically ordered that the parties agree on a person to prepare a life care plan and conduct an assessment of Mr. Tinajero's current living arrangements at defendants' expense. This Court concluded that the prior appeal was interlocutory and dismissed it so that additional proceedings related to the life care plan could take place. The parties ultimately agreed upon Susan Caston as the person to conduct the further assessment. In denying Mr. Tinajero's motion to depose Ms. Caston following completion of her report, the Commission found "that her report provides sufficient information for the Full Commission to rule upon the remaining issues in the case, and therefore, that a deposition at this point would only serve to further delay the entry of a final Opinion and Award."

The Commission then ordered that "plaintiff's motion to depose Ms. Caston is hereby DENIED, and Ms. Caston's report is received into evidence." In the opinion and award that followed this ruling, the Commission repeatedly referenced Ms. Caston's report as the support for various findings of fact. Further, even though Ms. Caston had not addressed all of the recommendations made by Mr. Tinajero's life care planner, Mr. Fryar, and Mr. Tinajero, in his motion to depose Ms. Caston, had indicated that a deposition was necessary to obtain her opinion regarding the appropriateness of those recommendations, the Commission denied those recommendations. Mr. Tinajero was given no opportunity to establish through Ms. Caston that those recommendations were appropriate.

This case is indistinguishable from *Allen* and *Goff*. Defendants, however, argue that Mr. Tinajero waived his request for a deposition and agreed to the Commission's proceeding without deposition of the experts in the case. Defendants point to an 8 August 2012 letter from Mr. Tinajero's counsel to the Full Commission that highlighted Mr. Tinajero's need for a speedy resolution of his case and requested a ruling from the Commission on the motion for depositions to further the final resolution of the case:

> *What the Plaintiff prays for now is the most expeditious ruling possible*. We respectfully request that you promptly enter an order allowing us to notice the defense with the depositions outlined in our motion. Having more information and an expanded opinion from Caston can only help the Commission make a better ruling without causing further delays. . . . We were disappointed that Caston's report did not have the quality and depth that a quadriplegic plaintiff deserves -- given the large number of spinal cord injury protocols to be followed -- so our intention was to flesh out those opinions through an expedited deposition.
>
> *Otherwise, we respectfully request that our motion be denied and that the Commission rule on the balance of the case as expeditiously as possibl*e. We venture to guess that Zurich American Insurance Co. will continue to appeal the case back to the Court of Appeals, and we would like to get that process underway as soon as possible. We do not want any further delay to be experienced by this very young man who suffers the consequences of this drawn out legal proceeding.

(Emphasis added.)

We hold that this letter -- essentially simply asking the Commission to allow or deny the motion as soon as possible -- cannot reasonably be read as a waiver of Mr. Tinajero's request to take the deposition of Ms. Caston. Although the language of the letter suggests frustration with the delay, it does not suggest that Mr. Tinajero was acquiescing in the admission of the contents of Ms. Caston's report without objection.

In sum, Mr. Tinajero properly requested leave to take Ms. Caston's deposition once he received Ms. Caston's report. Under *Allen* and *Goff*, the Commission erred in admitting Ms. Caston's report without allowing

Mr. Tinajero an opportunity to depose Ms. Caston. We, therefore, reverse the 16 October 2012 opinion and award and remand for further proceedings, including the entry of a new opinion and award following the deposition of Ms. Caston.

2. V. Robert May

Mr. Tinajero also argues that the Commission erred in denying his request to depose Mr. May. As to this request, Mr. Tinajero's motion asked that Mr. May's deposition be taken "for the limited purpose of authenticating the attached submissions and resulting report of the peer review of [Mr. Tinajero's] life care plan [created by Mr. Fryar] by the International Commission on Health Care Certification." The Commission found as to that motion that Mr. Tinajero sought "to rehabilitate Mr. Fryar and his life care plan, an issue that has already been ruled upon by the Commission."

We cannot conclude that the Commission abused its discretion in denying a request to take a deposition for the sole purpose of asking the Commission to reconsider a prior ruling. Nevertheless, because we acknowledge that it is possible Ms. Caston's testimony may provide a basis for renewing the motion, our holding is without prejudice to Mr. Tinajero's filing a new motion to take Mr. May's deposition following Ms. Caston's deposition.

B. Transportation

[4] We next address Mr. Tinajero's contention that the Commission erred in refusing to order defendants to provide Mr. Tinajero with the use of an adaptive van. The Commission made the following conclusion of law regarding Mr. Tinajero's transportation needs:

> Defendants are not required to purchase or lease adaptive transportation for plaintiff or for his use. *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985). Defendants have provided reasonable transportation for plaintiff through a private transportation service, access to public transportation, and a motorized wheelchair and shall continue to do so. N.C. Gen. Stat. § 97-2(19). Should plaintiff purchase his own vehicle, defendants are obligated to modify the same to accommodate plaintiff's disability. *McDonald v. Brunswick Elec. Membership Corp.*, *supra*, at 753, 336 S.E.2d at 407.

Mr. Tinajero argues that the Commission improperly relied upon *McDonald*. While we agree with Mr. Tinajero that *McDonald* can no longer stand for the proposition that an employer may never be required to provide a plaintiff with a specially-equipped van, we do not agree that the Commission applied such a rigid rule.

In *McDonald*, 77 N.C. App. at 753, 336 S.E.2d at 407, the plaintiff suffered a compensable injury by accident arising out of his employment that resulted in the amputation of both of his legs and his left arm. The Commission concluded that the defendants were required to provide the plaintiff with a specially-equipped van on the grounds that it was a reasonable and necessary rehabilitative service within the meaning of N.C. Gen. Stat. § 97-29. 77 N.C. App. at 754, 366 S.E.2d at 407.

