234 N.C. App.—No. 1 Pages 1-118

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 25, 2016

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 28 August 2015
[6] Deceased 3 May 2015. [7] Deceased 4 January 2015. [8] Deceased 27 January 2015. [9] Deceased 11 September 2015. [10] Retired 31 December 2014.
[11] Resigned 31 December 2014. [12] Resigned 31 December 2014.

Clerk

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COURT OF APPEALS

CASES REPORTED

FILED 20 MAY 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Final agency action—child care center—affirmative duty to substantiate allegation—In an action arising from a Department of Health and Human Services (DHHS) warning to a child care center arising from alleged abuse, DHHS had an affirmative duty to independently substantiate the abuse before issuing the warning and

mandating corrective action. N.C.G.S. § 110-105.2 plainly gives that affirmative duty to DHHS, thereby preventing it from treating a local Department of Social Services substantiation as dispositive. Furthermore, although a constitutional challenge was not advanced on appeal, the petitioner here arguably suffered a deprivation of liberty interests guaranteed by the State constitution. **Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Human Servs., 51.**

APPEAL AND ERROR

Appealability—imposition of lesser discovery sanctions—The Court of Appeals limited its review of the State's challenge to the trial court's order to a consideration of the lawfulness of the trial court's decision to dismiss the two obtaining property by false pretenses charges. The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State. **State v. Foushee, 71.**

Appealability—jurisdiction—not an aggrieved party—Defendant's appeals from the trial court's order which required BB&T to release funds from defendant's joint bank accounts to plaintiff Huttig Building Products, Inc. was dismissed. Defendant admitted that he had no interest in the challenged funds. Thus, the Court of Appeals lacked jurisdiction since defendant was not a party aggrieved by the trial court's order. **Huttig Bldg. Prods., Inc. v. McDonald, 17.**

Appellate rules violations—admonition—Although the Court of Appeals denied defendant's motion to dismiss the State's appeal based on numerous violations of the appellate rules, counsel for the State was strongly admonished to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future. **State v. Foushee, 71.**

Failure to file written appeal—untimely oral appeal—writ of certiorari granted—Where defendant had lost his right to appeal the trial court's order denying his motion to suppress by failing to file a written appeal from the order and failing to enter timely oral notice of appeal, defendant's writ of certiorari was granted and the Court of Appeals reviewed defendant's appeal on the merits. **State v. Jackson, 80.**

Mootness—expiration of involuntary commitment order—An appeal from a ninety-day involuntary commitment order was not moot even though the ninety days had passed because there could be collateral legal consequences. **In re Moore, 37.**

Notice of appeal—designation of court omitted—writ of certiorari—The Court of Appeals granted a petition for a writ of certiorari in an involuntary commitment case where the notice of appeal did not designate the court to which the appeal was taken. **In re Moore, 37.**

Notice of appeal—jurisdiction—The trial court did not err in a civil contempt proceeding by dismissing defendant's notice of appeal from a 50C no contact order. The court's jurisdiction over the case gave it authority to dismiss a filing in the case that defendant himself asserted was a nullity. **Tyll v. Berry, 96.**

Preservation of issues—failure to cite authority—Although defendant contended that the trial court exceeded its authority in a civil contempt proceeding by imposing additional restrictions on defendant's contact with plaintiffs and others in the order, this issue was abandoned under N.C. R. App. P. 28(b)(6) since defendant cited no authority in support of his argument. **Tyll v. Berry, 96.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to seek ruling at trial—failure to attend hearing—failure to move for continuance—Although defendant contended that the trial court erred in a civil contempt proceeding by failing to consider his request for appointed counsel, the Court of Appeals did not need to determine whether defendant was entitled to counsel since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter. **Tyll v. Berry, 96.**

Preservation of issues—waiver—involuntary recommitment—objection not raised at first hearing—The respondent in a case involving a ninety-day recommitment order waived his argument concerning subject matter jurisdiction and the facts alleged in the petition where his argument challenged the magistrate's determination to issue a custody order on those facts. Furthermore, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing. **In re Moore, 37.**

Waiver of argument on appeal—inconsistent with trial court argument—Plaintiff's contentions in a child custody action were waived where they were inconsistent with her positions in the trial court. She represented below that her remarriage and proposed relocation did not constitute a substantial change in circumstances and could not assert the contrary on appeal. **Green v. Kelischek, 1.**

Writ of certiorari—denial of counsel—granted—Defendant's petition for writ of certiorari was allowed and the Court of Appeals addressed the merits of defendant's argument that his constitutional right to assistance of counsel was violated when he was denied counsel at his resentencing hearing. **State v. Rouse, 92.**

CHILD CUSTODY AND SUPPORT

Proposed relocation—modification of custody—no abuse of discretion—The trial court did not abuse its discretion in a child custody action by modifying the existing order so that defendant would have school year custody if plaintiff moved to Oregon. Although plaintiff's interpretation of the evidence was different, she did not demonstrate how the trial court abused its discretion in reaching its result. **Green v. Kelischek, 1.**

Remarriage and relocation—change of circumstances—Even if plaintiff's arguments had been properly preserved for appeal, the trial court did not err by finding a substantial change of circumstances in plaintiff's remarriage and proposed relocation. The trial court did not rely on plaintiff's remarriage alone in invoking its authority to modify the existing order and did not abandon its responsibility to link individual changes in circumstance to the child's welfare. **Green v. Kelischek, 1.**

Remarriage and relocation—salutary effects of move—considered by trial court—The trial in a child custody action considered the salutary effects of plaintiff's proposed move, contrary to plaintiff's contention. **Green v. Kelischek, 1.**

CONSTITUTIONAL LAW

Assistance of counsel—resentencing—hearing—The trial court erred by denying defendant the assistance of counsel at his resentencing hearing. The trial court's judgments were vacated and the matter was remanded for resentencing. **State v. Rouse, 92.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ELIZABETH LAIRD PELZER GREEN, F/K/A KELISCHEK, PLAINTIFF
v.
NICHOLAS G. KELISCHEK, DEFENDANT

No. COA13-981

Filed 20 May 2014

1. Appeal and Error—waiver of argument on appeal—inconsistent with trial court argument

Plaintiff's contentions in a child custody action were waived where they were inconsistent with her positions in the trial court. She represented below that her remarriage and proposed relocation did not constitute a substantial change in circumstances and could not assert the contrary on appeal.

2. Child Custody and Support—remarriage and relocation—change of circumstances

Even if plaintiff's arguments had been properly preserved for appeal, the trial court did not err by finding a substantial change of circumstances in plaintiff's remarriage and proposed relocation. The trial court did not rely on plaintiff's remarriage alone in invoking its authority to modify the existing order and did not abandon its responsibility to link individual changes in circumstance to the child's welfare.

3. Child Custody and Support—remarriage and relocation—salutary effects of move—considered by trial court

The trial in a child custody action considered the salutary effects of plaintiff's proposed move, contrary to plaintiff's contention.

4. Child Custody and Support—proposed relocation—modification of custody—no abuse of discretion

The trial court did not abuse its discretion in a child custody action by modifying the existing order so that defendant would have school year custody if plaintiff moved to Oregon. Although plaintiff's interpretation of the evidence was different, she did not demonstrate how the trial court abused its discretion in reaching its result.

Appeal by plaintiff from custody order entered 13 February 2013 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 17 February 2014.

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

Steven Kropelnicki, PC, by Steven Kropelnicki, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Elizabeth Laird Pelzer Green ("Plaintiff") appeals from a custody modification order granting school year custody of her minor child, C.K., to his father, Nicholas G. Kelischek ("Defendant"), in the event Plaintiff moves outside of North Carolina or 125 miles away from Cherokee County. Plaintiff contends that the trial court erred in concluding that a substantial change in circumstances had occurred warranting modification of the parties' existing custody plan. In the alternative, Plaintiff contends that the trial court erred in concluding that it was in the best interest of C.K. to remain in North Carolina. For the following reasons, we affirm the trial court's order.

I. Factual & Procedural History

Plaintiff and Defendant married on 27 April 2006, separated in May 2008, and subsequently divorced on 26 April 2010. During the marriage, Plaintiff and Defendant had one child, C.K., who was born in December 2006.

On 25 March 2010, Plaintiff and Defendant entered into a separation agreement, which was incorporated into the decree of divorce to be enforceable as the judgment and order of the trial court. Pursuant to said agreement, each parent shared joint legal custody of C.K. Plaintiff had primary physical custody of C.K. during the week and Defendant

had physical custody each weekend. By all accounts, Plaintiff and Defendant have, with reasonable adjustments, followed this custody plan since their divorce. C.K., who is now seven years old, has lived with this schedule since the age of two.

The custody plan agreed to by Plaintiff and Defendant is contingent on the parties' residence. Specifically, the separation agreement provides that "[Defendant] and [Plaintiff] agree that . . . he/she will not move more than 125 miles outside of Cherokee County, North Carolina, unless otherwise agreed upon by the parties in writing or upon Order of the Court." Accordingly, at all times since their divorce, C.K. has resided with Plaintiff in Asheville on weekdays and with Defendant in Brasstown on weekends.

On 5 November 2012, Plaintiff filed a motion to modify custody, contending that there had been a substantial change in circumstances impacting C.K. since entry of the original custody order. Defendant moved to dismiss Plaintiff's motion, claiming that the motion was facially deficient, and, in the alternative, moved the trial court to modify custody giving him primary physical custody of C.K. The matter came on for a hearing before the trial court on 14 January 2013. Evidence at the hearing tended to show the following.

Since the parties' divorce, Plaintiff has maintained a residence in Asheville, albeit at three different locations. Plaintiff has not worked since C.K.'s birth and is currently unable to support herself financially. Nevertheless, Plaintiff has been attentive to C.K.'s needs, encouraging C.K. to participate in extracurricular activities and attending to C.K.'s medical needs.

In June 2011, Plaintiff rekindled a romantic relationship with Mr. Dominic Green ("Mr. Green"), a man she dated in high school. Mr. Green currently lives in Portland, Oregon. On 25 May 2012, Plaintiff married Mr. Green. Plaintiff has not relocated to Oregon but desires to do so.[1]

Since resuming a relationship with Mr. Green, Plaintiff has traveled to Oregon several times, including trips with C.K. Mr. Green has two children from a previous marriage of which he does not have primary custody. Mr. Green lives in a small condo, but has indicated he will buy a house and provide for Plaintiff and C.K. if they move to Oregon. Neither

1. Plaintiff's motion to modify custody asked the trial court to "award the Plaintiff the primary care and control of the child and [to enter an order concluding] that Plaintiff be allowed to relocate with the minor child to the State of Oregon."

Mr. Green nor Plaintiff have extended family in Oregon. C.K.'s maternal grandmother and great-grandmother are in North Carolina.

Since the parties' divorce, Defendant has lived near C.K.'s paternal grandparents in Brasstown and has worked in the family's instrument manufacturing and distribution business. Defendant's housing situation is stable and C.K. has his own room when staying with Defendant. Defendant has consistently exercised his weekend custody of C.K. and has also been attentive to C.K.'s developmental needs. Defendant's extended family is actively involved in C.K.'s life. Defendant is currently engaged to Ms. Misty Taylor ("Ms. Taylor"), whom he has known for three years. Ms. Taylor has met C.K. and has a warm relationship with him.

C.K. is a well-adjusted, healthy, and happy child. C.K. participates actively in extracurricular activities in both Asheville and Brasstown. C.K. is aware that Plaintiff wishes to relocate them to Oregon and is aware that the proposed relocation has placed tension between Plaintiff and Defendant. C.K. exhibited separation anxiety on one occasion when leaving Defendant to return with Plaintiff to Asheville.

C.K. is now old enough to attend school. Anticipating that C.K.'s education would necessitate changes to the custody plan, the parties' separation agreement included the following:

> When [C.K.] begins school, [Defendant] and [Plaintiff] agree to negotiate any necessary revisions to the visitation schedule. The parenting schedule will be reviewed each and every year in the month of June and tailored to meet the needs of both parents and [C.K.'s] development.

Notwithstanding this provision, there has been conflict between the parties as to whether C.K. should attend public school or be home-schooled by Plaintiff.

Upon hearing the foregoing and other record evidence, the trial court concluded that there had been a substantial change in circumstances since the entry of the divorce decree warranting modification of the original custody order. Accordingly, by order dated 13 February 2013, the trial court denied Defendant's motion to dismiss and concluded:

> That Plaintiff shall be entitled to the school year custody of the minor child and the minor child shall attend school within the Plaintiff's school districts provided the Plaintiff/mother continues to reside within 125 miles of Cherokee County, North Carolina. That should the Plaintiff/mother reside outside of North Carolina or outside of 125 miles

> of Cherokee County, North Carolina, the Defendant/father shall be entitled to the school year custody of the minor child and the minor child shall attend school within the Defendant's school districts.

Plaintiff filed timely notice of appeal.[2]

II. Jurisdiction & Standard of Review

Plaintiff's appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013).

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 695 (2014) (citation and quotation marks omitted). Here, Plaintiff has not challenged the trial court's findings of fact, so we consider them binding before this Court.[3]

However, "[i]n addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C at 475, 586 S.E.2d at 254. "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Respess*, ___ N.C. App. at ___, 754 S.E.2d at 695 (citation and quotation marks omitted); *see also Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) ("Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.").

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2. The record on appeal contains two substantively identical custody orders entered by the trial court on 13 February 2013—one entitled "Custody Order" and the other "Defendant's Proposed Order (Custody Order)." Plaintiff's notice of appeal is from both of these orders. Because there is no substantive difference between them, our disposition applies to both. Nevertheless, for ease of interpretation, all references to the trial court's custody modification order are in the singular form.

3. Plaintiff's brief, in passing, challenges portions of Finding of Fact 17, 20, 21, and 22. However, we consider these excerpts unessential to our holding or disposition in this case.

III. Analysis

In granting a motion to modify custody, the trial court's task is two-fold. First, the trial court must determine that a substantial change in circumstances affecting the minor child has taken place since entry of the existing custody order. *Shipman*, 357 N.C at 474, 586 S.E.2d at 253. Second, the trial court must determine that modification of the existing custody order is in the child's best interests. *Id.* "If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order." *Id.*

On appeal, Plaintiff challenges the trial court's conclusion that a substantial change in circumstances had occurred warranting modification of the original custody order. Alternatively, Plaintiff contends the trial court erred in determining that it was in C.K.'s best interests to stay in North Carolina. We address each of these arguments in turn.

A. Substantial Change in Circumstances

[1] With respect to the trial court's determination that a substantial change in circumstances had taken place, Plaintiff's brief makes three principal arguments: (1) that Plaintiff's proposed relocation does not constitute a substantial change in circumstances; (2) that the trial court erred by failing to make specific findings demonstrating a causal connection between the changed circumstances identified in the trial court's modification order and the welfare of C.K.; and (3) that the trial court acted under a misapprehension of law because it considered only the adverse consequences of Plaintiff's relocation for purposes of determining whether a substantial change in circumstances had taken place.

Notwithstanding Plaintiff's briefing of these issues, we hold that Plaintiff has waived these contentions by taking the opposite position in the trial court below.

Unlike the typical situation where the appellant has obtained an adverse ruling on the substantial change question in the trial court, here, Plaintiff was the movant below and specifically asked the trial court to conclude that a substantial change in circumstances had taken place based on her remarriage and proposed relocation to Oregon. However, because the trial court's subsequent best interests determination did not go as Plaintiff anticipated, Plaintiff now seeks to assert an inconsistent legal position on appeal in order to avoid the modified custody plan set forth in the trial court's order. This she cannot do.

"It is well established that a party to a suit may not change [her] position with respect to a material matter during the course of litigation.

Especially is this so where the change of front is sought to be made between the trial and the appellate courts." *Leggett v. Se. People's Coll.*, 234 N.C. 595, 597, 68 S.E.2d 263, 266 (1951) (internal citations and quotation marks omitted).

> Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. The [party] may not change [her] position from that taken at trial to obtain a steadier mount on appeal.

Balawejder v. Balawejder, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011) (internal quotation marks and citation omitted) (first alteration in original). Accordingly, because Plaintiff represented that her remarriage and proposed relocation did constitute a substantial change in circumstances before the trial court, she cannot assert the contrary for the first time on appeal.[4] Nor can she complain of a ruling she applied for and received from the trial court. *See Garlock v. Wake Cnty. Bd. of Educ.*, 211 N.C. App. 200, 212, 712 S.E.2d 158, 167–68 (2011) (stating that as to invited errors, "[o]ur Courts have long held to the principle that a party may not appeal from a judgment entered on its own motion or provisions in a judgment inserted at its own request. . . . An appellant is not in a position to object to provisions of a judgment which are in conformity with their prayer, and they are bound thereby" (internal quotation marks and citations omitted) (first alteration in original)).

[2] However, even if Plaintiff's arguments were properly preserved for our review, we find no error in the trial court's order. By arguments (1) and (2) above, Plaintiff contends that her remarriage and proposed relocation with C.K. is not, in and of itself, a substantial change in circumstances and that the trial court failed to connect the specific changes

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4. We note that our holding with respect to this point is distinguishable from our holding in *Hibshman v. Hibshman*, 212 N.C. App. 113, 710 S.E.2d 438 (2011), cited by Plaintiff. In *Hibshman*, we held that a party cannot waive the requirement that the trial court find a substantial change in circumstances because that requirement is not a right held by the litigant, rather, it is a limitation on the authority of the courts to modify custody orders in order to protect the children involved. *Id.* at 125, 710 S.E.2d at 445–46. Here, the trial court did not disregard its duty to determine whether a substantial change in circumstances had occurred, so *Hibshman* is inapposite.

upon which it relied with evidence concerning how such changes affect C.K.'s welfare.

We have previously held that

> remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child. Similarly, a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree.

Evans v. Evans, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (internal citations omitted). Accordingly, in situations where the substantial change involves a discrete set of circumstances, *e.g.*, a parent's relocation, remarriage, etc., "the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence *directly* linking the change to the welfare of the child." *Shipman*, 357 N.C at 478, 586 S.E.2d at 256.

Here, the trial court did make findings regarding Plaintiff's remarriage and proposed relocation, as well as how those actions affect C.K.:

> 19. . . . Plaintiff/mother married [Mr.] Green on May 25, 2012. She has not relocated to Oregon but desires to do so. She testified that she has no intention of moving to Oregon without [C.K.].
>
> . . . .
>
> 35. That the Court finds as fact that [Plaintiff and Defendant] have behaved well and the exchanges on weekends have gone very well until the issue of relocation arose in September 2011. At that time, Defendant/father became very concerned that Plaintiff/mother would try to take [C.K.] further away. Defendant/father was already concerned about not being able to see [C.K.] except on weekends.
>
> 36. That the Court finds as fact that when Plaintiff/mother married, the parties determined that mediation was necessary, and Defendant/father initiated scheduling a meeting. . . . Defendant/father believed that it would not be productive to try to resolve the issue without a mediator present.

37. That the Court finds as fact based on the evidence before it that the Plaintiff/mother complained that Defendant/father failed to communicate with her. The Court finds that the Defendant/father often did not respond to Plaintiff/mother because he did not find it productive to try to negotiate with her without a mediator. He allowed her to make plans for [C.K.] during her time and did not object to activities she had planned for [C.K.]. He trusted her judgment until the relocation issue arose. He then felt disrespected as a result of her decision to try to take [C.K.] so far away from him.