On appeal, this Court reversed. Relying solely on *Derebery v. Pitt Cnty. Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94 (1985), this Court "conclude[d] that neither the phrase 'other treatment or care' nor the term 'rehabilitative services' in G.S. 97-29 can reasonably be interpreted to include a specially-equipped van. This language in the statute plainly refers to services or treatment, rather than tangible, non-medically related items such as a van; thus, it would be contrary to the ordinary meaning of the statute to hold that it includes the van purchased by plaintiff." *McDonald*, 77 N.C. App. 756-57, 336 S.E.2d at 409.

Of course, subsequently, our Supreme Court reversed this Court's decision on which *McDonald*'s holding was founded and expressly rejected the reasoning adopted by *McDonald*. Following the Supreme Court's decision in *Derebery*, there can no longer be a black letter rule that a defendant cannot be required to provide a specially-adapted van and can only be required to modify a van already owned by a plaintiff. This Court subsequently recognized that *McDonald* was superseded by *Derebery* in *Grantham v. Cherry Hosp.*, 98 N.C. App. 34, 39-40, 389 S.E.2d 822, 825 (1990).

Under the Supreme Court's decision in *Derebery*, an employer may be required to provide adaptive transportation, including use of a specially-adapted van, if the plaintiff's existing access to transportation is not satisfactory and "for some exceptional reason" modification of those modes of transportation to make it satisfactory "is not practicable." 318 N.C. at 203, 347 S.E.2d at 821. Our review of the Commission's opinion and award indicates that the Commission made the findings required by *Derebery* even though it cited *McDonald* as support for its conclusion.

The Commission found regarding Mr. Tinajero's transportation needs:

> Plaintiff has never possessed a driver's license or owned a motor vehicle. Since his discharge from Shepherd Center, defendants have provided transportation for plaintiff through a private company for medical visits, therapy, and recreation at Shepherd Center, and social activities. Defendants also assisted plaintiff in obtaining his MARTA pass for the public transportation system in Atlanta. He has an electric wheelchair he uses for local trips. Dr. Bilsky and Dr. Scelza considered these reasonable transportation options for plaintiff. Defendants are not obligated to purchase a vehicle for plaintiff, but would be obligated to modify any vehicle plaintiff purchases for his own transportation to make it accessible to plaintiff's needs. The Full Commission finds that the transportation services currently being provided plaintiff by defendants are reasonable.

In other words, the Commission found that Mr. Tinajero's access to transportation is satisfactory at this time. This finding is supported by competent evidence and, therefore, is binding. Under *Derebery* and given this finding, the Commission was not required to mandate that defendants purchase a vehicle for Mr. Tinajero. We, therefore, affirm this portion of the Commission's opinion and award.[4]

C. Taxation of Attorneys' Fees and Costs

[5] Mr. Tinajero next contends that the Full Commission erred by failing to tax defendants with attorneys' fees for unreasonably pursuing their defense of this action before the Commission pursuant to N.C. Gen. Stat. § 97-88.1 (2013). Under that statute, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the *whole cost* of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." *Id.* (emphasis added).

The purpose of N.C. Gen. Stat. § 97-88.1 is to prevent " 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App.

4. We note that on remand, the Commission's decision regarding transportation may be affected by Mr. Tinajero's deposition of Ms. Caston since her report specifically addressed transportation.

767, 768, 394 S.E.2d 191, 192 (1990) (quoting *Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576). The statute's reference to the Commission's assessing "the whole cost" reveals the legislature's intent that the Commission would decide this issue at the end of the litigation when "the whole cost" would be known.

Here, the Commission concluded in its interlocutory order of 13 September 2010 with regard to defendants' liability under N.C. Gen. Stat. § 97-88.1:

> Defendants did not defend this claim in an unreasonable manner or without reasonable grounds and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1; *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

Especially since the Commission's 13 September 2010 opinion and award ordered the preparation of a life care plan, the Commission should not, at that stage, have decided whether Mr. Tinajero was entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.1. Instead, the proper point in the proceedings for the Commission to address this issue was in the Commission's final disposition of the case in its 16 October 2012 order.

We, therefore, reverse the Commission's determination that Mr. Tinajero is not entitled to fees under N.C. Gen. Stat. § 97-88.1. On remand, following the taking of Ms. Caston's deposition, the Commission shall revisit whether such an award is appropriate and, if so, what the amount of any award should be, in its final opinion and award.

Mr. Tinajero further argues that the Commission erred by failing to tax all costs against defendants, including the costs related to Mr. Tinajero's certified life care plan. The Commission concluded in its 13 September 2010 opinion and award:

> The report and life care plan prepared by Michael Fryar in this case was not an unbiased, objective, fair, and balanced assessment and is not accepted by the Full Commission as such. . . . Defendants are not required to pay for Mr. Fryar's report, because the same does not constitute a valid "rehabilitative service" within the meaning of N.C. Gen. Stat. § 97-2(19).

Because we have remanded for the taking of Ms. Caston's deposition and Mr. Tinajero has indicated his intent to question Ms. Caston regarding various components of Mr. Fryar's plan, the Commission should,

following that deposition, revisit whether Mr. Fryar's report constituted a valid "rehabilitative service" and whether defendants should pay for the cost of the preparation of that report.

Finally, Mr. Tinajero argues that defendants should be assessed attorney's fees for pursuing the prior interlocutory appeal. As Mr. Tinajero acknowledges, he requested in his motion to dismiss filed with this Court in the prior appeal that this Court instruct the Commission on remand to determine what amount of attorneys' fees and costs should be taxed against defendants as sanctions. Although this Court granted the motion to dismiss, it did not address Mr. Tinajero's request for attorneys' fees and costs and, therefore, implicitly denied that request. We are bound by the prior panel's failure to award attorneys' fees and costs based on the interlocutory appeal and cannot, in this later appeal, determine that fees and costs should have been awarded.

Conclusion

In sum, we affirm the Commission's determination that defendants were required to provide Mr. Tinajero with handicapped accessible housing and affirm its determination that defendants currently are providing reasonable transportation for Mr. Tinajero. We reverse the Commission's 16 October 2012 opinion and award for failure to allow Mr. Tinajero to take the deposition of Ms. Caston and remand to allow the taking of that deposition and entry of a new opinion and award taking into account not only Ms. Caston's report but also her deposition.

Finally, we reverse the Commission's determination that Mr. Tinajero was not entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.1 and was not entitled to have defendants pay for the cost of the preparation of Mr. Fryar's life care plan and remand for a determination of those two issues at the completion of the proceedings on remand.

Affirmed in part; reversed in part.

Judge ELMORE concurs.

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

I agree with the majority on all issues except with regard to the issue addressed in Section II.B. of its opinion, which addresses the Full Commission's requirement that Defendants pay for Plaintiff's housing. Accordingly, I concur, in part, and dissent, in part.

On the housing issue, Defendants contend, in part, that the Commission erred by ordering Defendants to pay for the entire lease expense of Plaintiff's handicapped accessible apartment. The Commission ordered Defendants to pay, *inter alia*, weekly, wage-replacement benefits of "$496.77 for the remainder of Plaintiff's lifetime as provided by N.C. Gen. Stat. § 97-31(17)" ***and*** the full amount of Plaintiff's lease payments for a handicapped accessible apartment as "other treatment" under N.C. Gen. Stat. § 97-25. The majority concluded that the Commission did not err. I agree with the majority that Defendants are, indeed, obligated to provide benefits to cover Plaintiff's lease payment in this case. However, I believe a *portion* of the lease payment is being provided through the weekly benefits Defendants are paying to cover Plaintiff's ordinary expenses of life; and, therefore, I believe the Commission erred by classifying Plaintiff's *entire* lease payment as "other treatment" under G.S. 97-25.

It is certainly within the discretion of the Commission to make an award for "other treatment" under G.S. 97-25. *Espinosa v. Tradesource, Inc.*, __ N.C. App. __, __, 752 S.E.2d 153, 159 (2013). However, the Commission's discretion to make such an award is limited to that which is reasonably "required to effect a cure or give relief[.]" *Id.* at __, 752 S.E.2d at 163 (citations omitted). In this case, Plaintiff's accident required his housing arrangement to be modified. Prior to the accident, he rented an apartment, living with two other people. Now, he requires a more expensive apartment that is handicapped accessible and which allows for 24-hour attendant care. I believe in this case that some portion of Plaintiff's lease payments is an ordinary expense of life and some portion is an expense designed to "effect a cure and give relief." By classifying the entire amount as "other treatment," the Commission is, in effect, providing Plaintiff a double recovery of that portion of his lease expense which represents an ordinary expense of life, since he is already being compensated for this portion from the weekly benefits. I believe this is unreasonable and is not a result that was intended by our General Assembly or required by decisions of our appellate courts.

The majority differentiates this case from *Espinosa*, *supra*, in which we affirmed the Full Commission's approach to classify a portion of the injured worker's adaptive housing as an ordinary expense of life. Specifically, the majority points out that, unlike *Espinosa*, Defendants in this case were paying Plaintiff's entire housing expenses while Plaintiff was housed at a long-term care facility and were willing to continue paying his entire housing costs if he remained at the long-term care facility,

rather than move into an apartment. Whether Defendants were, in fact, legally obligated to pay the entire housing cost of a nursing home or long-term care facility for Plaintiff is not before this Court, since the Commission has determined that Plaintiff should live in an apartment. However, I do not believe that Defendants' prior willingness to pay the entire cost for Plaintiff's housing while he remained in a long-term care facility is dispositive on the issue of whether Defendants are *legally obligated* to pay the entire rental expense of Plaintiff's apartment as "other treatment" under G.S. 97-25.

MARK WILLARD, Deceased-Employee, Plaintiff
v.
VP BUILDERS INC., Employer, Self-Insured, and SEDGWICK CMS, Third-Party Administrator, Defendants

No. COA13-413

Filed 6 May 2014

1. Workers' Compensation—offer of proof—opportunity must be afforded

The Full Industrial Commission erred in a workers' compensation case by failing to allow defendants the opportunity to make an offer of proof. While the rules of procedure and evidence governing proceedings in our general courts of justice do not generally apply in hearings before the Industrial Commission, upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent.

2. Workers' Compensation—denial of motions—reopen evidence—receive additional testimony—no abuse of discretion

The Full Industrial Commission did not err in a workers' compensation case by denying defendants' motions to reopen the record to receive rebuttal testimony from three doctors and to reconsider its opinion and award in light of this rebuttal testimony. The Commission did not abuse its discretion in denying defendants' motions and the rulings did not prevent them from effectively and meaningfully cross-examining a witness.

Appeal by defendants from opinion and award entered 18 December 2012 and order entered 29 January 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2013.

Oxner Thomas + Permar, by Kristin P. Henriksen, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by George H. Pender, Megan B. Baldwin, and Brian M. Love, for defendants-appellants.

DAVIS, Judge.

VP Builders, Inc. and its third-party administrator Sedgwick CMS (collectively "Defendants") appeal from the opinion and award of the North Carolina Industrial Commission awarding death benefits to Connie Willard ("Ms. Willard"), the widow of Mark Willard ("Plaintiff"), and the Commission's subsequent order denying Defendants' motion for reconsideration. After careful review, we affirm.