38. The Court finds as fact that as a result of the relocation issue, conflict began to build and [C.K.] became aware of the change in dynamics between Plaintiff/mother and Defendant/father. The minor child is aware that the Plaintiff/mother wanted to move to Oregon. In the past the parents had always stopped at a candy store in Dillsboro, NC, the half way point between them. It was typical for them to spend a half hour talking with [C.K.] about things he was doing and exchanging information about [C.K.'s] life with the other parent. The exchanges became shorter and on one occasion, for the first time, [C.K.] exhibited separation anxiety not wanting to leave his Defendant/father at the end of his time with Defendant/father.

39. That the Court finds as fact based on the evidence presented that the Plaintiff/mother's decisions to marry and move to Portland, Oregon were made not for the benefit of [C.K.], but for the benefit of the Plaintiff/mother. That the Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

40. The Court finds as fact based on the evidence presented that the stability of the Plaintiff/mother's plans are a concern. The Plaintiff/mother has stated that she has no intention of leaving [C.K.] in Asheville, and would not move her residence to Oregon without [C.K.]. However, she testified that she intends to continue her relationship with her husband and he will continue to work in Oregon. Plaintiff is in a new marriage and they have not lived

> together for more than three consecutive weeks since the marriage in April 2012. Plaintiff has not been employed for many years and has not been successful in maintaining stable long term employment or relationships. Defendant/father has reasonable grounds for resisting the relocation.
>
> 41. The Court finds as fact based on the evidence presented that it is not reasonable for [C.K.] to have to travel four times per year in order to stay with his Defendant/father for a one month period of time. This schedule would cause the minor child to have his residence intermittently upset, to forego a normal school and social environment and make it unnecessarily difficult for him to have friends and consistent activities. The court finds that this arrangement would not foster stability for [C.K.] or be in his best interest.

These findings directly link Plaintiff's remarriage and relocation to changes in C.K.'s life, namely, the growing tension between Plaintiff and Defendant, the resulting effect of that tension on C.K., the interference with C.K.'s educational and social development, and the likelihood that C.K. would be subjected to a less stable environment in Oregon.

The trial court's order also made findings of fact regarding Defendant's engagement and the effect of that relationship on C.K., as well as changes in C.K.'s educational needs as he reaches school age:

> 30. Evidence was before the court and the Court finds as credible, that the Defendant/father became recently engaged to [Ms.] Taylor, a woman he has known for about three years. . . . Ms. Taylor testified and the Court finds that she and [C.K.] have a warm relationship and that she is ready to be a stepparent to him.
>
> . . . .
>
> 42. The Court finds, and common sense dictates, that the needs of a very young child may change significantly as that child moves from infancy to school age. Even a short period of time in the life of a young child, can require a readjustment to appropriately meet the child's developmental needs and overall best interests. The parties to this action clearly anticipated in their Agreement/Court Order that when [C.K.] started school the visitation would be renegotiated. That the terms of the agreement now Order

> of April 26, 2012 regarding child custody issues were specific in many regards and included terms which are relevant to the matters before the Court:
>
> > a. The stand alone paragraph entitled Residence states: "The Husband and Wife agree to that he/she will not move more than 125 miles outside of Cherokee County, North Carolina, unless otherwise agreed upon by the parties in writing or upon Order of the Court."
> >
> > b. Paragraph 17. reads in part: "When [C.K.] begins school the [Defendant] and [Plaintiff] agree to negotiate any necessary revision to the visitation schedule. The parenting schedule will be reviewed each and every year in the month of June and tailored to meet the needs of both parents and [C.K.'s] development."

These changes were also considered by the trial court in its substantial change of circumstances analysis.

Furthermore, the order explicitly acknowledged our precedent regarding remarriage and relocation, stating:

> 43. The Court recognizes that the requested relocation of the Plaintiff is not, in and of itself a substantial change in circumstances which warrants a modification of the custody of the minor child, absent a finding that it is likely that the relocation to Portland would have an adverse effect on [C.K.]. The Court finds as fact based on the evidence presented that because of the close relationship [C.K.] has with his Defendant/father and the extended family in North Carolina that the loss of ongoing, stable, consistent, weekly contact between the Defendant and the minor child would indeed have an adverse affect [sic] on the minor child. It is not in the best interest of the minor child's development that he be relocated to Oregon.

Based on these and other finding of facts, the trial court concluded:

> 4. . . . that there has been a substantial change in circumstances impacting the welfare of the minor child since the entry of the last Order of April, 26, 2010, which warrants modification of the current custody schedule of the child and that such a modification is in the best interest of the minor child.

Accordingly, the trial court did not rely on Plaintiff's remarriage and relocation alone in invoking its authority to modify the existing custody order. Nor did the trial court abandon its responsibility to link individual changes in circumstance with C.K.'s welfare. Plaintiff's arguments on these points are therefore without merit.

[3] By argument (3) above, Plaintiff contends that the trial court acted under a misapprehension of law because it only considered the adverse consequences of Plaintiff's remarriage and relocation and not any salutary affects appertaining thereto. Again, Plaintiff's argument is without merit.

> [C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). Here, although the trial court stated in Finding on Fact 43 that it could not modify custody based on Plaintiff's relocation "absent a finding that it is likely that the relocation to Portland would have an adverse effect on [C.K.]," other language in the trial court's order indicates that it did not abandon its responsibility to consider salutary effects of Plaintiff's relocation on C.K.'s welfare. Specifically, Finding of Fact 39 states, in part:

> 39. . . . [T]he Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

Thus, the trial court did consider the salutary effects of Plaintiff's relocation for purposes of determining whether a substantial change in circumstances had taken place. We will not presume error based on an errant sentence found in Finding of Fact 43.

In summary, we hold that Plaintiff has waived her contention that the trial court erred in concluding that a substantial change in circumstances had taken place since entry of the original custody order. Even so, assuming *arguendo* that this question is properly before us, we would affirm the trial court's conclusion regarding changed circumstances.

B. Best Interests of the Child

[4] Plaintiff's second argument on appeal is that the trial court erred in determining that it was in C.K.'s best interests to remain in North Carolina.

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902.

> As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion. Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Stephens v. Stephens, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (internal quotation marks and citations omitted).

In evaluating the best interests of a child in a proposed relocation, "[t]he welfare of the child is the 'polar star' which guides the court's discretion." *Evans*, 138 N.C. App. at 141, 530 S.E.2d at 580. Factors that may be considered by the trial court include, for example:

> [T]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Id. at 142, 530 S.E.2d at 580 (quotation marks and citation omitted).

Here, the trial court made the following findings of fact pertinent to C.K.'s best interests:

> 26. The Court finds as fact based on the evidence presented that neither the Plaintiff/mother nor Mr. Green have any extended family in Portland Oregon. The Court finds that the minor child has extensive maternal family

connections in North Carolina. [C.K.'s] maternal grandmother visits about once or twice each month and [C.K.] sees his maternal great-grand-mother about every two months. He visits with his maternal grandfather about twice each year.

27. The Court finds as fact based on the evidence presented that the Defendant/father has consistently exercised his primary physical custody of [C.K.] on weekends. The Court finds as fact based on the evidence, that the minor child and the Defendant/father have a loving and close relationship. All the evidence before the Court was that this warm relationship includes the larger immediate paternal family that lives in the area of the Defendant/father's home and residence.

28. The Court finds as fact based on the evidence presented that the community in which the Defendant/father lives and works is a unique and enriching artistic environment. That the Defendant/father and his brothers grew up actively participating in music and in classes at the school. Defendant/father has many friends in the arts community and he actively spends time with his friends. He is involved in a dance team there. [C.K.] always participates in these activities and has now made friends there. They have no television, but do have Internet access. They have dinner with [C.K.'s] grandparents on Saturday evenings, and [C.K.] spends time with his paternal grandparents every weekend. The Defendant/father's home is a stable place that would benefit [C.K.]. Defendant/father has provided many enrichment activities for [C.K.]. [C.K.] has a rich life in the Kelischek community that would likely be diminished greatly if he were to move to Oregon.

29. The Court finds as fact based on the evidence presented that the Defendant/father has been employed in his family's business since the divorce. They make and distribute musical instruments all over the world. Several family members are employed there. Defendant/father is in charge of the Internet sales, but also works in any other capacity as may be necessary from time to time. His work schedule is Monday through Friday, although, he has for the last several years taken off early to pick up [C.K.] every Friday. Defendant/father now lives in a home close

to his parents. The house has a separate suite in the basement where his nephew and wife now reside. [C.K.] now has his own separate bedroom that he sleeps in when at the Defendant's home.

. . . .

31. That the Court finds as fact based on the evidence before it that the Defendant/father has shown a real and demonstrable dedication to his extended family. . . . Though [C.K.'s] first cousins are much older than him, they interact frequently with him [and] have a warm relationship with him. These first cousins grew up in Asheville, and have been very involved in music and arts in the Brasstown community, and it appears that they have benefitted from the involvement in the Brasstown community and the culture of the extended family. [C.K.'s] aunt, a physician, lives in Asheville. The Court finds as fact based on the evidence presented that [C.K.] has benefitted from the time he spends with this extended family, and he has good relationships with them.

. . . .

39. That the Court finds as fact based on the evidence presented that the Plaintiff/mother's decisions to marry and move to Portland, Oregon were made not for the benefit of [C.K.], but for the benefit of the Plaintiff/mother. That the Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

40. The Court finds as fact based on the evidence presented that the stability of the Plaintiff/mother's plans are a concern. The Plaintiff/mother has stated that she has no intention of leaving [C.K.] in Asheville, and would not move her residence to Oregon without [C.K.]. However, she testified that she intends to continue her relationship with her husband and he will continue to work in Oregon. Plaintiff is in a new marriage and they have not lived together for more than three consecutive weeks since the marriage in April 2012. Plaintiff has not been employed for many years and has not been successful in maintaining

> stable long term employment or relationships. Defendant/father has reasonable grounds for resisting the relocation.
>
> 41. The Court finds as fact based on the evidence presented that it is not reasonable for [C.K.] to have to travel four times per year in order to stay with his Defendant/father for a one month period of time. This schedule would cause the minor child to have his residence intermittently upset, to forego a normal school and social environment and make it unnecessarily difficult for him to have friends and consistent activities. The court finds that this arrangement would not foster stability for [C.K.] or be in his best interest.
>
> . . . .
>
> 43. . . . The Court finds as fact based on the evidence presented that because of the close relationship [C.K.] has with his Defendant/father and the extended family in North Carolina that the loss of ongoing, stable, consistent, weekly contact between the Defendant and the minor child would indeed have an adverse affect [sic] on the minor child. It is not in the best interest of the minor child's development that he be relocated to Oregon.

Plaintiff does not challenge these findings of fact with argument on appeal. Rather, Plaintiff points to other record evidence that would tend to support relocation and emphasizes the burden that remaining in North Carolina will place on her new marriage. While Plaintiff's interpretation of the record evidence is understandably different than the trial court, she has failed to demonstrate how the trial court abused its discretion in reaching its result, particularly in light of the above unchallenged findings of fact.

Importantly, by holding that the trial court did not abuse its discretion, we do not diminish the other findings of fact demonstrating Plaintiff's love and commitment to her son. Nor do we deny the existence of record evidence that suggests there would be benefits in allowing Plaintiff to move to Oregon with C.K. Rather, our holding recognizes the broad discretion given to the trial court in child custody matters and emphasizes our standard of review on appeal. As our Supreme Court has noted:

> The trial court has the opportunity to see the parties in person and to hear the witnesses, and its decision ought

> not be upset on appeal absent a clear showing of abuse of discretion. The trial court can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.

Pulliam, 348 N.C. at 625, 501 S.E.2d at 902–03 (alterations, quotation marks, and internal citations omitted). Accordingly, because Plaintiff has failed to demonstrate that the trial court's best interests determination was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision," we affirm the trial court's decision to modify the existing custody order such that Defendant is entitled to school year custody of C.K. if Plaintiff moves to Oregon.

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court modifying custody of Plaintiff and Defendant's minor child.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

HUTTIG BUILDING PRODUCTS, INC., PLAINTIFF
v.
ANGUS ALLAN McDONALD, JR., DEFENDANT

No. COA13-1419

Filed 20 May 2014

Appeal and Error—appealability—jurisdiction—not an aggrieved party

Defendant's appeals from the trial court's order which required BB&T to release funds from defendant's joint bank accounts to plaintiff Huttig Building Products, Inc. was dismissed. Defendant admitted that he had no interest in the challenged funds. Thus, the Court of Appeals lacked jurisdiction since defendant was not a party aggrieved by the trial court's order.

Appeal by defendant from order entered 13 August 2013 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 7 April 2014.

Smith, Debnam, Narron, Drake, Saintsing & Myers, LLP, by Gerald H. Groon, Jr., for plaintiff-appellee.

Robbins May & Rich, LLP, by P. Wayne Robbins and Neil T. Oakley, for defendant-appellant.

CALABRIA, Judge.

Angus Allan McDonald, Jr. ("defendant") appeals from the trial court's order which required Branch Banking and Trust Company ("BB&T") to release funds from defendant's joint bank accounts to Huttig Building Products, Inc. ("plaintiff"). We dismiss the appeal.

On 10 May 2012, the Wake County District Court entered a judgment in favor of plaintiff against defendant in the amount of $31,985.58 plus interest and attorney's fees. On 5 November 2012, plaintiff filed a motion with the Wake County Clerk of Superior Court ("the Clerk") seeking, *inter alia*, an order compelling BB&T to turn over any funds in its possession that belonged to defendant to plaintiff's counsel to be applied to the judgment. On 8 January 2013, the Clerk entered an order directing BB&T to release $9,089.69 from defendant's various accounts with BB&T to plaintiff, by and through its attorneys.

Defendant appealed the Clerk's order to the Wake County Superior Court. After a hearing, the trial court entered an order directing BB&T to release the $9,089.60 in defendant's accounts to plaintiff, by and through its attorneys. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by ordering BB&T to release all of the funds from four BB&T accounts that defendant held jointly with other family members. Defendant contends that he "has no interest in the BB&T accounts because [defendant]'s elderly mother and teenaged children contributed all of the funds to the BB&T accounts."

However, we are unable to consider defendant's argument because "only a 'party aggrieved' may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). If, as defendant has admitted, he has no interest in the challenged funds, defendant likewise has no interest which would allow him to appeal the trial court's order. Defendant's rights were not directly or injuriously affected when the trial court directed the BB&T funds, which defendant acknowledges he did not own, to be

turned over to plaintiff. Thus, he will receive no benefit from a reversal of the trial court's order. Instead, the funds at issue would be restored to a nonparty[1] and defendant would remain liable to plaintiff for the portion of his prior judgment that the BB&T funds were intended to satisfy.

In *Langley v. Gore*, 242 N.C. 302, 87 S.E.2d 519 (1955), the appeal was "directed solely to the judgment of the court below in respect to disposition of the fund of money in the hands of the Clerk of Superior Court." *Id.* at 303, 87 S.E.2d at 520. The Court concluded that the defendant-appellants were not a party aggrieved because there was

> nothing in the record to show that defendants have any interest in, or claim to [the funds at issue]. Indeed, defendants say in their brief, filed on this appeal, that they "did not claim the fund as theirs personally." They assert, however, reasons why they think plaintiffs are not entitled to the fund.

Id. Consequently, the *Langley* Court dismissed the appeal *ex mero motu*.

In the instant case, defendant, like the defendants in *Langley*, expressly disclaims any interest in the funds at issue in this appeal and instead "assert[s] . . . reasons why [he] think[s] plaintiff[is] not entitled to the fund." *Id.* Thus, we are bound by *Langley* to conclude that defendant is not a party aggrieved by the trial court's order. Accordingly, we lack jurisdiction to consider defendant's challenges to the court's order and must dismiss defendant's appeal. *See Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam) ("Where a party is not aggrieved by the judicial order entered . . . his appeal will be dismissed.").

Dismissed.

Chief Judge MARTIN and Judge McGEE concur.

1. None of the individuals that defendant identified as the true owners of the funds in the shared joint accounts at issue attempted to intervene in the instant case. Additionally, neither party made a motion to join these joint account holders as necessary parties.

IN THE MATTER OF INVESTIGATION REGARDING THE APPROVAL AND CLOSING OF THE BUSINESS COMBINATION OF DUKE ENERGY CORPORATION AND PROGRESS ENERGY, INC.

No. COA13-880

Filed 20 May 2014

1. Utilities—Utilities Commission—exceeded authority—dismissed appeal

The Utilities Commission exceeded its authority by dismissing proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc.'s appeal, including its appeal from an intervention order, for lack of standing.

2. Utilities—Utilities Commission—investigation—intervention denied—no standing to appeal

Proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc. was properly denied intervention into in an investigation conducted by the Utilities Commission and lacked standing to appeal from the settlement order between the parties to that investigation.

Appeal by proposed intervenor from orders entered 13 July 2012, 12 December 2012, and 29 April 2013 by the North Carolina Utilities Commission. Heard in the Court of Appeals 11 December 2013.

No brief filed on behalf of appellee State of North Carolina ex rel. Utilities Commission.

Chief Counsel Antoinette R. Wike for appellee Public Staff -- North Carolina Utilities Commission.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle, for proposed intervenor-appellant North Carolina Waste Awareness and Reduction Network, Inc.

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III; Allen Law Offices, PLLC, by Dwight W. Allen; and Duke Energy Corporation, by Deputy General Counsel Lawrence B. Somers, for appellees Duke Energy Corporation, Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc. (formerly Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.).

GEER, Judge.

Proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc. ("NC WARN") appealed two orders of the North Carolina Utilities Commission (1) denying NC WARN's motion to intervene in an investigation conducted by the Commission and (2) approving a settlement agreement by the parties to the investigation and closing the investigation. The Commission entered an order dismissing that appeal on the grounds that NC WARN lacked standing to appeal. NC WARN has appealed the dismissal order.

We hold that the Commission acted in excess of its jurisdictional authority in dismissing NC WARN's appeal for lack of standing, and we, therefore, vacate that order as void ab initio and address the merits of NC WARN's first appeal. We hold that the Commission properly denied NC WARN's motion to intervene and, therefore, affirm the order denying intervention. Since NC WARN was not a party to the Commission's investigation and had no standing to appeal from the settlement order, we also affirm that order.

Facts

On 4 April 2011, Duke Energy Corporation and Progress Energy, Inc. filed an application requesting that the Commission approve their proposed merger (the "merger docket"). The companies indicated in the application that William D. Johnson would be named president and CEO of the merged company ("Duke") for a three-year term. Mr. Johnson filed written testimony in the merger docket stating he would be president and CEO of Duke, and James Rogers filed testimony stating he would be the executive chairman of Duke's board of directors. On 29 June 2012, the Commission entered an order approving the merger subject to regulatory conditions and code of conduct. Duke closed the merger on 2 July 2012. The next day, on 3 July 2012, Duke announced that Mr. Rogers would replace Mr. Johnson as president and CEO of the company.

On 6 July 2012, the Commission opened an investigation, pursuant to N.C. Gen. Stat. § 62-37 (2011), into the change in leadership immediately following the merger. NC WARN filed a motion to intervene in the investigation on 10 July 2012, alleging it was a non-profit corporation, with approximately 1,000 individual members, established for the purpose of "reduc[ing] hazards to public health and the environment from nuclear power and other polluting electricity production through energy efficiency and renewable energy resources."

The motion alleged that most of NC WARN's members resided in North Carolina and were customers of Duke, and its members were "concerned about the merger's potential impacts on the cost of their electricity." NC WARN stated that it had intervened in the merger docket, and that if allowed to intervene in the investigation, it would "assist and support the Commission." Attached to the intervention motion were NC WARN's "initial scoping comments to assist the Commission in defining the investigation."