Factual Background

On 24 September 2008, Plaintiff suffered an admittedly compensable injury to his left hand. Plaintiff was examined by Dr. Andrew Koman ("Dr. Koman") and diagnosed with post-trauma complex regional pain syndrome and a crush injury involving the left thumb. Dr. Koman performed surgery on Plaintiff's left hand on 2 June 2009. Dr. Koman's physician's assistant, Randy Parks ("Mr. Parks"), prescribed Vicodin to Plaintiff from 6 May 2009 to 20 July 2009 in order to manage his pain symptoms.

On 5 August 2009, Mr. Parks, pursuant to Dr. Koman's directive, prescribed methadone to Plaintiff. The prescription instructed Plaintiff to take ten milligrams, three times per day as needed to manage his pain. Plaintiff's medical records indicate that Dr. Koman intended "to transition [Plaintiff] from Vicodin to Methadone as part of the treatment plan to control [Plaintiff's] pain." Plaintiff's medical treatment by Dr. Koman and Mr. Parks was authorized through his workers' compensation coverage and paid for by Defendants. Plaintiff was also receiving weekly disability compensation from Defendants as a result of his compensable injury.

On the morning of 6 August 2009, Ms. Willard drove Plaintiff to Dr. Koman's office and then to the Rite Aid Pharmacy to pick up and fill his methadone prescription. Plaintiff received 90 ten-milligram tablets

of methadone from the pharmacist. Plaintiff took one of the pills during the car ride home from the pharmacy. Ms. Willard returned home with Plaintiff and then departed alone to visit her mother between 12:00 p.m. and 1:00 p.m.

While she was away, Ms. Willard spoke to Plaintiff twice on the telephone. When she called him at 1:15 p.m., Plaintiff "sounded fine." When Ms. Willard called the second time at approximately 3:00 p.m., he told her that he was doing some research on the computer regarding possible trips to take with their granddaughter. During this telephone conversation, Plaintiff stated that he had taken a second ten-milligram tablet of methadone. Ms. Willard stated that he was speaking at a lower volume and speed than usual.

At 3:30 p.m., Plaintiff received a phone call from his brother. Plaintiff's brother told Ms. Willard that Plaintiff's speech was very slow and that when he asked Plaintiff if he was okay, Plaintiff responded, "I don't know. . . . My throat feels funny."

Ms. Willard called Plaintiff at 4:00 p.m. to inform him that she was on her way home, and Plaintiff did not answer the telephone. As she approached their house, Ms. Willard saw Plaintiff through the window "slumped over the kitchen table." When she reached him, he was unresponsive. Emergency personnel arrived and confirmed that Plaintiff was dead.

On 27 July 2010, Ms. Willard filed a Form 18 seeking death benefits pursuant to N.C. Gen. Stat. § 97-38. In response, Defendants filed a Form 61, denying the claim on the basis that (1) Plaintiff's death "[was] not related to the compensable left thumb injury"; and (2) N.C. Gen. Stat. § 97-12 — which provides that compensation shall not be paid if the employee's injury or death was proximately caused by "[h]is being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et. seq., where such controlled substance was not prescribed by a practitioner" — barred any recovery of workers' compensation benefits.

The matter came on for hearing before Deputy Commissioner Phillip A. Holmes ("Deputy Commissioner Holmes") on 18 November 2011. Before the hearing commenced, the parties came to an agreement regarding the scheduling of certain medical depositions. The parties agreed that Dr. Andrew Mason ("Dr. Mason"), a toxicologist serving as an expert witness for Plaintiff, would be deposed after the parties conducted "some of the key depositions in this case, particularly the medical examiner's office witnesses," consisting of Dr. Deborah Radisch ("Dr.

Radisch"), the Chief Medical Examiner of the North Carolina Office of the Chief Medical Examiner ("OCME"), and Dr. Ruth Winecker ("Dr. Winecker"), the Chief Toxicologist of the OCME. Pursuant to the agreement, if Dr. Mason's testimony "attack[ed] the toxicology report," then Defendants would have the opportunity to redepose Drs. Radisch and Winecker and, if necessary, designate and introduce testimony from a rebuttal toxicologist. This agreement was entered into to address Defendants' earlier contention that Dr. Mason's testimony should be excluded because Plaintiff had failed to promptly and fully disclose the substance of his opinions in various discovery responses.

Following the hearing, the parties took several medical depositions, including those of Drs. Radisch and Winecker (Defendants' witnesses) followed by the deposition of Plaintiff's expert witness, Dr. Mason. On 13 March 2012, Defendants filed a motion to extend the record, seeking to introduce into evidence rebuttal testimony from Dr. Winecker, Dr. Radisch, and Dr. Brian McMillen ("Dr. McMillen") — a toxicologist who was designated to serve as Defendants' rebuttal expert witness. Defendants' motion alleged that (1) Dr. Mason had offered deposition testimony that was "substantially different than what was represented in plaintiff's discovery responses"; and (2) because Dr. Mason's opinions were in conflict with those testified to by the OCME, Defendants were entitled to offer rebuttal testimony pursuant to the parties' pre-hearing agreement. Deputy Commissioner Holmes denied the motion that same day.

On 14 March 2012, Defendants filed a motion requesting the opportunity to make an offer of proof. Specifically, Defendants — incorporating by reference their 13 March 2012 motion to extend the record — sought to present the rebuttal deposition testimony of Drs. Winecker, Radisch, and McMillen as an offer of proof to preserve their challenge to Deputy Commissioner Holmes' ruling for purposes of appellate review. Deputy Commissioner Holmes denied this motion on 15 March 2012. He subsequently entered an opinion and award on 26 April 2012 (1) concluding that Defendants had failed to prove their affirmative defense under N.C. Gen. Stat. § 97-12 because the evidence did not establish that Plaintiff took the methadone in a manner contrary to the prescribed use; and (2) awarding Ms. Willard death benefits for a minimum total of 400 weeks and ordering Defendants to reimburse her for funeral expenses and to pay the costs of this action, including expert witness fees.

Defendants appealed to the Full Commission and filed a motion to reopen the record to include rebuttal testimony from Drs. Winecker, Radisch, and McMillen. Defendants requested, in the alternative, that

they be permitted to submit this deposition testimony as an offer of proof. The Full Commission concluded that Defendants "ha[d] not shown good grounds to receive further evidence" and issued an opinion and award on 18 December 2012 affirming, with some minor modifications, the opinion and award of Deputy Commissioner Holmes.

Defendants filed a motion for reconsideration on 18 January 2013, requesting that the Commission grant their earlier motion to reopen the record or, alternatively, allow them to make an offer of proof. Defendants further asked the Commission to reconsider its opinion and award once the requested depositions had occurred, "taking into account this additional medical and toxicological evidence." On 29 January 2013, the Commission entered an order denying Defendants' motion for reconsideration, motion to reopen the record, and request for leave to make an offer of proof. Defendants appealed to this Court.

On 5 December 2013, this Court entered an order remanding this matter to the Commission for the sole purpose of allowing Defendants to make an offer of proof consisting of the anticipated rebuttal testimony of Drs. Winecker, Radisch, and McMillen. Defendants' appeal was held in abeyance pending this Court's receipt of the offer of proof. Defendants submitted their offer of proof to this Court on 17 February 2014.

Analysis

I. Offer of Proof

[1] Defendants first contend that the Full Commission erred in failing to allow them the opportunity to make an offer of proof. We agree.

> The offer-of-proof requirement is imposed for the benefit of two different audiences. First, when the proponent makes the offer of proof, the trial [tribunal] may reconsider and change the ruling. . . . Second, the offer is also essential if there is an appeal. If there were no offer of proof, the appellate court would have a difficult time evaluating the propriety and effect of the trial [tribunal's] ruling. With an offer of proof in the trial record, the appellate court can make much more intelligent decisions as to whether there was error . . . [and] whether the error was prejudicial . . . .

Robert P. Mosteller et. al., *North Carolina Evidentiary Foundations* § 3-6, at 3-15 (2d. ed. 2006). An offer of proof is generally essential to appellate review of a lower court's decision to exclude evidence because "[a]bsent an adequate offer of proof, we can only speculate as to what a

witness's testimony might have been." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010). As we recently explained,

> in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. The essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Walston, ___ N.C. App. ___, ___, 747 S.E.2d 720, 723-24 (2013) (internal citations, quotation marks, and alterations omitted), *disc. review denied*, ___ N.C. ___, 753 S.E.2d 667 (2014).

As set out above, Defendants sought to introduce rebuttal deposition testimony from Drs. Winecker, Radisch, and McMillen and requested that Deputy Commissioner Holmes allow the rebuttal testimony to be included in the record. When Defendants' motion was denied, they sought leave to make an offer of proof with regard to this rebuttal testimony. This motion was also denied.

After Deputy Commissioner Holmes entered his opinion and award, Defendants appealed to the Full Commission and sought to reopen the record to include the rebuttal testimony. Defendants again requested, in the alternative, the opportunity to make an offer of proof regarding the rebuttal testimony. The Commission concluded that Defendants "ha[d] not shown good grounds to receive further evidence" and proceeded to enter its opinion and award without allowing Defendants to make an offer of proof.

Defendants then filed a motion for reconsideration, arguing that they had been prejudiced by Plaintiff's failure to fully disclose Dr. Mason's opinions in his discovery responses and by the Commission's denial of their request to reopen the record to receive the testimony of Dr. McMillen and the rebuttal testimony of Drs. Winecker and Radisch. Defendants asserted that the anticipated testimony from Dr. McMillen would "substantially contradict Dr. Mason's opinions" and that "his opinions could change the outcome in this case." Once again, Defendants sought leave to make an offer of proof to fully preserve this issue for appellate review. However, Defendants' motion was denied.

Because the Workers' Compensation Act requires that processes, procedures, and discovery under the Act "be as summary and simple as reasonably may be," N.C. Gen. Stat. § 97-80(a) (2013), we have held that

the rules of procedure and evidence that govern in our general courts of justice generally do not apply to the Industrial Commission's administrative fact-finding function. *Handy v. PPG Indus.*, 154 N.C. App. 311, 316, 571 S.E.2d 853, 857 (2002). However, "this Court has consistently held that the Commission must conform to court procedure and evidentiary rules where required to preserve justice and due process." *Id.* at 317, 571 S.E.2d at 857.

In *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000), we concluded that despite the general principle that workers' compensation proceedings are not subject to the rules of procedure and evidence that govern our general courts, "[t]he opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system" and must be observed by the Industrial Commission in such proceedings. *Id.* at 303-04, 528 S.E.2d at 64.

We believe that — like the right to cross-examine the opposing party's witnesses — the right to make a record sufficient for appellate review through an offer of proof is also necessary "to preserve justice and due process." *See Handy*, 154 N.C. App. at 317, 571 S.E.2d at 857; *see also State v. Brown*, 116 N.C. App. 445, 447, 448 S.E.2d 131, 132 (1994) ("It is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review [by submitting an offer of proof.]").