On 13 July 2012, the Commission entered an order denying NC WARN's motion to intervene. The order explained that the proceeding was "an investigation pursuant to the Commission's supervisory authority under Article 3 of Chapter 62 [of the General Statutes], rather than an application or rate case being conducted pursuant to the Commission's authority under Article 4." The Commission also found that "NC WARN is not a party affected within the meaning of G.S. 62-37, requiring the Commission to 'make no order without affording the parties affected thereby notice and a hearing.' "

Relying on *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 163 N.C. App. 1, 592 S.E.2d 277 (2004) (hereinafter "*CUCA*"), the Commission further found that its "order in this proceeding will have only a generalized effect on NC WARN's members, no more and no less than it will have on all of Duke's and Progress' ratepayers." In addition, the Public Staff of the North Carolina Utilities Commission ("Public Staff") and the Attorney General were parties to the investigation, and the Commission found that those parties "represent the interest of all consumers who will be affected by the Commission's investigation."

On 29 November 2012, the Staff of the North Carolina Utilities Commission, the Public Staff, and Duke entered into a settlement agreement regarding the investigation. The agreement provided that Mr. Rogers, Mr. Johnson, and other individuals had testified before the Commission during the investigation; that Duke had filed thousands of pages of documents with the Commission pursuant to orders during the investigation; and that the parties desired to resolve "all matters and issues . . . without further litigation and expense and to move forward in a positive manner." The terms of the settlement agreement included that: (1) Duke maintain certain staff in Raleigh; (2) Duke create a board committee for regulatory compliance; (3) Duke provide retail ratepayers an "additional $25 million in fuel and fuel-related cost savings" and contribute "an additional $5 million to workforce development and low-income assistance," each on top of amounts provided for in the merger order; (4) Duke make certain executive-level staffing changes; (5) Duke bring

in two new outside board members and retire current board members in a certain manner; (6) Mr. Rogers retire in December 2013 and the new top executive be hired from outside the company; and (7) Duke "issue a statement of acknowledgement to the Commission that its activities have fallen short of the Commission's understanding of Duke's obligations under its regulatory compact that frame the duties for a regulated utility in this state."

Although denied intervention, NC WARN continued to file comments in the investigation docket during the investigation, and NC WARN filed a motion opposing the settlement agreement on 3 December 2012. The Commission entered an order approving the settlement agreement and closing the investigation on 12 December 2012. The order provided that the "integrity of the Commission to carry out its statutory mandate relies on the openness and honesty of the regulated public utilities . . . ." The order further provided, however, that the settlement agreement "restore[d] the balance between legacy Duke and legacy Progress in the merged company . . ., reaffirm[ed] the regulatory compact and continued public confidence in the integrity of utility regulation, and allow[ed] the merged company to focus on its mission to provide affordable, reliable electric service to North Carolina consumers."

On 9 January 2013, NC WARN timely appealed the intervention order and the settlement order. Prior to NC WARN's service of the proposed record on appeal, Duke filed a motion to dismiss NC WARN's appeal with the Commission on 7 March 2013. The Commission entered an order dismissing NC WARN's appeal for lack of standing on 29 April 2013.

The majority of the Commission concluded that NC WARN had no right to intervene in the investigation under *CUCA*, and, as a non-party, NC WARN had no right to appeal. The majority further determined that it had jurisdiction to dismiss NC WARN's appeal for lack of standing. It reasoned that under N.C. Gen. Stat. § 62-90(c) (2011) and *Farm Credit Bank of Columbia v. Edwards*, 121 N.C. App. 72, 464 S.E.2d 305 (1995), the Commission retained certain jurisdiction over appealed orders until the appeal is docketed in the appellate court, including jurisdiction to dismiss an appeal by a non-party.

Commissioner ToNola D. Brown-Bland concurred in the result. Commissioner Brown-Bland reasoned that because the investigation was pursuant to the Commission's Article 3 powers and was wholly separate from the Commission's Article 4 judicial function, the only party affected by the investigation was necessarily Duke, the party investigated, since there was no assertion by any party during the investigation that the

public's interests were not adequately protected. Accordingly, only Duke could appeal the settlement order. Commissioner Brown-Bland, like the majority, believed the Commission could dismiss NC WARN's appeal, an appeal by an unaffected non-party, as a nullity, although she additionally concluded that the Commission could dismiss the appeal under Rule 25 of the Rules of Appellate Procedure.

Commissioner Bryan E. Beatty dissented because, while he agreed that the Commission properly denied NC WARN's intervention motion, he disagreed that the Commission had the authority to dismiss NC WARN's appeal from the intervention order. Commissioner Beatty reasoned that N.C. Gen. Stat. § 62-90(a) did not limit NC WARN, a non-party, from appealing since that statute was limited to a " 'final order or decision' " and the intervention order was an interlocutory procedural order. He further reasoned that Rule 25 of the Rules of Appellate Procedure did not give the Commission authority to dismiss the appeal for lack of standing because that rule was limited to dismissals for failure to take timely action, and there was no allegation NC WARN had not timely taken and perfected its appeal.

Commissioner Beatty noted that, although the Commission properly exercised its discretion in denying NC WARN intervention, "the majority's decision to dismiss NC WARN's appeal of that ruling on that same basis gives the appearance that the majority is acting as an appellate court in affirming its own exercise of discretion." Since Duke had cited no authority directly stating the Commission had the power to dismiss NC WARN's appeal from the intervention order, Commissioner Beatty "would follow the more cautious route and leave th[e] question to the appellate court."

On 16 May 2013, NC WARN timely appealed the order dismissing its first appeal and, in the same notice of appeal, again appealed the intervention order and settlement order. On the same day, 16 May 2013, NC WARN filed a petition for writ of certiorari in this Court seeking review of the order dismissing its first appeal. This Court entered an order denying NC WARN's petition on 4 June 2013. Duke filed a motion to dismiss NC WARN's second appeal in this Court on 7 August 2013.

I

[1] We first address the Commission's order dismissing NC WARN's first appeal, including its appeal from the intervention order, for lack of standing. NC WARN argues, both in its brief and in response to Duke's motion to dismiss filed in this Court, that the Commission did not have jurisdiction to dismiss its first appeal for lack of standing. We agree.

In reviewing an order by the Commission, this Court "may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) [i]n violation of constitutional provisions, or (2) [i]n excess of statutory authority or jurisdiction of the Commission, or (3) [m]ade upon unlawful proceedings, or (4) [a]ffected by other errors of law, or (5) [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) [a]rbitrary or capricious." N.C. Gen. Stat. § 62-94(b) (2013).

"The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*." *Estrada v. Jaques*, 70 N.C. App. 627, 637, 321 S.E.2d 240, 247 (1984). This general rule is, however, "subject to two exceptions and one qualification[.]" *Id.*

> "The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause."

Id. at 637-38, 321 S.E.2d at 247 (quoting *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977)).

While it retains jurisdiction over an appealed matter, a trial tribunal may dismiss an appeal under the circumstances provided for in Rule 25 of the Rules of Appellate Procedure. Rule 25 provides in relevant part:

> (a) *Failure of appellant to take timely action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall

> be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

This Court interpreted the scope of Rule 25 in *Estrada*, where the trial court dismissed an appeal on the grounds that the appealed order was interlocutory. 70 N.C. App. at 639, 321 S.E.2d at 248. The Court explained: "Taken out of context, the second sentence of the Rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole." *Id.* The Court reasoned: "The title and first and third sentences clearly indicate that the motions described in the second sentence are *only* those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal." *Id.*

In *Estrada*, the plaintiff appealed "various orders" prior to final judgment being entered as to all claims and parties, and the trial court dismissed the plaintiff's appeal as interlocutory. *Id.* at 637, 321 S.E.2d at 247. This Court then reviewed on appeal whether the trial court had jurisdiction to dismiss the plaintiff's appeal. *Id.* This Court laid out the above rules for a trial court's continued jurisdiction over an appealed matter and determined that the exceptions and qualification did not apply. *Id.* at 638, 321 S.E.2d at 248. The Court concluded that, given its interpretation of Rule 25, the trial court did not have jurisdiction under Rule 25 to dismiss the appeal on the grounds that the appeal was interlocutory. *Id.* at 639, 321 S.E.2d at 248. Consequently, the Court held, the trial court "acted beyond [its] authority in dismissing the appeal." *Id.*

Here, there is similarly no contention that NC WARN abandoned its first appeal or that the order dismissing NC WARN's first appeal was in any way related to settling the record on appeal. However, with respect to the "exception" in which a trial court maintains jurisdiction over an appealed matter during the session in which the appealed order was rendered, the Commission's order provided that "[i]n contrast to a Superior Court judge, the Utilities Commission never loses jurisdiction over its cases before appeals are docketed in the appellate court due to termination of a term of court." The order cited N.C. Gen. Stat. § 62-90(c) in

support of that distinction. *See id.* ("The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission."). The Commission further reasoned that its jurisdiction over appealed orders was "more pervasive than the General Court of Justice, especially in its investigation determinations under Article 3."

The Commission's order additionally provided: "North Carolina recognizes an exception to the rule that a lower tribunal loses jurisdiction upon notice of appeal so as to permit the lower tribunal to modify its judgment *thereby also permitting it to retain jurisdiction to dismiss an appeal.*" (Emphasis added.) In support of this latter proposition, the Commission cited *Farm Credit Bank* as support for its position that "[e]ven where the retention by the trial court of jurisdiction after notice of appeal may be circumscribed for settling the record on appeal, the courts have permitted the use of this limited jurisdiction to dismiss an appeal."

However, *Farm Credit Bank* does not stand for the proposition that simply because a trial tribunal retains jurisdiction over a matter in order to settle the record on appeal, the trial tribunal is empowered to dismiss the appeal for reasons *unrelated* to settling the record during that time. Rather, the *Farm Credit Bank Court* held that the trial court had jurisdiction over a motion to dismiss an appeal as being unauthorized because (1) that issue was expressly made an objection to the proposed record on appeal, (2) the plaintiff consented to the trial court addressing the matter, and (3) the plaintiff waived any objection to the jurisdictional issue by requesting affirmative relief from the trial court on other matters. 121 N.C. App. at 77, 464 S.E.2d at 307-08.

We note that *Farm Credit Bank*'s reasoning is directly contrary to the well-established principle that "[s]ubject matter jurisdiction 'cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial.' " *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). Nevertheless, the validity of the *Farm Credit Bank* Court's reasoning aside, that opinion's holding simply does not support the Commission's assertion that the Commission's continuing jurisdiction over certain matters, such as jurisdiction to hold a further hearing on exceptions set out in a notice of appeal under N.C. Gen. Stat. § 62-90(c), necessarily gives the Commission the authority to dismiss an appeal for reasons unrelated to the specific nature of that continued jurisdiction.

Moreover, the Commission's broad reading of *Farm Credit Bank* conflicts with the analysis in *Estrada*. In *Estrada*, the Court explained that since the session of the term of the appealed order had ended and there was no allegation that the plaintiff had abandoned the appeal or failed to timely take action with respect to the appeal, "the Superior Court had jurisdiction on [the day the defendants moved to dismiss the appeal] only for the purpose of settling the case on appeal." 70 N.C. App. at 638, 321 S.E.2d at 248.

The Court went on to hold that because the trial court's order dismissing the appeal as interlocutory had nothing to do with settling the record on appeal, the order went beyond the court's authority. *Id.* at 638, 639, 321 S.E.2d at 248. Since *Farm Credit Bank* could not overrule *Estrada*, *see In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we do not read *Farm Credit Bank* as providing a trial tribunal jurisdiction to dismiss an appeal during a time of continued jurisdiction for a reason unrelated to that continued jurisdiction apart from the trial tribunal's limited power to dismiss appeals as provided in Rule 25.

Thus, the Commission was correct that it had some continued jurisdiction over the orders at issue in NC WARN's first appeal, N.C. Gen. Stat. § 62-90(c). However, that continued jurisdiction allowed the Commission to dismiss NC WARN's appeal only based on the grounds specified in Rule 25.

We initially observe that because NC WARN's first appeal had not yet been docketed with this Court, Duke's motion to dismiss the appeal was properly made to the Commission. N.C.R. App. P. 25(a). *Estrada* held that Rule 25 gives a trial court authority to dismiss an appeal, prior to docketing in the appellate court, "*only* . . . for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal." 70 N.C. App. at 639, 321 S.E.2d at 248. There is no dispute in this case that NC WARN's first notice of appeal was timely filed, that NC WARN timely complied with all appellate rules concerning its appeal, and that NC WARN properly perfected its appeal. Consequently, the Commission's order dismissing NC WARN's first appeal was not properly based upon Rule 25.

The Commission determined, however, that it nonetheless had jurisdiction to dismiss NC WARN's appeal under the rule stated by our Supreme Court in *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 361, 365, 230 S.E.2d 671, 674 (1976) that "an attempted appeal from a nonappealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction." That rule does not support the

Commission's order, however, because the authority to ignore an appeal from a nonappealable order and proceed as if no appeal had been taken is not equivalent to authority to dismiss the appeal itself. In *Edmisten*, the Supreme Court held that the intervenor's appeal from a nonappealable order did not divest the Commission of jurisdiction over the appealed order, and, therefore, the Commission "was not deprived of authority later to modify this order." *Id.* Notably, however, the Commission in *Edmisten* did not attempt to dismiss the appeal, and it was this Court that held, in a different opinion, that the appealed order was interlocutory and, therefore, nonappealable. *Id.* at 363-64, 230 S.E.2d at 673.

Finally, the Commission's order was based on the reasoning that it could dismiss the appeal of any non-party to the proceeding, including NC WARN, since a non-party has no statutory right to appeal. This Court has, however, recognized a non-party's right to appeal from an order denying the non-party's motion to intervene, despite the fact that the non-party is, by virtue of the appealed order, not a party to the case. *See Procter v. City of Raleigh Bd. of Adjustment*, 133 N.C. App. 181, 184, 514 S.E.2d 745, 747 (1999) (holding proposed intervenors had standing to appeal order denying motion to intervene under Rule 24 of Rules of Civil Procedure, reversing intervention order, and remanding for entry of order allowing intervention). *See also State ex rel. Easley v. Philip Morris Inc.*, 144 N.C. App. 329, 334-35, 548 S.E.2d 781, 784 (2001) (reviewing merits of proposed intervenor's appeal from order denying motion to intervene and affirming denial of intervention).

If sustained, the Commission's position that it should be permitted to dismiss NC WARN's appeal from its order denying NC WARN's motion to intervene since NC WARN was a non-party would deprive NC WARN of appellate review of the denial of its motion to intervene. The Commission's decision would be insulated from review. We do not believe the General Assembly intended that result. We, therefore, hold that the Commission exceeded its authority in dismissing NC WARN's appeal for lack of standing.

In *Estrada*, after holding that the trial court had no authority to dismiss the plaintiff's appeal as interlocutory, the Court noted: "Depending on our interpretation of the legal basis of the order [dismissing the plaintiff's appeal], we could either: (1) treat [the plaintiff's] appeal as an application for certiorari, grant same, and consider the merits; or (2) treat the order as in excess of authority and void *ab initio*, and consider the purported appeal, assuming the substantial right doctrine applies [to the interlocutory appeal], as properly before us." 70 N.C. App. at 640, 321 S.E.2d at 249 (internal citations omitted).

The Court held, however, that it was unable to treat the plaintiff's appeal as a petition for writ of certiorari because the plaintiff had already petitioned the Court for a writ of certiorari to review the order dismissing his appeal, a separate panel of the Court had previously denied that petition, and the *Estrada* Court was bound by the prior decision denying the petition to review the same order. *Id.* at 640-41, 321 S.E.2d at 249. The Court further held that although it could treat the order dismissing the appeal as void ab initio and consider the merits of the appeal, the appeal at issue was interlocutory and, since a prior panel of the Court had also denied the plaintiff's separate petition for writ of certiorari to review the orders underlying the first appeal, the *Estrada* Court was unable to conclude that the appeal affected a substantial right. *Id.* at 641, 321 S.E.2d at 249. Consequently, the Court dismissed the plaintiff's appeal of the interlocutory orders. *Id.*

In this case, as in *Estrada*, NC WARN has already filed a petition for writ of certiorari in this Court seeking review of the Commission's order dismissing its first appeal. A separate panel of this Court has denied that petition. We may not, therefore, treat NC WARN's appeal as a petition for writ of certiorari and allow it in order to reach the merits of NC WARN's appeal from the underlying orders. There is no impediment, however, to our treating the Commission's order "as in excess of authority and void *ab initio*, and consider[ing] the purported appeal . . . as properly before us." *Id.* at 640, 321 S.E.2d at 249.

We, therefore, hold that the Commission's order dismissing NC WARN's first appeal is void ab initio and we treat NC WARN's first appeal, from the intervention order and settlement order, as properly before us. In light of our holding, we need not address the sufficiency of NC WARN's second appeal from the intervention order and the settlement order.

II

[2] We next address NC WARN's appeal from the order denying its motion to intervene. We initially observe that NC WARN does not substantively challenge, in its brief, the Commission's order denying NC WARN's motion to intervene as of the time the order was entered. Although NC WARN makes an unsupported assertion that "the Commission's denial of NC WARN's Motion to Intervene was improper because NC WARN had standing to participate in this case," that bare contention, without any supporting authority or argument, is insufficient to raise the issue of the merits of the intervention order at the time it was entered. N.C.R. App. P. 28(b)(6).

Rather than arguing that the intervention order was erroneous when entered, NC WARN contends that the Commission's subsequent settlement order affected NC WARN, thereby giving rise to NC WARN's standing to intervene in this investigation docket. Since NC WARN has abandoned its right to substantively challenge the intervention order, we affirm that order.

We now turn to NC WARN's argument that it had standing to intervene after entry of the settlement order. The Commission's investigation in this case was an investigation pursuant to N.C. Gen. Stat. § 62-37, which provides:

> (a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the *parties affected* thereby notice and hearing.

(Emphasis added.)

NC WARN contends that it was a "party affected" by the Commission's settlement order because the settlement order "directly modified the underlying merger order in the merger docket" since it "goes outside the scope of investigation and attempts to . . . resolve matters in the merger dockets." NC WARN was a party to the merger docket, and it contends that it "cannot be a party affected in the merger dockets and somehow no longer affected when the merger order is modified in another docket."

We note that NC WARN never filed a second motion to intervene with the Commission, after entry of the settlement order, presenting the argument it now raises on appeal. However, NC WARN did argue in its first notice of appeal that the settlement order "approved a settlement agreement that had the intent and effect of significantly modifying the Commission's [merger order] in the other dockets relating to the merger of the two electric utilities . . . in which NC WARN was an intervening party." This is essentially the same basis upon which NC WARN now contends that it had standing to intervene in this investigation.

In its order dismissing NC WARN's first appeal, the Commission determined that NC WARN was properly denied intervention and that "the Commission's order in this docket does not modify its order in the merger docket as NC WARN alleges." We assume, without deciding, that

NC WARN's assertions in its first notice of appeal, and the Commission's ruling in its order dismissing that appeal, sufficiently preserve for appeal NC WARN's standing argument.

This Court addressed a similar standing issue in *CUCA*. There, the Commission and a South Carolina agency initiated a joint investigation of Duke Power under N.C. Gen. Stat. § 62-37 regarding accounting irregularities at Duke alleged by a whistleblower. *CUCA*, 163 N.C. App. at 2, 592 S.E.2d at 278. Carolina Utility Customers Association, Inc. ("CUCA"), an association representing many of North Carolina's largest industrial manufacturers, sought permission to "participate in" the investigation "to insure that the interests of its rate-paying manufacturers who may have suffered disproportionately from any excessive charges for electrical power were protected." *Id.*

The Commission denied CUCA's request to participate, and during the investigation it was determined that Duke had, through accounting practices, " 'inappropriately reduced' " its " 'pre-tax utility operating income' " for several years by millions of dollars. *Id.* at 3, 592 S.E.2d at 279. The Commission Staff and Duke then negotiated a settlement agreement whereby Duke would be required, among other things, to correct erroneous accounting entries, " 'make a one-time $25 million credit in 2002 to its deferred fuel amounts in North Carolina and South Carolina . . . to be incorporated into the next fuel cost proceedings in the respective states[,]" implement certain remedial actions, and " 'acknowledge and regret that communications with the two State Commissions failed to adequately detail significant changes to prior accounting practices[.]' " *Id.* at 4, 592 S.E.2d at 279.