We fail to see why the same notions of fundamental fairness requiring the general courts of justice to accept offers of proof should not likewise apply in workers' compensation proceedings.[1] Accordingly, while we reiterate that the rules of procedure and evidence governing proceedings in our general courts of justice do not generally apply in hearings before the Industrial Commission, we hold that, upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent.[2]

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1. Indeed, this Court has indicated that in administrative hearings — where, as with hearings before the Industrial Commission, evidentiary procedures "are not so formal as litigation conducted in superior courts" — administrative law judges should permit a party to make an offer of proof to demonstrate the substance of the excluded evidence where its significance is not readily apparent. *Eury v. N.C. Employment Sec. Comm'n*, 115 N.C. App. 590, 602-03, 446 S.E.2d 383, 390-91, *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

2. We note that offers of proof can take different forms with varying degrees of formality. See Kenneth S. Broun, 1 *Brandis & Broun on North Carolina Evidence* § 18, at 76-80 (7th ed. 2011) (explaining various methods of making offer of proof).

II. Denial of Motion to Reopen Record and Motion for Reconsideration

[2] We now turn our attention to the question of whether the Commission committed reversible error in denying Defendants' motions to (1) reopen the record to receive the rebuttal testimony of Drs. Winecker, Radisch, and McMillen; and (2) reconsider its opinion and award in light of this rebuttal testimony.

Motions to receive additional evidence and motions for reconsideration are both reviewed by this Court for abuse of discretion. *Beard v. WakeMed*, ___ N.C. App. ___, ___, 753 S.E.2d 708, 712 (2014); *see Moore v. Davis Auto Serv.*, 118 N.C. App. 624, 629, 456 S.E.2d 847, 851 (1995) ("The Commission's power to receive additional evidence is a plenary power to be exercised in the sound discretion of the Commission . . . . and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." (citation and quotation marks omitted)).

> The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Beard, ___ N.C. App. at ___, 753 S.E.2d at 712-13 (citation omitted).

"In determining whether to accept new evidence, the Commission must consider the relative prejudices to the parties, the reasons for not producing the evidence at the first hearing, the nature of the testimony, and its probable effect upon the conclusion reached." *Andrews v. Fulcher Tire Sales and Serv.*, 120 N.C. App. 602, 606, 463 S.E.2d 425, 428 (1995) (citation and quotation marks omitted). However, when deciding whether to receive additional evidence, the Commission is not required to make specific findings of fact regarding its decision. *Keel v. H & V, Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366-67 (1992).

After carefully reviewing the excluded rebuttal testimony of Drs. Winecker, Radisch, and McMillen that we received in response to our 5 December 2013 order, we conclude that the Commission did not abuse its discretion in denying Defendants' motion to reopen the record and

reconsider its opinion and award. Defendants' offer of proof revealed that Dr. McMillen — Defendants' rebuttal toxicologist — would have testified that (1) making a dosage determination of methadone from tissue samples is scientifically reliable; and (2) he could opine with a reasonable degree of medical certainty that Plaintiff had consumed four to eight 10-milligram tablets of methadone based on the concentration levels found during the autopsy.

However, with regard to the rebuttal testimony of Drs. Winecker and Radisch, Defendants' offer of proof reveals that they would merely have reaffirmed their opinions that neither could state to a reasonable degree of medical certainty that Plaintiff consumed more than two ten-milligram tablets of methadone (the prescribed dosage). Moreover, Dr. Winecker would have critiqued the methodology that Dr. McMillen — Defendants' rebuttal toxicologist — utilized to arrive at his dosage determination range of four to eight tablets on the ground that Dr. McMillen used standard median textbook values derived from controlled clinical studies, which, in her opinion, were not appropriate in the present case given that Plaintiff's body was embalmed and then autopsied six months after his death.

Defendants contend that because of the pre-hearing agreement between the parties, Defendants were entitled to offer this rebuttal testimony and that, as a result, the Commission erred by denying their motion to reopen the record, consider the rebuttal testimony, and reconsider its opinion and award. As explained above, Defendants and Plaintiff entered into a pre-hearing agreement regarding the order in which medical depositions were to be scheduled and under what circumstances Defendants would be allowed to offer rebuttal testimony. Specifically, the parties agreed that if Dr. Mason attacked the toxicology report issued by the OCME, then Defendants could offer rebuttal testimony from Drs. Winecker and Radisch, and, if necessary, designate and offer testimony from a rebuttal toxicologist.

However, because Dr. Mason's testimony did not attack the toxicology report itself, the pre-hearing agreement was not triggered. In his deposition, Dr. Mason did not dispute the calculations of the methadone concentration levels found in Plaintiff's tissue samples. Nor did he contradict or criticize any other information contained within the toxicology report prepared by the OCME. Instead, Dr. Mason offered his opinion as to what information could be *extrapolated* from tissue concentration data contained in the report. Specifically, he opined that methadone dosage could not be accurately determined from tissue samples because

methadone is highly variable. This opinion did not attack the toxicology report itself, and as such, the Commission's denial of the motion to reopen the record and motion for reconsideration was not inconsistent with the parties' pre-hearing agreement.