The Commission held a staff conference to discuss the settlement agreement, and CUCA presented the Commission, at the conference, with a "motion requesting further investigation and hearing." *Id.* at 5, 592 S.E.2d at 279. The Commission denied CUCA's motion and voted unanimously to approve the settlement agreement, but the vote did not constitute a final order since the South Carolina agency had not yet approved the agreement. *Id.*, 592 S.E.2d at 279-80.

Prior to entry of a final order, CUCA and an individual ratepayer, Wells Eddleman, filed petitions to intervene and motions for further investigation and hearing. *Id.* at 2, 5, 592 S.E.2d at 278, 280. The Commission subsequently entered a final order granting CUCA and Eddleman's motions to intervene after concluding that " 'as ratepayers, CUCA [and] Eddleman . . . are affected by the level of Duke's rates and have an interest in this matter.' " *Id.* at 5, 592 S.E.2d at 280. The

Commission's order, however, denied the motions for further hearing and formally approved the settlement agreement. *Id.* On appeal, CUCA and Eddleman "raise[d] issues regarding the investigation of Duke and the Commission's subsequent order approving the settlement agreement resulting from that investigation." *Id.* at 6, 592 S.E.2d at 280. Duke, in turn, cross-appealed and argued that the Commission erred in granting CUCA and Eddleman intervention since they were not " 'parties affected' " by the investigation. *Id.*

This Court in *CUCA* held that CUCA and Eddleman were not " 'parties affected' " by the order and, therefore, had no standing to appeal the Commission's approval of the settlement agreement. *Id.* The Court first noted that "the investigation of Duke was conducted by the Commission pursuant to its powers and duties defined under Article 3 of our General Statutes, particularly Section 62-37, and not pursuant to the Commission's judicial functions outlined in Article 4." *Id.* The Court observed that intervention under the Commission Procedural Rules was permitted as follows: " 'Any person having an interest in the subject matter of any hearing or investigation pending before the Commission may become a party thereto and have the right to call and examine witnesses, cross-examine opposing witnesses, and be heard on all matters relative to the issues involved . . . .' " *Id.* at 7-8, 592 S.E.2d at 281 (quoting N.C.U.C. Rule R1-19(a)). The Commission had, therefore, "concluded that CUCA and Eddleman not only had an 'interest in the subject matter' but were also 'parties affected' by the order . . . ." *Id.* at 8, 592 S.E.2d at 281.

With respect to whether CUCA and Eddleman were "parties" to the investigation, the Court held that CUCA and Eddleman were not "parties" under N.C. Gen. Stat. § 62-37 until the Commission's final order granted their motion to intervene. 163 N.C. App. at 9, 592 S.E.2d at 282. The Court then addressed whether CUCA and Eddleman were parties "affected" by the order, and looked to a case interpreting the prior version of the statute providing a right to appeal the Commission's orders for " 'any *party affected* thereby.' " *Id.* (quoting *In re Hous. Auth. of City of Charlotte*, 233 N.C. 649, 657, 65 S.E.2d 761, 767 (1951)). The Court observed that " 'party affected' " had been defined, under that statute, as follows: " '[A] party is not affected by a ruling of the Utilities Commission unless the decision affects or purports to affect some right or interest of a party to the controversy and [is] in some way determinative of some material question involved.' " *Id.* (quoting *In re Hous. Auth.*, 233 N.C. at 657, 65 S.E.2d at 767).

Further, with respect to whether a party is "affected," the Court explained that the current appeals statute, which replaced the statute construed in *In re Housing Authority*, used the phrase "'party aggrieved'" instead of "'party affected.'" 163 N.C. App. at 10, 592 S.E.2d at 282 (quoting N.C. Gen. Stat. § 62-90(a) (2003)). The Court observed that, generally, "'[a] "party aggrieved" is one whose rights have been directly and injuriously affected by the judgment entered . . . .'" *Id.* (quoting *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999)). In addition, "[t]his Court's interpretation of 'party aggrieved' as it relates to an appeal of an order by the Commission also suggests that more than a generalized interest in the subject matter is required." *Id.*

Applying those interpretations of "'party affected'" and "'party aggrieved'" to the facts before it, the Court in *CUCA* reasoned:

> Duke was the only party recognized by the Commission throughout the investigation, as well as the only party directly and substantially affected by any subsequent order arising therefrom in the sense envisioned by the statute. As such, only Duke was entitled to receive notice and hearing pursuant to Section 62-37 to protect its due process rights. *While CUCA and Eddleman may have had an interest in the matter, their interest was only generalized and unsubstantial — not specific to them as individual Duke customers.*

Id., 592 S.E.2d at 283 (emphasis added).

The Court also rejected CUCA and Eddleman's argument that there was no party in the investigation that adequately protected their interests. *Id.* at 11, 592 S.E.2d at 283. In fact, the Court pointed out, the Public Staff participated in the investigation and recommended approving the settlement agreement, and the Public Staff acts independently of the Commission and was created "'to represent [the interests of] the using and consuming public' in matters before the Commission." *Id.* (quoting N.C. Gen. Stat. § 62-15(b) (2003)).

The Court in *CUCA* concluded that while CUCA and Eddleman "may have had an interest in the matter sufficient for intervention in a hearing or investigation pending before the Commission pursuant to Article 4, Article 3 requires the prospective interveners to also be 'parties affected' pursuant to Section 62-37." *Id.* at 11-12, 592 S.E.2d at 283-84. Since "approval of the settlement agreement only had a generalized and unsubstantial affect on CUCA and Eddleman, they were not 'parties

affected[,]' " and the Commission abused its discretion in granting their petitions to intervene. *Id.* at 12, 592 S.E.2d at 284. Further, since CUCA and Eddleman had no standing to appeal from the Commission's final order, the Court affirmed the order. *Id.* at 6, 12, 592 S.E.2d at 280, 284.

Here, Duke was the only party investigated by the Commission and, as in *CUCA*, the investigation was pursuant to the Commission's Article 3 powers and not its Article 4 judicial power. Like CUCA, NC WARN is an organization of ratepayer members and sought to intervene in order to protect the financial interests of its members. In other words, NC WARN's interest was "only generalized and unsubstantial — not specific to [it] as [an] individual Duke customer[]." *Id.* at 10, 592 S.E.2d at 283. And, as in *CUCA*, the Public Staff, the party protecting the interest of the consuming public, participated in the investigation and recommended the Commission adopt the settlement agreement. NC WARN's interest in this case is, therefore, materially indistinguishable from the interests of the intervenors in *CUCA*.

NC WARN nonetheless tries to distinguish *CUCA* from the present case by arguing that here, unlike in *CUCA*, the settlement order modified the merger order and NC WARN, having already been a party to the merger docket, was therefore necessarily a party affected by the settlement order. In support of its argument, NC WARN relies upon the following specific provisions of the settlement agreement:

> C. Duke will guarantee that Duke's North Carolina retail ratepayers will receive an additional $25 million in fuel and fuel-related cost savings over and above the amount Duke is obligated to provide pursuant to the Merger Order.
>
> D. Duke will contribute an additional $5 million to workforce development and low-income assistance in North Carolina on top of the amount provided in the Merger Order.

NC WARN also points to the settlement agreement's statement that the parties "desire to resolve all matters and issues involved in the Commission's investigation and the Merger Dockets without further litigation and expense and to move forward in a positive manner." These provisions of the settlement agreement were summarized in the Commission's settlement order.

Based on the provisions highlighted by NC WARN, however, we believe that the settlement agreement does not modify the merger order

but, by its own terms, requires Duke to comply with provisions that are "over and above" obligations placed on Duke in the merger order. While we acknowledge that the parties' assertion in the settlement agreement that they wanted to resolve "all matters and issues involved in the . . . Merger Dockets" unnecessarily blurred the otherwise clear distinction between the two proceedings, the parties' loose statement does not serve to alter the material terms of the settlement agreement highlighted by NC WARN. Based on the face of the agreement as to those terms, we cannot conclude that the settlement order modified the merger order.

Further, even assuming that the settlement order dealt with some of the same matters at issue in the merger order, *CUCA* makes clear that there are different requirements for intervention in an Article 4 judicial proceeding before the Commission and intervention in an Article 3 investigation before the Commission. While it appears that the Commission's Procedural Rules permit intervention by "'[a]ny person having an interest in the subject matter of any hearing'" before the Commission, *id.* at 7, 592 S.E.2d at 281 (quoting N.C.U.C. Rule R1-19(a)), the "party affected" standard under N.C. Gen. Stat. § 62-37(a) is higher and does not permit intervention by a party that merely has a "generalized and unsubstantial" interest in the matter, *CUCA*, 163 N.C. App. at 10, 592 S.E.2d at 283. Thus, under *CUCA*, even assuming NC WARN had an interest sufficient to intervene in the merger docket, a non-Article 3 proceeding, NC WARN's intervention in the merger docket does not show that it was a party affected for purposes of the investigation docket.

Under *CUCA*, we hold that NC WARN was properly denied intervention by the Commission and that the subsequent entry of the settlement order did not change NC WARN's status and make NC WARN a "party affected." Consequently, as in *CUCA*, NC WARN has no standing to appeal from the settlement order, and we affirm that order as well. In light of our disposition, we deny Duke's motion to dismiss the appeal.

Vacated in part; affirmed in part.

Judges BRYANT and CALABRIA concur.

IN RE MOORE

[234 N.C. App. 37 (2014)]

IN THE MATTER OF GILBERT MOORE, JR.

No. COA13-1397

Filed 20 May 2014

1. Appeal and Error—notice of appeal—designation of court omitted—writ of certiorari

The Court of Appeals granted a petition for a writ of certiorari in an involuntary commitment case where the notice of appeal did not designate the court to which the appeal was taken.

2. Appeal and Error—mootness—expiration of involuntary commitment order

An appeal from a ninety-day involuntary commitment order was not moot even though the ninety days had passed because there could be collateral legal consequences.

3. Appeal and Error—preservation of issues—waiver—involuntary recommitment—objection not raised at first hearing

The respondent in a case involving a ninety-day recommitment order waived his argument concerning subject matter jurisdiction and the facts alleged in the petition where his argument challenged the magistrate's determination to issue a custody order on those facts. Furthermore, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing.

4. Mental Illness—findings—evidentiary—recital of doctor's testimony

In an involuntary commitment proceeding, the trial court did not err by making a challenged evidentiary finding of fact even though it was reciting some of a doctor's testimony because the trial court went on to find the ultimate facts that defendant was mentally ill and a danger to himself and others.

5. Mental Illness—involuntary commitment—findings—defendant a threat to himself

The trial court in an involuntary commitment proceeding properly found that respondent was a danger to himself because of a reasonable possibility that defendant would suffer serious physical debilitation in the near future. While the trial court made findings about defendant's past conduct, the trial court also made finding about respondent's likely future conduct.

IN RE MOORE

[234 N.C. App. 37 (2014)]

Appeal by respondent from order entered 5 August 2013 by Judge Amanda E. Stevenson in Granville County District Court. Heard in the Court of Appeals 5 May 2014.

Roy Cooper, *Attorney General*, *by Adam Shestak*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for respondent-appellant.*

MARTIN, Chief Judge.

Respondent Gilbert Moore, Jr. appeals from the trial court's involuntary commitment order 5 August 2013 recommitting him for ninety days of inpatient treatment. Respondent argues that the trial court lacked subject-matter jurisdiction and that the evidence does not support the trial court's ultimate findings that respondent was a danger to himself as well as others.

On 25 September 2012, a licensed clinical social worker in Guilford County filed an affidavit and petition to have respondent involuntarily committed. The affidavit contained the following facts:

> Mr. Moore has a history of mental illness. At present he has very disorganized speech and is not making any sense. He has reported to the crisis center multiple times this morning. He is not able to express exactly what he needs due to his mental illness. He appears to have a thought disorder or some kind of psychotic disorder. He is in need of evaluation and treatment.

The same day, a Guilford County magistrate, based on petitioner's affidavit and petition, issued a custody order and respondent was picked up by a law enforcement officer and taken to a facility for examination. Respondent was then examined by two different physicians, both of whom recommended inpatient commitment for respondent, and respondent was taken to Central Regional Hospital. After a hearing on 2 October 2012, the District Court of Granville County issued an involuntary commitment order committing respondent to thirty days of inpatient commitment and sixty days of outpatient commitment. The court recommitted respondent to ninety days of inpatient treatment on 1 November 2012. Additional involuntary commitment orders for varying durations were issued by the district court on 31 January 2013, 4 April 2013, 13 June 2013, and 5 August 2013.

Before issuing its 5 August 2013 order, the court heard evidence as follows: Dr. Jeffrey Fahs, respondent's attending physician, testified that respondent had schizoaffective disorder. He further testified that by age forty-four respondent had been committed to state hospitals approximately twenty-seven times, and one of the reasons he was re-hospitalized so many times was because he would stop taking his medication when he was released. Dr. Fahs also thought that respondent was a danger to others; respondent was on Central Regional Hospital's alert system due to at least one altercation with another patient. Dr. Fahs, based on respondent's condition, history of violence, and the fact that no suitable discharge placement was available, recommended that respondent be recommitted for ninety days.

Esther Robie, a social worker who worked with respondent, also testified that respondent needed a proper discharge placement because his discharges have become shorter and his readmissions more frequent because he stops taking his medication during periods of discharge. In fact, in the year before respondent's 2 October 2012 involuntary commitment, he had been admitted to hospitals on three different occasions. Ms. Robie also testified that when respondent first arrived at Central Regional Hospital he was placed in the high management unit because of his aggressive behavior.

Based on Dr. Fahs's and Ms. Robie's testimony the district court made the following findings of fact:

> 1. The respondent was admitted to this facility on 09-29-2012.
>
> 2. The respondent has a diagnosis of schizoaffective disorder with psychotic and manic symptoms. In the past, he also had delusional thinking.
>
> 3. Upon admission on September 29, 2012, he had exhibited aggressive tendencies.
>
> 4. The respondent has a history of 27 state psychiatric hospitalizations and many other non-state psychiatric hospitalizations.
>
> 5. He has a history of non-compliance with his medications outside of the hospital.
>
> 6. The respondent is at high risk of decompensation if released and without medication.

7. During his relapses, he is a danger to others.

8. Since October 2012, he has been compliant with medications. He is doing well with treatment, listens to team and is on level 5. This entitles him to off campus privileges.

9. Dr. Fahs stated he is concerned he would "relapse by the end of football season" if released without placement.

10. His readmissions are more frequent.

11. The respondent acknowledges his mental illness.

Based on these findings of fact, the trial court found that there was clear, cogent, and convincing evidence to support a finding that respondent is mentally ill and is a danger to himself and others, and ordered the recommitment of respondent as an inpatient for ninety days. Respondent appeals.

Before addressing the merits of respondent's appeal we must address two preliminary matters: (1) whether to grant respondent's petition for writ of certiorari, and (2) whether respondent's appeal is moot.

[1] First, respondent has filed a petition for writ of certiorari because his notice of appeal failed to designate "the court to which [his] appeal is taken" as required by North Carolina Rule of Appellate Procedure 3(d). A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Thus, failure to comply with Rule 3 is a jurisdictional default that prevents this Court "from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). North Carolina Rule of Appellate Procedure 21(a)(1), however, allows us to issue a writ of certiorari under "appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." In *State v. Hammons*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012), we exercised our discretion to allow the defendant's petition for writ of certiorari when "it [was] readily apparent that [the] defendant ha[d] lost his appeal through no fault of his own, but rather as a result of sloppy drafting of counsel." Therefore, we exercise our discretion and grant respondent's petition for writ of certiorari and address the merits of his appeal.

[2] Next, we hold that respondent's appeal is not moot even though the ninety-day commitment period provided in the 5 August 2013 order, from which respondent appeals, has expired. Our Supreme Court has addressed the question of whether the discharge of a person who was involuntarily committed renders an appeal moot. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 634 (1977). The Court in *Hatley* reasoned that "[t]he possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot." *Id.* at 695, 231 S.E.2d at 635. Respondent's appeal is not moot.

[3] Respondent's first substantive argument is that the trial court lacked subject-matter jurisdiction to recommit him on 5 August 2013 because the 25 September 2012 affidavit and petition were fatally deficient because the facts alleged did not demonstrate that respondent met the statutory requirements for involuntary commitment. This argument fails for the reasons stated below.

While respondent claims he is challenging the subject-matter jurisdiction of the trial court to commit him, his argument appears to be that the facts in the original affidavit and petition were insufficient to demonstrate that reasonable grounds existed to believe that respondent was mentally ill and a danger to himself or others. *See* N.C. Gen. Stat. § 122C-261(a)–(b) (2013) (requiring the petitioner to state the facts that his opinion that the respondent is mentally ill and a danger to himself or others is based on, and requiring the magistrate to determine if there are reasonable grounds to believe that the respondent is mentally ill and a danger to himself or others). Thus, respondent challenges the magistrate's 25 September 2012 determination to issue a custody order. For the reasons stated below, we hold that respondent has waived this argument.

We have previously found that N.C.G.S. § 122C-261's reasonable grounds requirement is synonymous with probable cause in the criminal context. *See, e.g.*, *In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978) ("Reasonable grounds has been found to be synonymous with probable cause," (internal quotation marks omitted)). We have drawn this comparison because a custody order deprives a person of their liberty and therefore is analogous to a criminal proceeding, like the issuance of an arrest warrant, where a defendant is deprived of his liberty. *In re Zollicoffer*, 165 N.C. App. 462, 466, 598 S.E.2d 696, 699 (2004). In the past, we have left the analogy there, however, today we take the analogy one step further.

When there is a problem with a warrant, a defendant may waive his objection to the sufficiency of the warrant if he does not object before he enters a plea of not guilty. *State v. Green*, 251 N.C. 40, 43, 110 S.E.2d 609, 611–12 (1959); *see also* Irving Joyner, Criminal Procedure in North Carolina § 2.4[C] (3rd ed. 2005). Based on the procedure for challenging a warrant in the criminal context, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing. Furthermore, while none of our involuntary commitment case law has directly addressed respondent's argument, a requirement that respondents raise issues with the affidavit, petition, or custody order in the first involuntary commitment hearing is consistent with our case law. *Reed*, 39 N.C. App. at 228, 249 S.E.2d at 865, addressed a respondent's argument that an affidavit was defective. The Court recited the facts of the case as follows:

> On the affidavit of his cousin, respondent was taken into custody. At his commitment hearing, he moved to dismiss on the ground that the petition for commitment was so vague as to violate both the statutory standard and due process, so that there could have been no finding of probable cause for issuance of the custody order.

Id. at 277, 249 S.E.2d at 865. Thus, the facts suggest that the respondent in *Reed* challenged the sufficiency of the affidavit during his first involuntary commitment hearing, rather than at a later recommitment hearing. Here, respondent failed to raise the issue of the sufficiency of the affidavit during the first involuntary commitment hearing, nor did the record reflect that he raised it at any of the four recommitment hearings preceding the present appeal. Thus, we hold respondent has waived any challenge to the sufficiency of the affidavit to support the magistrate's original custody order.