Moreover, given that the overwhelming weight of the evidence — both in the record and in Defendants' offer of proof — indicates that methadone is highly variable and that tissue concentrations do not provide scientifically reliable determinations of methadone dosage, we cannot conclude that Defendants were prejudiced by the Commission's denial of their motions to reopen the record and to reconsider its opinion and award. This Court has repeatedly held that we will not find an abuse of discretion in the denial of a motion to consider additional evidence where the party has failed to show that it was actually prejudiced by the denial. *See Andrews*, 120 N.C. App. at 606, 463 S.E.2d at 428 (holding that defendants were not prejudiced by denial of their motion to consider new evidence in workers' compensation proceeding because such evidence would "probably not affect the outcome" of the hearing, and, therefore, Commission did not abuse its discretion); *Moore*, 118 N.C. App. at 629, 456 S.E.2d at 851 (ruling that because additional evidence defendants sought to introduce in workers' compensation proceeding was cumulative, defendants were not prejudiced by denial of motion and failed to show manifest abuse of discretion). Here, we believe that Defendants have failed to show actual prejudice because their offer of proof demonstrates that had Defendants been allowed to submit rebuttal toxicology testimony from Dr. McMillen, their two primary witnesses — Drs. Winecker and Radisch — would have nevertheless reaffirmed their opinions that tissue concentrations do not provide scientifically reliable determinations of methadone dosage and that, as such, they could not state with a reasonable degree of medical certainty that Plaintiff consumed methadone in a manner contrary to his prescription.

Finally, Defendants contend that the Commission's rulings prevented them from effectively and meaningfully cross-examining Dr. Mason. In making this argument, Defendants primarily rely on this Court's decision in *Allen*.

In *Allen*, the plaintiff sustained an injury while moving a box of stationary and placing it in a shopping cart. *Allen*, 137 N.C. App. at 298-99, 528 S.E.2d at 61. The plaintiff's treating physician diagnosed her with a cervical and lumbar muscle strain and noted that she had also been suffering from panic attacks and depression for some time. *Id.* at 300, 528 S.E.2d at 62. As treatment of the plaintiff continued, the physician

eventually diagnosed the plaintiff with fibromyalgia as well. *Id.* The doctor testified that her diagnosis of fibromyalgia was "sort of by exclusion because all of the other tests . . . looked pretty normal." *Id.* The plaintiff did not seek out a specialist familiar with fibromyalgia prior to her hearing before the deputy commissioner, and on 22 July 1997, the deputy commissioner entered an opinion and award determining that she was no longer disabled and awarding her medical expenses incurred as a result of the muscle strain but not for the treatment of fibromyalgia. *Id.*

The plaintiff appealed to the Full Commission and filed a motion "for independent psychiatric and fibromyalgia specialist examinations." *Id.* at 301, 528 S.E.2d at 62. The Commission granted the motion, and over the defendants' numerous objections, the Commission allowed the plaintiff to submit reports from a psychiatrist and a general practitioner who had experience in treating and diagnosing fibromyalgia. *Id.* at 301, 528 S.E.2d at 63. The Commission relied on these reports in entering its opinion and award in which it concluded that the plaintiff's panic attacks, depression, and fibromyalgia "were caused or significantly aggravated by her injury by accident." *Id.* at 302, 528 S.E.2d at 63. This Court reversed, concluding that the Commission erred "by allowing significant new evidence to be admitted but denying [the] defendants the opportunity to depose or cross-examine the physicians, or [failing to require the] plaintiff to be examined by experts chosen by [the] defendants." *Id.* at 304, 528 S.E.2d at 64.

In so holding, we noted that (1) the defendants filed five separate objections to the admission of this evidence to which the Commission failed to respond; and (2) "[t]he evidence offered by [the psychiatrist and the practitioner experienced in diagnosing fibromyalgia] was completely different from any other evidence admitted up to then." *Id.* We thus concluded that "where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party to rebut or discredit that evidence." *Id.* at 304, 528 S.E.2d at 64-65.

Here, conversely, Defendants were able to extensively cross-examine Dr. Mason. Indeed, we note that Defendants were able to specifically question him concerning both (1) his opinion that methadone dosage could not be accurately determined using tissue concentrations; and (2) Dr. McMillen's opinion that Plaintiff's recorded levels of methadone could not have been reached by ingesting only two ten-milligram tablets of methadone. As such, *Allen* is distinguishable from the present case, and Defendants' argument on this issue is overruled.

Conclusion

For the reasons stated above, we affirm the Commission's 18 December 2012 opinion and award and its 29 January 2013 order denying Defendants' motion for reconsideration.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 May 2014)

Case	County	Disposition
ALLEN INDUS., INC. v. KLUTTZ No. 13-1032-2	Guilford (13CVS5637)	Dismissed
BELL v. CITY OF NEW BERN No. 13-817	Craven (12CVS1410)	Affirmed in part; dismissed in part
COSTON v. UNIV. OF N.C. AT CHARLOTTE No. 13-1020	Mecklenburg (11CVS22954)	Reversed
DAVIS v. DAVIS No. 13-1168	Onslow (12CVS4163)	Affirmed
EVANS v. EVANS No. 13-1305	Durham (90CVD123)	Vacated
HENSEL v. XEROX BUS. SERVS., LLC No. 13-1073	Guilford (13CVS4734)	Affirmed
HUNT v. HUNT No. 13-1153	New Hanover (10CVD5691)	Affirmed in part; Remanded in part
IN RE A.L.E. No. 13-999	Wake (11JT241-242)	Affirmed
IN RE B.M. No. 13-1354	Durham (12JA32-34)	Affirmed
IN RE C.B. No. 13-1349	Durham (12JB127)	Affirmed
IN RE E.W.P. No. 13-1114	Brunswick (11JA125-126)	Reversed and Remanded
IN RE ECHOLS No. 13-804	Bertie (10SP78)	Affirmed
IN RE H.M. No. 13-1031	Buncombe (12JA44)	Affirmed
IN RE J.A. No. 13-832	Mecklenburg (12JA382) (12JA383) (12JA384)	Affirmed
IN RE J.D.V. No. 13-1061	Onslow (12JA38)	Reversed and Remanded