[4] Next, respondent challenges two findings of fact from the 5 August 2013 order: (1) Finding of Fact 9, and (2) the ultimate findings that respondent was a danger to himself as well as others.

Our standard of review for a recommitment order is the same as our standard of review for a commitment order. *In re Hayes*, 151 N.C. App. 27, 29, 564 S.E.2d 305, 307 ("We see no reason to distinguish the standard of review of a recommitment order from that of a commitment order."), *disc. review denied and appeal dismissed*, 356 N.C. 613, 574 S.E.2d 680 (2002). When we review a commitment order, our review is limited to determining "(1) whether the court's ultimate findings are indeed supported by the 'facts' which the court recorded in its order as supporting

its findings, and (2) whether in any event there was competent evidence to support the court's findings." *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). If a respondent does not challenge a finding of fact, however, it is "presumed to be supported by competent evidence and [is] binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984). Furthermore, we do not reweigh the evidence because "[i]t is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing." *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978).

Respondent challenges Finding of Fact 9, which states: "Dr. Fahs stated he is concerned [respondent] would 'relapse by the end of football season' if released without placement." Respondent argues that this is not a finding of fact because it is simply a recitation of evidence. For this proposition respondent relies on *In re Rogers*, 297 N.C. 48, 55, 253 S.E.2d 912, 917 (1979), which states: "Indeed [the Board] made no findings of fact at all. It merely recited some of the evidence presented and stated its conclusion that Rogers had not satisfied the Board of his good moral character." While on its face this statement would seem to support respondent's argument, it does not.

There are two types of facts: Ultimate facts and evidentiary facts. *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Id.* Thus, knowing that there are evidentiary facts and ultimate facts, it is clear that the issue in *Rogers* was that the Board only found evidentiary facts and not ultimate facts, which would support its conclusion of law. Applied here, the trial court did not err in making the evidentiary finding in Finding of Fact 9 even though it was reciting some of Dr. Fahs's testimony because the trial court went on to find the ultimate facts that respondent was mentally ill and a danger to himself and others.

[5] Next, respondent asserts that there is not clear, cogent, and convincing evidence to support the trial court's ultimate findings that respondent is a danger to himself and a danger to others.[1]

1. We note that respondent states he is challenging the trial court's conclusions of law that respondent is a danger to himself and others. While the pre-printed Involuntary Commitment Order AOC-SP-203 categorizes these as "conclusions," the law is clear that these determinations are not conclusions of law because "[w]hether a person is mentally ill . . . and whether he is imminently dangerous to himself or others, present questions of fact." *Hogan*, 32 N.C. App. at 433, 232 S.E.2d at 494. Thus, "[w]e will ignore the incorrect designation and treat the court's conclusions as findings of the ultimate facts required by [the statute]." *See id.*

A person is a danger to himself if within the relevant past:

1. The individual has acted in such a way as to show:

   I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

   II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself . . . .

N.C. Gen. Stat. § 122C-3(11)(a) (2013). Respondent concedes that the evidence supports subpart I of the definition, but argues that the evidence does not support the finding that there was a "reasonable probability" that respondent would suffer serious physical debilitation in the near future. Respondent relies on *In re Whatley*, __ N.C. App. __, __, 736 S.E.2d 527, 531 (2012), *appeal after remand*, __ N.C. App. __, 754 S.E2d 258 (2014) (unpublished), for the proposition that the possibility of relapse alone cannot satisfy the requirement of serious physical debilitation in the near future. The *Whatley* court was concerned that the trial court's findings of fact were all focused on the respondent's past conduct and not about the respondent's potential future conduct. *Id.* ("Each of the trial court's findings pertain to either Respondent's history of mental illness or her behavior prior to and leading up to the commitment hearing, but they do not indicate that these circumstances render Respondent a danger to herself in the future."). The facts before us are distinguishable from *Whatley* because, while the trial court did make findings of fact about respondent's past conduct, the trial court also made findings about respondent's likely future conduct. The trial court found that respondent "is at a high risk of decompensation if released and without medication," and that Dr. Fahs thought respondent, if released, would "relapse by the end of football season." As a result, the trial court's findings of fact indicate that respondent is a danger to himself in the future. Therefore, the trial court properly found that

respondent is a danger to himself because there is a reasonable possibility that he will suffer serious physical debilitation in the near future.

We do not need to consider respondent's argument that he is not a danger to others because N.C.G.S. § 122C-276(e) in conjunction with N.C.G.S. § 122C-271(b)(2) only requires that the trial court find that a respondent is a danger to himself or others.

For the reasons stated above, we affirm.

Affirmed.

Judges STEELMAN and DILLON concur.

ALEX D. McLENNAN, JR., DOROTHY N. McLENNAN, AND RUFUS T. CARR, JR., PLAINTIFFS

v.

C.K. JOSEY, JR., DEBORAH G. JOSEY, JOSEY PROPERTIES, LLC, THOMAS D. TEMPLE, IV, CRYSTAL TEMPLE, BETTY JO TEMPLE, AND JOSEPH LANIER RIDDICK, III, DEFENDANTS

No. COA13-1271

Filed 20 May 2014

Real Property—dispute—boundary line—summary judgment

The trial court did not err in a real property dispute case by granting plaintiffs' motion for summary judgment. Plaintiffs established a prima facie case of title to the disputed land, and defendants presented no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. No genuine issue of material fact existed as to the true location of the boundary line as contemplated by the partition.

Appeal by defendants from order entered 10 June 2013 by Judge J. Carlton Cole in Halifax County Superior Court. Heard in the Court of Appeals 19 March 2014.

Rountree & Boyette L.L.P., by Charles S. Rountree, for plaintiffs-appellees.

Etheridge, Hamlett & Murray, L.L.P., by Ernie K. Murray, for defendants-appellants.

ELMORE, Judge.

Defendants appeal from order granting plaintiffs' motion for summary judgment. After careful consideration, we affirm.

I. Facts

Alex McLennan, Jr., Dorothy McLennan, and Rufus Carr, Jr., (collectively plaintiffs) and C.K. Josey, Jr., Deborah G. Josey, Josey Properties, LLC., Thomas D. Temple, IV, Crystal Temple, Betty Jo Temple, and Joseph Lanier Riddick, III, (collectively defendants) own adjoining tracts of land with a common boundary located in Halifax County. In July 2010, defendants recorded a map at Book 2009, Page 193, and a deed at Book 2321, Page 750, in the Halifax County Registry that asserted ownership of an area allegedly owned by plaintiffs. On 27 August 2010, plaintiffs filed a "COMPLAINT TO ESTABLISH BOUNDARY AND QUIET TITLE" pursuant to N.C. Gen. Stat. § 41-10. Plaintiffs alleged that defendants "claimed ownership of lands owned by Plaintiffs and have created a cloud on title to Plaintiff's [sic] property." Thereafter, plaintiffs filed a motion for summary judgment that was heard before Judge J. Carlton Cole on 25 and 26 February 2013. At the hearing, the evidence showed that both parties obtained title to their tracts from a common source, David Clark, on 10 November 1882. Following Clark's death, his lands were partitioned and divided among his heirs in the "Report of Commissioners in Partition" (the partition). Plaintiffs' source of title is "Lot 4," allocated to Anna Clark, and defendants' source of title is "Lot 8," allotted to Dora Clark. Plaintiffs' southern boundary line and defendants' northern boundary line are shared in common. The partition describes the common boundary line as "down the run of [Gaynor's] Gut to the Canal[.]" The dispute arises from the parties' disagreement as to the location on the ground of the run of the gut to the canal. Both parties agree that the shared boundary runs southwest to a point where the flow of the gut diverges. However, plaintiffs argue that the gut forks left at that divergent point and runs through a dam, a pond, and then empties into the canal. Defendants contend that the gut forks right at the split and then empties into the canal.

II. Analysis

a.) Prima Facie Case

Defendants argue that the trial court erred in granting plaintiffs' motion for summary judgment. Specifically, defendants aver that plaintiffs failed to meet their burden of establishing the on-the-ground

location of the claimed boundary line: the run of the gut to the canal. We disagree.

"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, 523-24, 649 S.E.2d 382, 385 (2007)). We must consider "the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]" *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997).

Pursuant to N.C. Gen. Stat. § 41-10, an individual can institute an action to remove a cloud on title "against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2013). The statute provides this express authority in an attempt to "free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion[.]" *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citation and quotation omitted). Should the plaintiff establish "a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff's claim." *Id.* (citation omitted). The plaintiff establishes a *prima facie* case for removing a cloud on title upon satisfying two prongs: "(1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest." *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004) (citation omitted). In order to establish ownership of the disputed land under prong one, the plaintiff can utilize the "common source of title" doctrine, which requires him "to connect both [himself] and defendants with a common source of title and then show in [himself] a better title from that source." *Chappell v. Donnelly*, 113 N.C. App. 626, 629-30, 439 S.E.2d 802, 805 (1994) (citation omitted). Additionally, the plaintiff must show that "the disputed tract lies within the boundaries of their property." *Id.* (citations omitted). Accordingly, the burden is on the plaintiff to establish "the on-the-ground location of the boundary lines which they claim." *Id.* (citation omitted). He must "locate the land by fitting the description in the deeds to the earth's surface." *Id.* (citation and quotation omitted). In locating such land:

> courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed; for, in describing the property, parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position, and that of the property conveyed.

Cox v. McGowan, 116 N.C. 74, 76, 21 S.E. 108, 109 (1895) (citation omitted). It necessarily follows that "[r]esort may not be had to a junior conveyance for the purpose of locating a call in a senior deed." *Bostic v. Blanton*, 232 N.C. 441, 445, 61 S.E.2d 443, 446 (1950) (citations omitted).

In *Poe v. Bryan*, the plaintiff testified that she had personal knowledge of the contended boundary line because she lived on the tract of land during her youth and learned about the boundary lines from her grandfather. 12 N.C. App. 462, 466, 183 S.E. 2d 790, 792-93 (1971). A surveyor also testified that "the courses on the court map were normal variations from the courses on the deed and that the land described in the deed is the same tract of land shown as plaintiffs' contended tract." *Id.* at 466-67, 183 S.E.2d at 793. We held that "the testimony of the feme plaintiff and the [trial] court appointed surveyor constitutes sufficient evidence that the description of the . . . deed fits the land and embraces the land in controversy." *Id.* at 467, 183 S.E.2d at 793. Conversely, our Supreme Court in *Day v. Godwin* held that the plaintiff failed to meet his burden to locate the on-the-ground location of the disputed land because no survey of the disputed land was conducted nor did plaintiff have personal knowledge about the location of the disputed tract. 258 N.C. 465, 470-71, 128 S.E.2d 814, 817-18 (1963).

In the case at bar, plaintiff McClennan testified that he worked on his grandfather's farm and Lot 4 since 1958. During that time, he "came to know the location of Gaynor's Gut from the Dam at Blue Pond to the Dam at Coon Pond, and from the Dam at Coon Pond through Coon Pond to where Gaynor's Gut enters Clark's Canal." In 1967, he managed the farm on a full-time basis, and it required that he "know the location of Gaynor's Gut and the other boundaries of the property being managed." Plaintiff McClennan testified that the disputed boundary line encompassing plaintiffs' land "has been a well known, well marked and agreed upon line between our lands since the division of the David Clark lands in the 1800's." Additionally, a professional surveyor, Donald S. Hilhorst, surveyed Gaynor's Gut in 2010 using various recorded documents in the Halifax County Register of Deeds Office. He found the boundary line to comport with plaintiff McClennan's testimony. Hilhorst's survey was

also consistent with "the legal description of Gaynor's Gut" found in a 1909 deed and "the recorded survey of the Mrs. Anna C. Arnold [map]."

The 1909 deed divided defendants' predecessors' Lot 8 into two parcels and gave one 805-acre parcel to the Wilts Veneer Company with the remaining tract to be held by defendants' predecessors. The deed explicitly indicated a shared boundary line between Wilts Veneer Company and Anna Arnold's (plaintiffs' predecessor in title) Lot 4, which necessarily included the disputed land as part of Lot 4. It also contained a course and distance description of the run of Gaynor's Gut that places the disputed tract within Lot 4.

The Anna Arnold map was created in 1918 to reflect a portion of Lot 4 that was given by Anna Arnold to Wilts Veneer Company in a timber rights conveyance. It included a metes and bounds description of Gaynor's Gut from Lot 4's northeast corner down to its run to the Canal. The metes and bounds description reflected on the map shows the disputed land to have been owned by Anna Arnold.

Although Hilhorst used junior conveyances by referencing the 1909 and 1918 documents in his survey, they did not enlarge the plaintiffs' boundary lines, but rather provided an unambiguous specific description of Gaynor's Gut, which comports with the general description found in the partition. *See Carney v. Edwards*, 256 N.C. 20, 24, 122 S.E.2d 786, 788-89 (1961) ("It is . . . well settled that a general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey. Only when the attempted specific description is ambiguous and uncertain will the general prevail." (citation omitted)). In totality, plaintiffs' evidence was sufficient to meet their burden to show that the disputed area lies within the boundaries of their land.

b.) Defendants' Burden

Since plaintiffs established a *prima facie* case of title to the disputed land, defendants were required to establish that their title was superior.

On appeal, however, defendants present no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. Moreover, defendants' recorded map in 2010 and subsequent deeds using the map's boundary description to convey the disputed land are junior to the 1909 and 1918 documents that describe the run of Gaynor's Gut. Thus, the descriptions found in the 1909 and 1918 documents control. *See Goodwin v. Greene*, 237 N.C. 244, 250, 74 S.E.2d 630, 634 (1953) ("Where a junior deed calls for a corner or line in a prior

deed . . . it is not permissible to resort to a call in the junior deed for the purpose of establishing the call or line in the prior deed."). The 1909 deed is included by reference in each deed within defendants' chain of title. Their chain of title specifically excludes defendants and their predecessors from the tract that was given to the Wilts Veneer Company in the 1909 deed. As previously mentioned, the 1909 deed establishes that the disputed land was never a part of defendants' Lot 8.

Although defendants offer parol evidence in the form of a 2010 elevation study, affidavits of individuals with personal knowledge of the boundary line, and other extrinsic testimony to show that the disputed land belongs to them, reliance on such evidence is improper. *See Overton v. Boyce*, 289 N.C. 291, 293-94, 221 S.E.2d 347, 349 (1976) ("When the deed itself, including its references . . . describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land" but is inadmissible to "enlarge the scope of the description in the deed." (citations omitted)). Thus, defendants failed to establish that their title to the disputed property was superior to plaintiffs' title. Accordingly, the trial court properly granted summary judgment to plaintiffs.

III. Conclusion

In sum, we affirm the trial court's order granting plaintiffs' motion for summary judgment because no genuine issue of material fact exists as to the true location of the boundary line as contemplated by the partition.

Affirmed.

Judges McCULLOUGH and DAVIS concur.

NANNY'S KORNER CARE CENTER BY BERNICE M. CROMARTIE, CEO, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES — DIVISION OF CHILD DEVELOPMENT, RESPONDENT

No. COA13-602

Filed 20 May 2014

Administrative Law—final agency action—child care center—affirmative duty to substantiate allegation

In an action arising from a Department of Health and Human Services (DHHS) warning to a child care center arising from alleged abuse, DHHS had an affirmative duty to independently substantiate the abuse before issuing the warning and mandating corrective action. N.C.G.S. § 110-105.2 plainly gives that affirmative duty to DHHS, thereby preventing it from treating a local Department of Social Services substantiation as dispositive. Furthermore, although a constitutional challenge was not advanced on appeal, the petitioner here arguably suffered a deprivation of liberty interests guaranteed by the State constitution.

Appeal by petitioner from order entered 9 January 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 October 2013.

George Ligon, Jr., for petitioner–appellant.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

HUNTER, JR., Robert N., Judge.

Petitioner Nanny's Korner Care Center by Bernice M. Cromartie, CEO ("Petitioner") appeals from an order affirming the Final Agency Decision of Respondent North Carolina Department of Health and Human Services ("DHHS") in which DHHS issued a written warning to Petitioner's child care center and prohibited Petitioner's husband from being on the child care center's premises while children are on site. Petitioner contends that the superior court erred in concluding that DHHS could rely on a substantiation of abuse made by a local Department of Social Services to invoke its disciplinary authority under N.C. Gen. Stat. § 110-105.2(b). We agree.

I. Factual & Procedural History

Bernice Cromartie ("Mrs. Cromartie") is the CEO and President of Nanny's Korner Care Center ("Nanny's Korner"), a child care facility located in Lumberton, operating pursuant to a license issued by the Division of Child Development and Early Education ("the Division") within DHHS. Ricky Cromartie ("Mr. Cromartie"), Mrs. Cromartie's husband, was a lead teacher at Petitioner's facility and was also responsible for performing janitorial and maintenance work at the facility.

On 5 November 2009, the Division received a report that an eight-year-old girl who was enrolled with Petitioner had complained that a staff member at Nanny's Korner had touched her inappropriately. On that same day, Sharon Miller ("Ms. Miller"), an abuse and neglect consultant with the Division, along with a social worker from the Robeson County Department of Social Services ("DSS") began to investigate the allegations in the report. Ms. Miller and the DSS social worker visited the complainant's school and spoke with the minor child's guidance counselor and teacher. They then visited the minor child's home and interviewed the complainant, her three-year-old sibling, and the complainant's mother.

Ms. Miller and the DSS social worker next visited Nanny's Korner and interviewed Mr. and Mrs. Cromartie, as well as several staff members. Ms. Miller learned that, on occasion, Mr. Cromartie had been "the sole caregiver for the children after [another staff member's] shift ended at eight-thirty p.m." Mrs. Cromartie was adamant that the allegations against her husband were false and upset that her husband was being accused of such conduct. Mr. Cromartie denied inappropriately touching the complainant.

According to Ms. Miller, in order to ensure the safety of affected children during the pendency of an investigation into allegations of child abuse or neglect, the Division typically enters into a "protection plan" with the provider or owner of the facility under investigation. Such a protection plan identifies rules to which the provider or owner agrees to adhere during the course of the investigation. In the present case, on 6 November 2009, Mrs. Cromartie was informed of, and agreed to, a protection plan which provided, in relevant part, that "Mr. Ricky Cromartie can not [sic] and will not be on the premises of the child care center during normal business hours . . . and therefore . . . will not be present while children are present." Ms. Miller made subsequent visits to Nanny's Korner in December 2009 and again in January 2010 in order to monitor Petitioner's compliance with the protection plan.

On 2 February 2010, Ms. Miller received notice that the local DSS had concluded its investigation and had substantiated the allegations of sexual abuse against Mr. Cromartie. Two days later, on 4 February 2010, Ms. Miller submitted a Case Decision Summary to her supervisor containing the results of the Division's investigation into the allegations of sexual abuse made against Mr. Cromartie. In this Case Decision Summary, Ms. Miller noted that DSS had substantiated that Ricky Cromartie inappropriately touched a child being cared for at Nanny's Korner and recommended issuance of a special provisional license to Nanny's Korner. The Case Decision Summary also indicated that, in making its determination, the Division considered the following "other factors": "The male staff member submitted to a polygraph test and passed with no deception. No criminal charges were filed. No indication that any other staff were involved/aware of the incidents. Protection plan implemented during the initial visit."

Since changing the status of Petitioner's license to a special provisional license "would have resulted in changing the star [rating of the facility]," the Division's Internal Review Panel met in March 2010 to discuss the issuance of a proposed special provisional license and to give Petitioner an opportunity to explain in writing why she believed the Division should not take such action. After meeting for a second time in June 2010 and considering Petitioner's compliance with the corrective action plan in place at Nanny's Korner, the Division's Internal Review Panel reduced the administrative action to a written warning. However, Mr. Cromartie was still prohibited from being on the premises of Nanny's Korner while children were present. The Review Panel articulated the following rationale for its decision to issue the written warning and to prohibit Mr. Cromartie from being on Petitioner's premises during operational hours:

> An eight-year old child disclosed to a medical professional who conducted a Child Medical Examination (CME) that on two separate occasions, Ricky Cromartie, the facility owner's husband, engaged in incidents of inappropriate touching at the facility, a violation of North Carolina General Statute 110-91(10) regarding care and treatment of children. The child also disclosed consistent information to the Department of Social Services and the Child Abuse/Neglect Consultant. Mr. Cromartie was the sole caregiver present at the facility at the time of the incidents. The child is no longer enrolled.

The Review Panel noted that its decision to take the less severe administrative action of issuing a written warning in lieu of a special provisional license was due to the fact that Mrs. Cromartie "has complied [with] all written request[s] from [the Division]." However, the Review Panel determined that its decision to prohibit Mr. Cromartie from being at the facility during its operational hours should be upheld "as a result of the substantiation of child sexual abuse by the local department of social services" and would remain in place "unless substantiation is overturned."

Petitioner filed a timely petition for a contested case hearing in the Office of Administrative Hearings ("OAH") to challenge this decision and a hearing on the petition was held on 12 July 2011. After hearing the evidence, the Administrative Law Judge ("ALJ") made numerous findings of fact, including the following:

> 39. None of the parents who testified at the hearing in this matter had any concerns about Mr. Cromartie caring for their children. These parents could not give any reasons why Mr. Cromartie should not be allowed to work at Nanny's Korner[.]
>
> . . . .
>
> 43. None of the employees who testified at the hearing in this matter observed or had knowledge of any of the conduct which gave rise to the allegations of sexual abuse by Ricky Cromartie[.]
>
> . . . .
>
> 52. Petitioner also kept a communication log on [the minor child]. In her communication logs concerning [the minor child], Petitioner documented that [the minor child's] mother had experienced behavior problems with [the minor child], and documented three incidents in which [the minor child] lied while at Petitioner's facility.
>
> . . . .
>
> 69. Petitioner saw no indication, and received no reports of inappropriate touching or sexual misconduct towards children prior to November 6, 2009[.]
>
> . . . .

85. Neither [the minor child] nor [the minor child's] mother testified at the contested case hearing. Neither [the minor child's] elementary school teacher, nor [the minor child's] guidance counselor, nor any one from the Robeson County Department of Social Services testified at the contested case hearing.

In its conclusions of law, the ALJ concluded that:

9. When there is a substantiation of child sexual abuse at a child care facility by a local department of social services, the Division may issue a written warning to the facility, although other more stringent remedies are also available to the Division. N.C. Gen. Stat § 110- 105.2(b), (e)[.]

10. Respondent has the authority to permanently remove a substantiated child abuser or neglecter from child care pursuant to N.C. Gen. Stat. § 110-105.2(d).

11. The only issue before the undersigned is whether Respondent acted properly in issuing the written warning to Petitioner's family child care center, and in implementing the Corrective Action plan prohibiting Ricky Cromartie from being on the child care facility's premises while children are in care.

12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused [the minor child] at Petitioner's center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of the DSS' substantiation is located in another forum other than the Office of Administrative Hearings.

Accordingly, based on its findings of fact and conclusions of law, the ALJ determined that "Respondent's decisions to issue a written warning to Petitioner's child care center and to prohibit Petitioner's husband from being [on] the child care center premises while children are in care, should be AFFIRMED." On or about 12 March 2012, DHHS adopted the ALJ's order as its own Final Agency Decision.[1]

1. In 2011, the General Assembly modified the contested case procedure set out in the Administrative Procedure Act ("APA") by amending and repealing numerous statutory

Petitioner then filed a petition in superior court requesting judicial review of DHHS's Final Agency Decision pursuant to N.C. Gen. Stat. § 150B 36. On 9 January 2013, the superior court entered an order in which it concluded the following:

> 9. The Division has the authority to issue a written warning to a facility at which child abuse or neglect has been substantiated by the local department of social services and to "specify any corrective action to be taken by the operator." N.C.G.S. § 110-105.2(b)[.]
>
> 10. The Division also has the statutory authority to permanently remove a "substantiated abuser or neglecter from child care." N.C.G.S. § 110-105.2(d).
>
> 11. By statute, substantiations of child abuse or neglect are issued by the local departments of social services throughout the State of North Carolina. *See* N.C.G.S. § 7B-101, *et seq*.
>
> . . . .
>
> 13. Local units of government such as Robeson County Department of Social Services are not subject to OAH's jurisdiction because they are not an "agency" as defined by the APA. Therefore, a substantiation of child abuse or neglect is not subject to review in OAH. *See* N.C.G.S. § 150B 2(1a).
>
> 14. The Administrative Law Judge and the Agency properly held that the Agency's action was proper and within the Agency's authority as set out in the North Carolina Child Care Act, N.C.G.S. § 110-105.2.
>
> 15. The Agency's issuance of the Written Warning was not arbitrary or capricious.
>
> 16. The Agency's issuance of the Written Warning was supported by substantial evidence in the whole record.

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provisions contained in Chapter 150B of the North Carolina General Statutes as well as several other statutory provisions affected by those procedures. 2011 N.C. Sess. Law 1678, 1685–97, ch. 398, §§ 15–55. These amendments became effective on 1 January 2012 and apply to contested cases commenced on or after that date. *See* 2011 N.C. Sess. Law 1678, 1701, ch. 398, § 63. However, because Petitioner's contested case was initiated on 21 July 2010, the General Assembly's 2011 modifications to the APA are inapplicable to the present case, so we conduct our review according to the statutory procedures that were in effect at the time Petitioner's contested case was filed with OAH.

17. There is credible evidence in the record that Ricky Cromartie was a "substantiated abuser" as set forth in the North Carolina Child Care Act, N.C.G.S. § 110- 105.2(d), and as such, the Agency had authority pursuant to statute to prevent him from being on the premises when children are in care.

18. Prohibiting Ricky Cromartie from being on the premises of Petitioner's child care facility while children are in care was not arbitrary or capricious.

Based on its findings and conclusions, the superior court affirmed the Final Agency Decision. Petitioner gave timely notice of appeal from the superior court's order.

II. Jurisdiction

Plaintiff's appeal from the superior court's order lies as of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). *See also* N.C. Gen. Stat. § 150B-52 (2013).

III. Analysis

On appeal, Petitioner argues that the superior court erred as a matter of law by concluding that DHHS could rely on the local DSS substantiation of child abuse to support its issuance of a written warning, which prohibited Mr. Cromartie from being on the premises of the facility while children were present under Petitioner's care.

"The North Carolina Administrative Procedure Act governs both trial and appellate court review of administrative agency decisions." *Eury v. N.C. Emp't Sec. Comm'n*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387 (citation omitted), *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). "On judicial review of an administrative agency's final decision, the substantive nature of each [issue on appeal] dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll* (*Carroll*), 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

Pursuant to N.C. Gen. Stat. § 150B-51, a trial court is authorized to reverse or modify the agency's decision

> if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency or the administrative law judge;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B 29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2011).

"The first four grounds for reversing or modifying an agency's decision . . . may be characterized as 'law-based' inquiries," while "[t]he final two grounds . . . may be characterized as 'fact-based' inquiries." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (internal citations omitted). "It is well settled that in cases appealed from administrative tribunals, [q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *Id.* (alterations in original) (quotation marks and citation omitted).

"Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (alterations in original) (quotation marks and citation omitted). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Res.*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). "The reviewing court must not consider only that evidence which supports the agency's result; it must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* at 530–31, 372 S.E.2d at 890. However, the "whole record" test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views." *Lackey v. N.C. Dep't of Human Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). Instead, "the reviewing court must determine whether the administrative decision had a rational basis in the evidence." *Henderson*, 91 N.C. App. at 531, 372 S.E.2d at 890.

"As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error

of law." *ACT-UP Triangle v. Comm'n for Health Serv. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quotation marks and citation omitted). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quotation marks and citation omitted). Here, Petitioner challenges DHHS's statutory authority to issue a written warning and prohibit Mr. Cromartie from being on Petitioner's premises while children were present pursuant to N.C. Gen. Stat. § 110-105.2. Accordingly, we review the superior court's order to decide if the superior court, under a *de novo* review, erred in affirming the ALJ's order.[2]

Petitioner argues that, in accordance with N.C. Gen. Stat. § 110-105.2, DHHS was required to conduct its own investigation and to independently substantiate whether a child had been abused at Nanny's Korner before issuing a warning letter to Petitioner. For the following reasons, we agree and hold that a plain reading of the pertinent statutes and administrative rules places an affirmative duty on DHHS to independently substantiate abuse before it can issue a warning to a facility and mandate corrective action.

As we apply the pertinent statutory provisions to the present case, we are mindful that "[t]he paramount objective of statutory interpretation is to give effect to the intent of the legislature [and that] [t]he primary indicator of legislative intent is statutory language." *In re Proposed Assessments v. Jefferson–Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citation omitted). "Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *Id.* (quotation marks and citation omitted). "Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Id.* (quotation marks and citation omitted).

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2. We note that with the exception of Petitioner's unsupported assertion in its brief that its "due process rights will be severely impacted" as a consequence of DHHS's Final Agency Decision, Petitioner does not bring forward a constitutional challenge to the superior court's order on appeal. Therefore, because Petitioner has not advanced a substantive constitutional argument and because "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *see Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), we lack any basis to engage in a constitutional analysis of the issue raised by Petitioner and instead confine our review to whether a violation of the North Carolina General Statutes—or any administrative rules promulgated pursuant to the General Statutes—occurred.

Here, the plain meaning of the statutory and administrative language places an affirmative duty on DHHS to independently substantiate abuse, thereby precluding DHHS from treating a local DSS substantiation as dispositive.

The General Assembly established, within DHHS, a special unit—the Child Care Commission—"to deal primarily with violations involving child abuse and neglect in child care arrangements." N.C. Gen. Stat. § 143B-168.5 (2013). The Child Care Commission was created by the General Assembly with the mandate that it "shall make rules for the investigation of reports of child abuse or neglect and for administrative action when child abuse or neglect is substantiated, pursuant to G.S. 110- 88(6a), 110 105, and 110-105.2." *Id.*

Section 110-105.2(b) (2013) of our General Statutes provides:

> When an investigation *pursuant to G.S. 110-105(a)(3)* substantiates that child abuse or neglect did occur in a child care facility, the Department may issue a written warning which shall specify any corrective action to be taken by the operator.

(Emphasis added).[3] Thus, in order to invoke the disciplinary authority conferred by this statute, abuse or neglect must be substantiated in the manner prescribed by N.C. Gen. Stat. § 110-105(a)(3). That section makes clear that it is the responsibility of the Child Care Commission within DHHS to inspect child care facilities upon being notified of abuse and "to determine whether the alleged abuse or neglect has occurred." N.C. Gen. Stat. § 110-105(a)(3) (2013). *See also* N.C. Gen. Stat. § 110-88(6a) (2013) (conferring disciplinary rule making power on the Child Care Commission "when the *Secretary's investigations* pursuant to G.S. 110-105(a)(3) substantiate that child abuse or neglect did occur in the facility" (emphasis added)); 10A N.C. Admin. Code 09.1904(b) ("A written warning specifying corrective action to be taken by the operator of the child care center or home may be issued when the investigation is concluded and *the Division determines* that abuse or neglect occurred . . . ." (emphasis added)). Accordingly, a plain reading of the pertinent statutes and administrative rules requires DHHS to determine or substantiate an accusation of abuse. Any lack of specificity in the statutes concerning the process of substantiation cannot be construed to relieve DHHS of this responsibility.

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3. "Specific corrective action required by a written warning . . . may include the permanent removal of the substantiated abuser or neglecter from child care." N.C. Gen. Stat. § 110-105.2(d).

Importantly, requiring DHHS to independently investigate and substantiate abuse does not undermine the investigative collaboration between DHHS and the local DSS encouraged by other pertinent statutes and administrative rules. *See, e.g.*, 10A N.C. Admin. Code 09.1903(a) ("Reports from law enforcement officers and other professionals, as well as photographs and other investigative tools, may be used as appropriate.") and (c) ("The Division shall share information related to investigations with departments of social services, as appropriate."). However, investigatory collaboration and the sharing of evidence does not, *ipso facto*, absolve DHHS of responsibility for independently determining or substantiating the occurrence of abuse. Stated differently, while DHHS may utilize evidence collected by the local DSS in its investigation, DHHS may not treat a local DSS substantiation as dispositive for purposes of discipline. Here, that seems to be exactly what happened.

The Final Agency Decision indicates that DHHS reduced the administrative action proposed in Ms. Miller's Case Decision Summary from the issuance of a special provisional license to a written warning based on "Petitioner's compliance with the corrective action plan in place at Petitioner's facility." However, "[Mr.] Cromartie was still prohibited from being on the premises of the facility while children were in care, *as a result of the substantiation of child sexual abuse by the local department of social services.*" (Emphasis added.) Thus, the record indicates that DHHS based its administrative action on the local DSS substantiation, not its own.

Moreover, Conclusions of Law 9 and 12 of the ALJ's decision state:

> 9. When there is a substantiation of child sexual abuse at a child care facility by a local department of social services, the Division may issue a written warning to the facility, although more stringent remedies are also available to the Division. N.C. Gen. Stat. § 110-105.2(b), (e)[.]
>
> . . . .
>
> 12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused [the minor child] at Petitioner's center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of the DSS' substantiation is located in another forum other than the Office of Administrative Hearings.

Plainly, the ALJ did not find the evidence of abuse presented at the hearing compelling, yet treated the local DSS substantiation as dispositive. The Superior Court's order also contains a finding indicating that the local DSS substantiation was treated as dispositive by the ALJ:

> 19. The Administrative Law Judge noted that DSS's substantiation of child abuse against Petitioner's husband is a violation of North Carolina Child Care law, N.C.G.S. § 110-105.2, and that the Division had the authority to issue the Written Warning and to prohibit Petitioner's husband from being present while children were in care *based upon the DSS substantiation* pursuant to that same statute.

(Emphasis added.) The Superior Court's order also concluded that local DSS substantiations could be treated as dispositive by DHHS for purposes of invoking DHHS's disciplinary authority:

> 9. The Division has the authority to issue a written warning to a facility at which child abuse or neglect has been substantiated by the local department of social services and to "specify any corrective action to be taken by the operator." N.C.G.S. § 110-105.2(b)[.]
>
> . . . .
>
> 14. The Administrative Law Judge and the Agency properly held that the Agency's action was proper and within the Agency's authority as set out in the North Carolina Child Care Act, N.C.G.S. § 110-105.2.

Because we find a clear statutory directive that DHHS independently substantiate abuse before taking administrative action, we hold that these conclusions are errors of law.

Furthermore, we find a statutory interpretation allowing local DSS substantiations to be dispositive before the ALJ particularly troubling on due process grounds where, as here, the local DSS substantiation report was admitted at the OAH hearing for the limited purpose of establishing that a substantiation had occurred:

> [Counsel for DHHS]: And, Your Honor, we're happy to introduce this document for the sole purpose of noting the DSS conclusion, the substantiation of sexual abuse.
>
> THE COURT: Okay.

> [Counsel for DHHS]: I have no objection to omitting the hearsay from the document.
>
> THE COURT: Okay. So---
>
> [Counsel for Petitioner]: So we would be redacting, I guess, "[the minor child] stated," et cetera, "[the minor child] described," et cetera, "[the minor child] had," et cetera.
>
> THE COURT: Okay.
>
> [Counsel for DHHS]: Your Honor, I have no objection to that.
>
> THE COURT: Okay. We can take care of that after the hearing. Okay. So Number 9 is allowed for the purpose stated by counsel.

Thus, none of the underlying facts in the report supporting DSS's substantiation were admitted at the hearing and the local DSS representative did not testify. As a consequence, Petitioner was not afforded the ability to challenge the evidence or cross-examine the person who substantiated the abuse. Further, because the ALJ did not have jurisdiction to review the merits of the local DSS substantiation, Petitioner was powerless before the ALJ to challenge an unsupported assertion dispositive of her rights. An independent substantiation of abuse from DHHS, on the other hand, would be subject to review by the ALJ.

Article I, Section 1 of the North Carolina Constitution declares that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. Article I, Section 19 states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. As our Supreme Court has noted:

> These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to

> be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation . . . ."

State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citation omitted); *see also Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957) ("The right to conduct a lawful business or to earn a livelihood is regarded as fundamental." (quotation marks and citations omitted)). Furthermore, in another context, we have held that a "DSS investigation alone is plainly insufficient to support the loss of liberty that accompanies [placing a substantiated abuser's name on a 'Responsible Individuals List']." *In re W.B.M.*, 202 N.C. App. 606, 619, 690 S.E.2d 41, 50 (2010). Thus, given the documented evidence in the record showing the impact of DHHS's administrative action on Petitioner's livelihood, Petitioner has arguably suffered a deprivation of her liberty interests guaranteed by our State's constitution, necessitating a procedural due process analysis.

However, as noted above, Petitioner has not advanced a constitutional challenge to the trial court's order on appeal, thereby limiting this Court's review to whether a violation of the pertinent statutes and administrative rules has occurred. Nevertheless, we believe the constitutional issue should still affect this Court's *statutory analysis* when attempting to discern legislative intent. "If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question." *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465, 223 S.E.2d 323, 328 (1976). Because a statutory construction treating a local DSS substantiation as sufficient to support administrative action in this context raises a serious concern with respect to Petitioner's due process rights, we find further support for the statutory interpretation requiring DHHS to independently substantiate claims of abuse before taking administrative action.

IV. Conclusion

For the foregoing reasons, we hold that the superior court order erred in concluding that DHHS could rely on the local DSS substantiation. Furthermore, because the record evidence reveals that the agency

and the court below treated the local DSS substantiation as dispositive, we vacate the superior court's order and remand the matter to the trial court for further remand to DHHS with instructions to conduct an independent investigation to determine whether there is substantial evidence of abuse and for any needed additional administrative action in accordance with the statute.

VACATED AND REMANDED.

Judges ERVIN and DAVIS concur.

HAZEL B. SIMS, PLAINTIFF-APPELLANT
v.
GRAYSTONE OPHTHALMOLOGY ASSOCIATES, P.A.; GRAYSTONE SURGERY, LLC; GRAYSTONE EYE SURGERY OF HICKORY, LP D/B/A GRAYSTONE EYE SURGERY CENTER; GRAYSTONE OPHTHALMOLOGY SUGERY CENTER, PLLC; JAMES W. HARRIS; RANDALL J. WILLIAMS; ANN K. JOSLYN; T. REGINALD WILLIAMS; JOHN G. TYE; RALPH E. OURSLER; AND RICHARD I. CHANG, DEFENDANT-APPELLEES

No. COA13-870

Filed 20 May 2014

Negligence—summary judgment—genuine issue of material fact

The trial court erred in a negligence case arising out of injuries the 86-year-old plaintiff sustained when she fell from a rolling chair during a visit to her eye doctor by granting defendant's motion for summary judgment. There were genuine issues of material fact concerning whether defendant was negligent in causing plaintiff's injuries and whether plaintiff was negligent in contributing to her injuries.

Appeal by plaintiff from order entered 15 January 2013 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 6 January 2014.

Grant Richman, PLLC, by Robert M. Grant, Jr., for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant-appellee.

McCULLOUGH, Judge.