IN RE J.L. No. 13-539	Orange (12JB99)	Dismissed in part; Affirmed in part; Vacated and Remanded in part.
IN RE J.R. No. 13-1019	Mecklenburg (10JT305-306)	Affirmed
IN RE J.W. No. 13-1346	Buncombe (11JA110)	Affirmed
IN RE J.W.A.M. No. 13-973	New Hanover (09JT226) (11JT81)	Affirmed
IN RE K.A.F. No. 13-1270	Guilford (12JA532)	AFFIRMED in Part; REVERSED and REMANDED in Part.
IN RE K.I. No. 13-1403	Catawba (09JA22-23)	Affirmed
IN RE K.L.C. No. 13-1365	Davidson (12JT98)	Affirmed
IN RE S.B.A. No. 13-1029	Greene (11JT3-4)	Affirmed
IN RE S.H. No. 13-1037	Davidson (10JT133-134) (11JT134)	Affirmed
IN RE S.M. No. 13-1241	Wake (12JT45)	Affirmed
McGRAW v. McGRAW No. 13-1195	Johnston (08CVD985)	Reversed and Remanded
MURRELLE v. MURRELLE No. 13-1264	Carteret (10CVD1713) (12CVD133)	Affirmed
N.C. HUM. REL. COMM'N v. CARRIAGES AT ALLYNS LANDING OWNERS ASS'N, INC. No. 13-823	Wake (13CVS75)	Reversed
NORRIS v. WAL-MART ASSOCS., INC. No. 13-798	N.C. Industrial Commission (562529)	Affirmed

PAREDONES v. WRENN BROS. No. 13-910	N.C. Industrial Commission (W60905)	Affirmed
PURYEAR v. PURYEAR No. 13-1014	Wake (09CVS825)	Dismissed
ROANOKE COUNTRY CLUB, INC. v. TOWN OF WILLIAMSTON No. 13-756	Martin (10CVS374)	Affirmed
SHACKELFORD v. LUNDQUIST No. 13-960	Guilford (07CVD12047)	No Error
SMITH v. AM. NAT'L INS. CO. No. 13-943	N.C. Industrial Commission (X20253)	Affirmed
STATE v. ANDERSON No. 13-1105	Onslow (11CRS55657-61)	No Plain Error
STATE v. ANTHONY No. 13-982	McDowell (12CRS51028)	No Error
STATE v. BARKLEY No. 13-1025	Wake (11CRS218802) (11CRS9216)	No Error
STATE v. BENNETT No. 13-1058	Haywood (12CRS1115) (12CRS52488)	No Error
STATE v. BOOTHE No. 13-1233	Stokes (13CRS50761-66) (13CRS50768)	Remanded for redetermination of restitution
STATE v. DAVIS No. 13-1108	Scotland (11CRS50535)	Reversed and Remanded
STATE v. DILWORTH No. 13-856	Guilford (11CRS69355)	No prejudicial error
STATE v. EWART No. 13-782	Jackson (11CRS1364)	No Error
STATE v. FINCH No. 13-1212	Johnston (11CRS4362-63) (11CRS54753-54) (11CRS55107-08) (11CRS55109-110) (11CRS55111)	Dismissed

STATE v. FOWLKES No. 13-1319	Wake (11CRS223948) (11CRS223961-63) (11CRS224370-71)	No Error
STATE v. GLOVER No. 13-1141	Henderson (10CRS53859)	No Error
STATE v. GLOVER No. 13-1079	Forsyth (12CRS60503)	Affirmed
STATE v. GRADY No. 13-958	New Hanover (06CRS52283)	Affirmed
STATE v. HOFFMAN No. 13-540	Lincoln (11CRS51150)	No Error
STATE v. HORTON No. 13-1012	Forsyth (12CRS17180) (12CRS56767)	No Error
STATE v. INYAMA No. 13-666	Wake (11CRS219377)	Affirmed
STATE v. JANDREAU No. 13-735	Currituck (10CRS50796) (10CRS50914)	No prejudicial error
STATE v. JOHNSON No. 13-1206	Cumberland (11CRS66293)	Affirmed
STATE v. KING No. 13-1118	Union (10CRS50358-60)	No Error in Part; Vacated and Remanded in Part.
STATE v. KORNEGAY No. 13-1011	Johnston (10CRS53554) (11CRS3596)	No Error
STATE v. LOPEZ-PESINA No. 13-1047	Martin (10CRS50633) (10CRS605-610)	No Error
STATE v. LUKE No. 13-966	Mecklenburg (11CRS207253)	No Error
STATE v. MANN No. 13-819	Rockingham (10CRS54259)	No error in part; Remanded for resentencing

STATE v. MARTIN No. 13-1218	Edgecombe (13CRS324)	Affirmed
STATE v. MICKENS No. 13-1165	Johnston (02CRS52867)	Affirmed
STATE v. MILLER No. 13-1024	Cabarrus (09CRS53721)	Remanded for redetermination of restitution
STATE v. MOORE No. 13-1351	Person (12CRS50508-11)	No error in part; no prejudicial error in part.
STATE v. RAY No. 13-949	Mecklenburg (12CRS214702)	No Error
STATE v. SHINE No. 13-1183	Person (13CRS329) (13CRS330)	Affirmed
STATE v. SMITH No. 13-965	Buncombe (09CRS301) (09CRS53119)	No plain error; No error
STATE v. STRAYHORN No. 13-924	Sampson (11CRS53251-52)	No Error
STATE v. THOMPSON No. 13-1198	Alamance (11CRS56118)	No error in part; reversed and remanded in part.
STATE v. West No. 13-959	Onslow (11CRS53063-64)	No Error
STATE v. WASH No. 13-1152	Rowan (06CRS57896-97) (07CRS51270)	No Error

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