Hazel B. Sims ("plaintiff") appeals from the trial court's order granting summary judgment in favor of Graystone Ophthalmology Associates, P.A. ("defendant"). For the following reasons, we reverse.

I. Background

The underlying facts of this case were agreed to in stipulations by the parties. These stipulations can be summarized as follows: Plaintiff was a patient of Dr. James W. Harris of defendant and was present on the premises of defendant for a vision examination on 5 November 2007. While on defendant's premises, plaintiff was seated on a rolling chair for her vision examination. After taking a seat, but prior to the examination, plaintiff fell from the rolling chair and fractured her right proximal humerus at the right shoulder and her right hip at the right intertrochanteric femur. Plaintiff incurred considerable costs for treatment and rehabilitation.

On 5 November 2010, plaintiff initiated this action by filing a complaint against defendant and others associated with defendant. In the complaint, plaintiff alleged the named defendants "were jointly and severally negligent . . . by placing [her] in the rolling stool or chair from which she fell . . . when they knew or should or [sic] known that such stools or chairs, without arms or handles, were dangerous to elderly patients such as [her]" and "[t]hat as the direct and proximate result of the negligence . . . , [she] has been damaged in excess of Ten Thousand Dollars ($10,000.00)."

The named defendants answered plaintiff's complaint on 26 May 2011 asserting various affirmative defenses, including contributory negligence. The named defendants later filed a motion for summary judgment on 4 December 2012.

Prior to a hearing on the motion for summary judgment, the parties stipulated that defendant was the proper party to be sued and all other named defendants were dismissed from the action. The motion for summary judgment then came on to be heard in Catawba County Superior Court on 14 January 2013, the Honorable Timothy S. Kincaid, Judge presiding.

Upon consideration of the pleadings, depositions, stipulations, and arguments of counsel, by order filed 15 January 2013, the trial court granted summary judgment in favor of defendant and taxed the costs of the action against plaintiff. Plaintiff filed notice of appeal on 14 February 2013.

II. Discussion

The sole issue raised on appeal is whether the trial court erred in granting summary judgment in favor of defendant.

Standard of Review

"The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

> [S]uch 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." *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007) (citations and quotation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

"The trial court may not resolve issues of fact in deciding a motion for summary judgment and must deny the motion if there is a genuine issue as to any material fact." *Daily Exp., Inc. v. Beatty*, 202 N.C. App. 441, 444, 688 S.E.2d 791, 795 (2010) (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). "If there is any question as to

the weight of evidence, summary judgment should be denied." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999).

Negligence

Plaintiff contends the trial court erred in granting defendant's motion for summary judgment in the present case because there are genuine issues of material fact concerning whether defendant was negligent in causing plaintiff's injuries and whether plaintiff was negligent in contributing to her injuries.

As our appellate courts have long recognized, "[n]egligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment." *DeHaven v. Hoskins*, 95 N.C. App. 397, 402, 382 S.E.2d 856, 859, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989). This is because " 'ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person.' " *Finley Forest Condominium Ass'n v. Perry*, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (quoting *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985)). Yet, " 'summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.' " *Hahne v. Hanzel*, 161 N.C. App. 494, 497-98, 588 S.E.2d 915, 917 (2003) (emphasis omitted) (quoting *Williams v. Carolina Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979)), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004).

"It is well established that in order to prevail in a negligence action, plaintiff[] must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). Even if evidence of negligence is presented, plaintiff cannot prevail if the evidence reveals plaintiff was contributorily negligent. *See Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) ("In this state, a plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence.").

In this case, it is uncontested that defendant owed plaintiff a duty of reasonable care and plaintiff suffered damages as a result of her fall from the rolling chair. But in response to plaintiff's arguments that there are issues of fact concerning negligence and contributory negligence, defendant maintains, as it did below, that summary judgment is

appropriate because there is no evidence of actionable negligence, there is no evidence of proximate cause, and, in the alternative, plaintiff was contributorily negligent as a matter of law. Considering the evidence in the light most favorable to plaintiff, we disagree with defendant and hold the issues of negligence and contributory negligence should have been presented to a jury. Thus, the trial court erred in granting summary judgment in favor of defendant.

In this case, the issue is not solely whether the chair was a dangerous condition, but, as plaintiff alleged in her complaint, whether defendant was negligent in placing plaintiff on the rolling chair from which she fell.

Viewing the evidence contained in the depositions and stipulations in the light most favorable to the plaintiff, the evidence tends to show the following: Plaintiff was 86 years old at the time of her fall. Plaintiff had been a patient of defendant's for over ten years, having two to three appointments per year. A typical appointment begins with a technician conducting a vision examination. Plaintiff recalled that the technician usually instructs her to take a seat on an armless rolling chair and move up to the table where the examination machine was located. This was common procedure and nothing different happened on the day plaintiff fell.

During plaintiff's deposition, plaintiff could not recall exactly what caused her to fall. But plaintiff did recall she never made it to the table. Plaintiff testified "I was trying to get my balance and I was trying to get up to the table, but I know I wasn't at the table 'cause I couldn't touch anything. It seemed like a long time, like I was fighting to get my balance."

Although plaintiff could not remember at her deposition how she fell, stipulations agreed to by the parties provide statements made by plaintiff during an interview just days after the incident. These statements indicate that after plaintiff was seated in the rolling chair, she leaned to place her purse on another chair in the examination room. Then, as plaintiff shifted her weight back down on the rolling chair, the chair started to roll. Plaintiff attempted to catch herself but there was nothing to grab onto and the chair slipped out from under her, causing plaintiff to fall.

Plaintiff testified no one had ever assisted her with the chair prior to her fall. Although plaintiff was aware the chair was on rollers, plaintiff testified she was unaware of how dangerous it could be. At appointments subsequent to her fall, defendant has assisted plaintiff with the chair.

The evidence tends to show that the staff of defendant was aware of the dangers of the rolling chair. Specifically, the CEO of defendant testified that defendant was aware of one incident prior to plaintiff's fall in which a patient fell when a rolling chair slid out from underneath the patient while she was being seated. Furthermore, at the deposition of the technician performing plaintiff's vision examination on the day of the incident, the technician stated that it was her usual practice to hold the chair and place her foot on the bottom of the chair while a patient is being seated in order to keep the chair from rolling. Yet, when questioned about the specifics of how plaintiff was seated on the day of plaintiff's fall, the technician indicated she had no specific recollection. The technician did not witness the fall as she was facing away from plaintiff at the time of the fall.

We hold this evidence sufficient to carry the issue of negligence to a jury for determination of whether defendant exercised the degree of care that a reasonable and prudent person would exercise under the circumstances. Although defendant's use of the rolling chair may not itself be negligent, instructing an elderly patient with a purse to sit on the rolling chair and move up to the examination table without offering assistance may be found to be negligent. Additionally, the evidence supports plaintiff's argument that the nature of the rolling stool, i.e. the rollers and lack of arms, was the proximate cause of plaintiff's fall.

Defendant further argues that if it was negligent, summary judgment is appropriate because the danger was open and obvious. *See Kelly v. Regency Centers Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95 (2010) ("There is no duty to protect a lawful visitor from dangers which are either known to him or so obvious and apparent that they may reasonably be expected to be discovered."). While plaintiff was aware the chair was on rollers, in this case, plaintiff was instructed to sit on the rolling chair and move up to the table. Although plaintiff's actions may be found by the jury to constitute contributory negligence, we hold the evidence does not establish contributory negligence as a matter of law.

III. Conclusion

Taking the evidence in the light most favorable to plaintiff, we hold material issues of fact exist as to whether defendant was negligent and whether plaintiff was contributorily negligent. Thus, we hold the trial court erred in entering summary judgment in favor of defendant.

Reversed.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA
v.
SHARKEEM JAMMARCUS FOUSHEE

No. COA13-846

Filed 20 May 2014

1. Appeal and Error—appellate rules violations—admonition

Although the Court of Appeals denied defendant's motion to dismiss the State's appeal based on numerous violations of the appellate rules, counsel for the State was strongly admonished to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future.

2. Appeal and Error—appealability—imposition of lesser discovery sanctions

The Court of Appeals limited its review of the State's challenge to the trial court's order to a consideration of the lawfulness of the trial court's decision to dismiss the two obtaining property by false pretenses charges. The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State.

3. Discovery—violations—misapprehension of law

The trial court erred by dismissing two counts of obtaining property by false pretenses based on a misapprehension of law concerning the extent to which a discovery violation actually occurred. The trial court's order was reversed and remanded.

Appeal by the State from order entered 19 February 2013 by Judge R. Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 9 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Defendant.

ERVIN, Judge.

The State has sought appellate review of an order dismissing two counts of obtaining property by false pretenses that had been lodged

against Defendant Sharkeem Jammarcus Foushee and precluding the State from calling certain witnesses to testify at the trial of a separate felonious larceny charge that had been lodged against Defendant, with both of these decisions resting on the trial court's determination that the State had violated the provisions of N.C. Gen. Stat. § 15A-903. On appeal, the State argues that the trial court erroneously dismissed the obtaining property by false pretenses charges on the grounds that the State had not, in fact, violated the applicable discovery statutes. After careful consideration of the State's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 17 July 2012, a warrant for arrest charging Defendant with one count of felonious larceny and two counts of obtaining property by false pretenses was issued. According to the allegations contained in the warrant, Defendant took twenty-six rings and a pair of earrings with a total value of $17,655 belonging to Alfreda Andrews and pawned four of the rings at Friendly Jewelry and Pawn Shop based upon a representation that he owned the property in question. On 17 September 2012, the Durham County grand jury returned a bill of indictment charging Defendant with one count of felonious larceny and two counts of obtaining property by false pretenses based on the same factual allegations set out in the earlier warrant for arrest.

On 24 September 2012, Defendant filed a request for formal arraignment, a motion to preserve evidence, and a request for voluntary discovery. On 26 September 2012, Defendant filed a motion for discovery. On 3 October 2012 and 13 February 2013, respectively, the State responded to Defendant's discovery requests.

On 13 February 2013, Defendant filed two motions *in limine*. In the first motion, Defendant requested that the trial court (1) order the State to certify that it had complied with the provisions of N.C. Gen. Stat. § 15A-903; (2) prohibit the State from introducing evidence that had not been provided to Defendant; and (3) order the State to comply with N.C. Gen. Stat. §§ 15A-903(a)(1)(a) and 15A-903(a)(1)(c) by providing Defendant with a copy of any new statements made by any witness before that witness was called to testify. In the second motion, Defendant requested that the trial court prohibit the State from introducing or referring to any extra-judicial statements made by any person

who was not going to testify at trial. On 13 February 2013, the State provided Defendant with a supplemental discovery response and a certification that all materials subject to discovery had been provided to Defendant.

On 18 February 2013, Defendant filed two dismissal motions. In the first of these motions, Defendant requested that all of the charges that had been lodged against him be dismissed as the result of alleged discovery violations stemming from the State's failure to interview and provide statements from certain witnesses. More specifically, Defendant alleged in the first dismissal motion that the State had been made aware that Ms. Andrews' children, Chynna Andrews and Carlston Andrews, had been on the premises of the family home at the time that the stolen jewelry had become missing, that Chynna and Carlston Andrews might possess potentially exculpatory information, and that the State had wilfully failed to interview them. In the second of these motions, Defendant requested that all of the charges that had been lodged against him be dismissed as the result of certain alleged discovery violations stemming from the State's failure to obtain and preserve a surveillance video from the pawn shop. More specifically, Defendant alleged in the second dismissal motion that, despite having knowledge that a potentially exculpatory surveillance video had been made at Friendly Jewelry and Pawn, the State had negligently failed to obtain the video prior to its destruction, which had occurred approximately six months after the date upon which the stolen jewelry was pawned there.

A hearing was held with respect to Defendant's dismissal motions before the trial court on 18 February 2013. After hearing arguments concerning the merits of Defendant's dismissal motions, the trial court entered an order concluding that the State had failed to "use reasonable diligence to investigate, preserve, document, or make [the surveillance video] available" "or [to obtain] any relevant evidence" from two witnesses who had been present at the time that one of the alleged offenses was committed in violation of the State's discovery obligations as prescribed in N.C. Gen. Stat. § 15A-903. Based upon this set of determinations, the trial court sanctioned the State by dismissing the two counts of obtaining property by false pretenses that had been lodged against Defendant and ordering that the State be precluded from calling Chynna or Carlston Andrews to testify at Defendant's trial for felonious larceny. After the trial court denied a motion to continue the trial of the felonious larceny charge, the State took a voluntary dismissal with respect to that charge. The State noted an appeal to this Court from the trial court's order.

On 7 October 2013, Defendant filed a motion to dismiss the State's appeal or, in the alternative, a motion to strike the record on appeal and portions of the State's brief on the basis that the State had committed numerous violations of the North Carolina Rules of Appellate Procedure. On 16 October 2013, the State filed a response to Defendant's motion and an alternative petition seeking the issuance of a writ of *certiorari* authorizing appellate review of the trial court's order. On 18 October 2013, Defendant filed a response to the State's *certiorari* petition.

II. Substantive Legal Analysis

A. Motion to Dismiss Appeal

[1] As an initial matter, we must address Defendant's motion to dismiss the State's appeal or, in the alternative, to strike the record on appeal and portions of the State's brief. Although Defendant is certainly correct in contending that the State has violated numerous provisions of the North Carolina Rules of Appellate Procedure,[1] "we dismiss appeals 'only in the most egregious instances of nonjurisdictional default[.]' " *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 6, 678 S.E.2d 725, 729 (2009) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008)); *see also* 5 Am.Jur.2d Appellate Review § 804, at 540 (stating that "it is preferred that an appellate court address the merits of an appeal whenever possible," so that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal"). As a result of the fact that the State's violations of the North Carolina Rules of Appellate Procedure are nonjurisdictional in nature and, while troubling, do not rise to the level of a "substantial failure" to comply with or a "gross violation" of the applicable rule provisions, we conclude, in the exercise of our discretion, that we should review the State's challenge to the validity of the trial court's order on the merits rather than dismissing the State's appeal. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Put another way, "we believe [that] the fundamental principle of *Dogwood*, to 'promote public confidence in the administration of justice in our

1. Among the rules violations upon which Defendant's motion was predicated are that (1) Defendant's dismissal motions and "other papers" were missing a critical page and were treated as attachments rather than included in the record on appeal; (2) a number of other important documents were treated as attachments rather than included as part of the record on appeal; (3) the pages in the record on appeal and attachments were not individually and consecutively numbered; (4) Defendant's social security number was not redacted from the documents included in the record on appeal; (5) the State failed to provide the court reporter with the appellate docket number or request that the transcript be electronically filed; and (6) the State's brief failed to "define clearly the issues presented to the reviewing court."

appellate courts[,]' does not necessitate dismissal in the instant case." *Carolina Forest*, 198 N.C. App. at 6-7, 678 S.E.2d at 729. As a result, although we deny Defendant's motion to dismiss the State's appeal, we strongly admonish counsel for the State to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future.

B. Appealability of Orders Imposing Discovery Sanctions

[2] Secondly, we must determine the extent to which the trial court's order is subject to appeal by the State. "The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982). "The State's right of appeal is granted by [N.C. Gen. Stat.] § 15A-1445." *State v. Watkins*, 189 N.C. App. 784, 785, 659 S.E.2d 58, 60 (2008). "N.C. Gen. Stat. § 15A–1445(a)(1) allows the State to appeal from a 'decision or judgment dismissing criminal charges as to one or more counts.' " *State v. Dorman*, __ N.C. App. __, __, 737 S.E.2d 452, 470 (quoting N.C. Gen. Stat. § 15A–1445(a)(1)), *disc. review denied*, __ N.C. __, 743 S.E.2d 206 (2013). "The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State." *Id.* at __, 737 S.E.2d at 470-71. As a result, the State has the right to appeal a trial court order dismissing a criminal charge while lacking the authority to appeal an order imposing a lesser sanction.

Although the trial court granted Defendant's motion to dismiss the two counts of obtaining property by false pretenses that had been lodged against Defendant, it simply precluded the State from offering the testimony of certain potential witnesses in the felonious larceny case. Moreover, the State voluntarily dismissed the felonious larceny charge after the trial court denied its continuance motion. Although the State's notice of appeal stated that it was appealing from the order "in which the Court dismissed two counts of Obtaining Property by False Pretenses and prohibited the State from introducing the testimony of two witnesses" and although the State clearly has the right to seek appellate review of that portion of the trial court's order challenging the dismissal of the obtaining property by false pretenses charges, *see State v. Newman*, 186 N.C. App. 382, 385, 651 S.E.2d 584, 587 (2007) (stating that "under the plain language of N.C. Gen. Stat. § [15A–]1445(a)(1), the State has a right to appeal the dismissal of one count and this appeal is not interlocutory"), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234 (2008), the fact that "[t]he General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions

upon the State," *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470-71, necessitates a determination that the State lacks the right to seek appellate review of that portion of the trial court's order precluding the presentation of any testimony from Chynna and Carlston Andrews at the trial of the felonious larceny case. As a result, we will limit our review of the State's challenge to the trial court's order to a consideration of the lawfulness of the trial court's decision to dismiss the two obtaining property by false pretenses charges.[2]

C. Validity of the Trial Court's Dismissal Decision

[3] In its brief, the State contends that the trial court erred by dismissing the two counts of obtaining property by false pretenses based upon the State's failure to comply with the provisions of N.C. Gen. Stat. § 15A-903. More specifically, the State contends that certain of the trial court's findings of fact lacked adequate evidentiary support[3] and that the trial court erroneously concluded as a matter of law that the failure to obtain and preserve the surveillance video taken at the establishment at which Ms. Andrews' jewelry was pawned constituted a violation of Defendant's rights under the applicable discovery statutes. The State's argument has merit.

1. Standard of Review

A determination of the extent, if any, to which the State failed to comply with its obligation to provide discovery to a criminal defendant is a decision left to the sound discretion of the trial court. *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995). For that reason, this Court "review[s] a [trial court's] ruling on discovery matters for an abuse of discretion." *State v. Pender*, __ N.C. App. __, __, 720 S.E.2d 836, 841, *disc. review denied*, 366 N.C. 233, 731 S.E.2d 414 (2012). " 'The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Cook*, 362 N.C. 285, 295,

2. The State candidly concedes that, despite the reference to the portion of the trial court's order precluding it from presenting certain testimony at the trial of the felonious larceny charge in its notice of appeal, it has no right to appeal from that portion of the trial court's order imposing sanctions in the felonious larceny case, stating that, "[a]lthough the trial court's order regarding the larceny charge was also incorrect, the State has not attempted to appeal that order."

3. Although the parties have expended considerable energy debating the sufficiency of the record support for the trial court's findings of fact in their briefs, we need not address those contentions given our ultimate determination that, in light of the facts found in the trial court's order, no discovery violation occurred.

661 S.E.2d 874, 880 (2008) (quoting *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987)). "When discretionary rulings are made under a misapprehension of the law, [however,] this may constitute an abuse of discretion." *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008) (quotations omitted).

2. Basic Principles of Criminal Discovery

"It is now well settled in North Carolina that the right to discovery is a statutory right." *Tuck*, 191 N.C. App. at 771, 664 S.E.2d at 29. According to N.C. Gen. Stat. § 15A-903, "upon a motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." N.C. Gen. Stat. § 15A-903(a)(1). "The term 'file' includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." N.C. Gen. Stat. § 15A-903(a)(1)(a).

"The State, however, is under a duty to disclose only those matters in its possession and 'is not required to conduct an independent investigation' to locate evidence favorable to a defendant." *State v. Chavis*, 141 N.C. App. 553, 561, 540 S.E.2d 404, 411 (2000) (quoting *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994)). "[W]e note that this Court has interpreted the provisions of [N.C. Gen. Stat. §] 15A-903 to require production by the State of *already existing documents*." *Dorman*, __ N.C. App. at __, 737 S.E.2d at 471. As a result, "[t]he statute imposes no duty on the State to create or continue to develop additional documentation regarding an investigation." *Id.*

"If a trial court determines that the State has violated statutory discovery provisions or a discovery order, it may impose a wide array of sanctions[,] including dismissal of the charge with or without prejudice." *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470. "However, prior to imposing any [] sanctions, the trial court must 'consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply' with the discovery requirements." *State v. Jaaber*, 176 N.C. App. 752, 755, 627 S.E.2d 312, 314 (2006) (quoting N.C. Gen. Stat. § 15A-910(b)). "If the court imposes any sanction, it must make specific findings justifying the imposed sanction." N.C. Gen. Stat. § 15A–910(d). " 'Given that dismissal of charges is an 'extreme sanction' which should not be routinely imposed, orders dismissing charges

for noncompliance with discovery orders preferably should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.' " *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470 (quoting *State v. Allen*, __ N.C. App. __, __, 731 S.E.2d 510, 527-28 (internal quotation marks and citations omitted), *disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, __ U.S. __, 133 S. Ct. 2009, 185 L. Ed. 2d 876 (2013).

3. Extent to Which Discovery Violation Occurred

According to the argument that Defendant advanced in the trial court and that the trial court accepted in its order, the State violated the discovery-related provisions of N.C. Gen. Stat. § 15A-903 by negligently failing to obtain and preserve the pawn shop surveillance video.[4] More specifically, Defendant asserted in his dismissal motion stemming from the loss and destruction of the surveillance video that his trial counsel notified the State on 7 August 2012 that there was reason to believe that Chynna Andrews had been at the pawn shop on the date of the alleged offense and inquired if the State had obtained a surveillance video from the pawn shop on the theory that this video might "show Chynna Andrews at the pawn shop." Approximately two or three weeks before 18 February 2013, the date upon which Defendant's trial was scheduled to begin, Defendant's trial counsel made another inquiry about the extent to which the State had obtained the pawn shop surveillance video. As a result of this inquiry, the prosecutor spoke with an investigator who "went down to the pawn shop and asked about a video," ultimately learning "that after six months it had been destroyed." Based upon this set of facts, Defendant argued that the State was "aware of evidence that could be exculpatory and acted with negligence to allow it to be destroyed" contrary to the discovery-related obligations to which the State was subject pursuant to N.C. Gen. Stat. § 15A-903. We do not

4. On appeal, Defendant has not attempted to defend the trial court's dismissal decision as a proper exercise of the trial court's authority to sanction a discovery violation by the State. Instead, Defendant argues that the trial court's order should be upheld based upon a trial tribunal's inherent authority "to do all things that are reasonably necessary for the proper administration of justice." *Beard v. North Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). We will not, however, address Defendant's "inherent authority" argument on the merits given the trial court's failure to adopt such a rationale as the basis for its dismissal order. As a result, Defendant will, of course, remain free to seek any available relief stemming from the loss of the surveillance video based on any theory other than an alleged violation of the State's statutory discovery obligations during the course of the proceedings on remand.

find Defendant's argument, which provided the basis for the trial court's decision, persuasive.

A careful review of the record reveals no indication that the surveillance video at issue here was ever in the State's possession. Given that "[t]he State . . . is under a duty to disclose only those matters in its possession and 'is not required to conduct an independent investigation' to locate evidence favorable to a defendant," *Chavis*, 141 N.C. App. at 561, 540 S.E.2d at 411 (quoting *Smith*, 337 N.C. at 664, 447 S.E.2d at 379), the State was under no statutory obligation to obtain and provide the pawn shop surveillance video to Defendant. As a result, given that the record contains no support for the trial court's determination that the State failed to comply with the discovery-related obligations imposed by N.C. Gen. Stat. § 15A-903 stemming from its failure to obtain, preserve, and disclose the pawn shop surveillance video to Defendant, the trial court's decision that the State did not comply with the mandates of N.C. Gen. Stat. § 15A-903 rested upon a misapprehension of the applicable law sufficient to render its decision to dismiss the obtaining property by false pretenses charges that had been lodged against Defendant an abuse of discretion. *Tuck*, 191 N.C. App. at 771, 664 S.E.2d at 29. As a result, given that the trial court's decision to dismiss the obtaining property by false pretenses charges rested upon a misapprehension of law concerning the extent to which a discovery violation actually occurred, the trial court's order should be reversed and this case should be remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.[5]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by dismissing the two counts of obtaining property by false pretenses that had been lodged against Defendant based on the State's alleged failure to comply with its discovery obligations under N.C. Gen.

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5. Aside from the issue discussed in the text, the trial court's order does not "detail the perceived prejudice to the defendant" that would "justif[y] the extreme sanction imposed." *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470. "Absent a finding explaining the specific and continuing prejudice [the d]efendant will suffer," a trial court is not authorized to dismiss a pending criminal case as a sanction for a discovery violation by the State. *Id.* Thus, wholly aside from the fact that the record does not, in fact, disclose the existence of any discovery violation relating to the failure to obtain and preserve the pawn shop surveillance video, we would also be required to reverse the trial court's dismissal order based upon its failure to delineate the "specific and continuing" prejudice to which Defendant would be subject as a result of the alleged discovery violation.

Stat. § 15A-903. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
TIYOUN JIMEK JACKSON

No. COA13-743

Filed 20 May 2014

1. Appeal and Error—failure to file written appeal—untimely oral appeal—writ of certiorari granted

Where defendant had lost his right to appeal the trial court's order denying his motion to suppress by failing to file a written appeal from the order and failing to enter timely oral notice of appeal, defendant's writ of certiorari was granted and the Court of Appeals reviewed defendant's appeal on the merits.

2. Search and Seizure—reasonable articulable suspicion—insufficient evidence

The trial court erred by denying defendant's motion to suppress. The finding of fact that the officer had recovered a stolen gun from defendant during a prior encounter with defendant was not supported by the evidence. Furthermore, under the totality of the circumstances, the police officer lacked the reasonable articulable suspicion of criminal activity needed to justify an investigatory stop. Moreover, because the stop was unlawful, defendant's subsequent consent to the officer's search of his person was invalid.

DILLON, Judge, dissenting.

Appeal by Defendant from order entered 10 January 2013 by Judge C.W. Bragg and judgment entered 22 January 2013 by Judge A. Robinson

Hassell in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant.

STEPHENS, Judge.

Procedural and Factual Background

In this appeal, Defendant Tiyoun Jimek Jackson challenges the trial court's denial of his motion to suppress evidence discovered by Officer Timothy D. Brown of the Greensboro Police Department following an investigatory stop of Defendant on the night of 9 April 2012.

The order denying Defendant's motion to suppress includes the following pertinent findings of fact:

1. [Officer] Brown is and has been an officer for the Greensboro Police Department since August 15, 2009.

2. Officer Brown based on training and experience is familiar with marijuana and other narcotic drugs.

3. Officer Brown was on duty and in uniform on Monday, April 9, 2012.

4. Prior to April 9, 2012, Officer Brown had on two occasions contact with [D]efendant . . . .

5. On the first occasion, Officer Brown investigating a report of the discharging of a firearm spoke with [D]efendant . . . concerning that incident and recovered from him a stolen firearm.

6. Approximately two months prior to April 9, 2012, Officer Brown was investigating a breaking and entering in the area of Lombardi Street in Greensboro, North Carolina and again came into contact with [D]efendant . . . .

7. . . . [D]efendant . . . was standing with 3 to 4 individuals in the area of the reported breaking and entering.

8. As Officer Brown approached he could smell the odor of marijuana.

9. Officer Brown conducted a search of the individuals including [D]efendant . . . .

10. Officer Brown did find an amount of marijuana, but not on the person of [D]efendant . . . .

11. On April 9, 2012, Officer Brown was assigned and was patrolling zone 450 in a marked patrol car.

12. Officer Brown at approximately 9:00 pm was patrolling in the vicinity of Kim's Mart located at 2200 Phillips Avenue.

13. Based on Officer Brown's experience as a Greensboro Police Officer he knows that the immediate area outside of Kim's Mart has been the location of hundreds of narcotic investigations some resulting in arrests.

14. Officer Brown has personally made drug arrests in the immediate area of Kim's Mart.

15. Officer Brown is personally aware that hand-to-hand drug transactions have taken place on the sidewalk and street directly adjacent to Kim's Mart as well as inside Kim's Mart.

16. At approximately 9:00 pm on April 9, 2012 Officer Brown saw [D]efendant . . . and Curtis M. Benton standing near the newspaper dispenser outside of Kim's Mart.

17. Two days prior Officer Brown conducted a motor vehicle stop in which Curtis M. Benton was riding.

18. During the motor vehicle stop, Officer Brown noticed the smell of marijuana coming from the car.

19. [D]efendant . . . and Curtis M. Benton upon spotting Officer Brown in his marked patrol car stopped talking and dispersed.

20. [D]efendant . . . went to the East and walked into Kim's Mart and Curtis M. Benton walked away, in the opposite direction, to the West.

21. Officer Brown testified that his training and experience indicate that upon the approach of a law enforcement officer, two individuals engaged in a drug transaction will separate and walk away in opposite directions.

22. Officer Brown continued past Kim's Mart and down Phillips Avenue.

23. After losing sight of [D]efendant . . . and Curtis M. Benton, Officer Brown made a u-turn and headed back up Phillips Avenue toward Kim's Mart.

24. As Officer Brown again approached Kim's Mart, [D]efendant . . . and Curtis M. Benton were again standing in front of Kim's Mart approximately 20 feet from where Officer Brown saw them originally.

25. Officer Brown pulled into the parking lot at Kim's Mart.

26. As Officer Brown was pulling into the parking lot at Kim's Mart, [D]efendant . . . and Curtis M. Benton again separated and began walking away in opposite directions.

27. As [D]efendant . . . was walking away from Kim's Mart, he came within 5-10 feet of Officer Brown's patrol car.

28. Officer Brown wanted to speak with [D]efendant . . . about possible drug activity.

29. Officer Brown asked [D]efendant . . . to place his hands on the patrol car . . . .

30. [D]efendant . . . placed his hands on the front left fender of Officer Brown's patrol car.

Based on these findings, the court concluded "[t]hat based on the totality of the circumstances . . . Officer Brown had a reasonable and articulable suspicion that criminal activity was afoot" and "was legally permitted to make a brief investigatory stop of [D]efendant[.]" The court further found and concluded that Defendant thereafter "consented to a search of his person by Officer Brown" which led to the discovery of a handgun.[1]

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1. A subsequent search of Benton yielded "a bag containing a multitude of smaller bags of marijuana."

While reserving the right to appeal the denial of his motion, *see* N.C. Gen. Stat. § 15A-979(b) (2013), Defendant pled guilty on 7 January 2013 to possession of a firearm by a felon, possession of a firearm with an altered serial number, and conspiracy to possess with intent to sell or deliver marijuana. The trial court consolidated Defendant's offenses for judgment, suspended a prison sentence of twelve to twenty-four months, and placed him on twenty-four months of supervised probation.

Appellate Jurisdiction

[1] Defendant has filed a petition for writ of *certiorari*, acknowledging a jurisdictional defect in his notice of appeal, to wit, that he did not initially appeal from the final judgment as required by N.C.R. App. P. 4(b), but rather appealed only from the denial of his suppression motion. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) (dismissing appeal for lack of jurisdiction where the "[d]efendant did file . . . a written notice of appeal from the denial of [the d]efendant's motion to suppress, but [the d]efendant did not appeal from his judgment of conviction") (internal quotation marks omitted). Further, Defendant gave oral notice of appeal thirteen days after the judgment was filed, rather than at trial as required by N.C.R. App. P. 4(a)(1). *See State v. Hammonds*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012) (granting writ of *certiorari* after dismissing an appeal for inadequate notice where the defendant's counsel attempted to give oral notice of appeal to the trial court days after the trial and not "at trial" as required by Rule 4).

As a result, Defendant's "right to prosecute an appeal has been lost by [his] failure to take timely action[.]" N.C.R. App. P. 21(a)(1). The State has neither moved to dismiss Defendant's appeal nor opposed our review by writ of *certiorari*. Accordingly, we grant the requested writ and review Defendant's challenges to the denial of his suppression motion on the merits.

Motion to Suppress

[2] Defendant argues that the court erred in denying his motion to suppress because Officer Brown lacked the reasonable articulable suspicion of criminal activity needed to justify an investigatory stop. *See*, *e.g.*, *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). Because the stop was unlawful, Defendant further contends that his subsequent consent to Officer Brown's search of his person was invalid. We agree.

In reviewing the denial of a motion to suppress, our task is to determine "whether competent evidence supports the trial court's findings of

fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Findings not challenged by Defendant "are deemed to be supported by competent evidence and are binding on appeal." *Id.* (citation omitted). We review *de novo* a trial court's conclusion of law that an "officer had reasonable suspicion to detain a defendant[.]" *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (citation omitted).

Here, Defendant challenges only finding of fact 5, which states that Officer Brown recovered a stolen gun from Defendant during a prior encounter with Defendant and another individual. The evidence, however, shows that, although Officer Brown did recover a stolen firearm during that encounter, "[D]efendant was not the one that was actually charged in that[.]" This finding of fact is not supported by competent evidence, and, accordingly, we do not consider it in analyzing Defendant's challenge to the trial court's ultimate conclusion that Officer Brown had a reasonable suspicion of criminal activity justifying an investigatory stop.[2]

"The Fourth Amendment protects the right of the people against unreasonable searches and seizures. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. It applies to seizures of the person, including brief investigatory detentions[.]" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citations, internal quotation marks, and ellipsis omitted). Accordingly, "[a]n investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *Id.* at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists." *Id.* (citation and internal quotation marks omitted). "This process allows officers to draw on their own experience and specialized training to make inferences from

2. We note that no evidence was introduced and no finding of fact was made that Defendant had any criminal history, much less that Officer Brown was aware of any previous criminal activity by Defendant. Further, even had such evidence been introduced, "a prior criminal record is not, standing alone, sufficient to create reasonable suspicion." *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (citation and internal quotation marks omitted). As for the findings of fact concerning Benton's criminal history, "[t]here is no reasonable suspicion merely by association." *Id.* at 539; *see also State v. Smith*, __ N.C. App. __, __, 729 S.E.2d 120, 125 (noting that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person") (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 396, 735 S.E.2d 190 (2012).

and deductions about the cumulative information available to them that might well elude an untrained person." *State v. Williams*, 366 N.C. 110, 116-17, 726 S.E.2d 161, 167 (2012) (citation and internal quotation marks omitted). However, case law has drawn clear limits on what inferences are constitutionally permissible when an officer observes a citizen in an area known for illegal drug activity or other criminal activity.

"[T]he presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, *coupled with evasive actions by* [*a*] *defendant*[, is] sufficient to form reasonable suspicion to stop an individual." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (citation omitted; emphasis added). While what constitutes an "evasive action" has never been explicitly defined, a careful review of case law from this State's appellate courts and from the United States Supreme Court reveals that merely walking away from one's companion in the presence of law enforcement officers cannot be considered an evasive action which, when coupled with one's presence in an area known for drug sales or other illegal activity, will support the warrantless stop of a citizen.

For example, in *State v. Fleming*,

> at the time [the o]fficer . . . first observed [the] defendant and his companion, they were merely standing in an open area between two apartment buildings [in a "high drug area"]. At this point, they were just watching the group of officers standing on the street and talking. *The officer observed no overt act by [the] defendant at this time nor any contact between [the] defendant and his companion.* Next, the officer observed the two men walk between two buildings, out of the open area, toward Rugby Street and then begin walking down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that [the] defendant was involved in criminal conduct, *it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers.*

106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992) (emphasis added). Thus, *walking away from law enforcement officers with one's companion after watching law enforcement officers* is not suspicious and, even when coupled with being present in an area known for drugs, cannot create the reasonable suspicion needed to justify a stop. *Id.*; *see also In re J.L.B.M.*, 176 N.C. App. 613, 620, 627 S.E.2d 239, 245 (2006) (holding

there was no reasonable suspicion where an officer "relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the 'Hispanic male' description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car").

> In *Brown*, two police officers observed [the] defendant and another person walking away from one another in an alley. The officers drove into the alley, approached [the] defendant and asked him to identify himself and to explain what he was doing there. [The d]efendant refused and told the officers they had no right to stop him. One of the officers told [the] defendant he was in a high drug area; the other officer then frisked [the] defendant and found nothing. At trial, one officer testified that he had stopped [the] defendant because the situation looked suspicious and he had never seen that subject in that area before. Further, the area where [the] defendant was stopped had a high incidence of drug traffic. The officers never claimed to suspect [the] defendant of any specific misconduct, nor did they have any reason to believe [the] defendant was armed.

Fleming, 106 N.C. App. at 170, 415 S.E.2d at 785 (internal quotation marks omitted) (discussing the circumstances present in *Brown*, which did not create the reasonable suspicion needed to sustain a stop). Thus, *walking away from one's companion in the presence of law enforcement officers*, even when coupled with being present in an area known for drugs, cannot create reasonable suspicion.

In contrast, in *State v. Butler*, the circumstances relevant to a determination of reasonable suspicion were:

> 1) [the] defendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) [the officer] had had the corner under daily surveillance for several months; 3) [the officer] knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) [the officer] was aware of other arrests there as well; 5) [the] defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight; and 7) it was [the officer's] experience that people involved in drug traffic are often armed.

331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992). The Court specifically distinguished the circumstances in Butler from those in *Brown* by noting "an additional circumstance — [the] defendant's immediately leaving the corner and walking away from the officers *after making eye contact with them*." *Id.* at 234, 415 S.E.2d at 722-23 (emphasis added). The Court construed these actions as "behavior that is evidence of *flight*[.]" *Id.* at 233, 415 S.E.2d at 722 (emphasis added). Thus, making eye contact with an officer before immediately turning and walking away in a manner which suggests an attempt to flee, when coupled with being present in an area known for drugs, *will* establish reasonable suspicion to sustain a stop.[3]

In *Watson*, upon the approach of law enforcement officers, the "defendant immediately attempted to enter the convenience store to avoid detention . . . [and] made evasive maneuvers to avoid detection, *i.e.*, putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store[.]" 119 N.C. App. at 398, 458 S.E.2d at 522 (italics added). The defendant's attempt to swallow drugs, coupled with his presence in an area known for drugs, created reasonable suspicion for a stop. *Id.* In *State v. Sutton*, the defendant's evasive action was "clinch[ing]" something in a waistband and posturing to conceal an item from a nearby officer. __ N.C. App. __, __, 754 S.E.2d 464, 471-72 (2014) ("While many of the facts in *Fleming* are the same or similar to this case, in *Fleming*, the defendant did not make any overt actions, and here [the] defendant did when he used his right hand to grab his waistband to clinch an item."). Similarly, in *State v. Willis*, the circumstances supported a determination of reasonable suspicion when a defendant "left a suspected drug house just before [a] search warrant was executed[,] . . . [took] evasive action when he knew he was being followed[,] . . . [and] exhibited nervous behavior." 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997). Thus, *overt*, *evasive behaviors* such as attempting to destroy contraband, behaving nervously while being

3. In contrast, simply observing law enforcement officers before walking away from them does *not* support a determination of reasonable suspicion. *See Fleming*, 106 N.C. App. at 170, 415 S.E.2d at 785 (finding no reasonable suspicion where the defendant and his companion "were just watching the group of officers standing on the street and talking" before walking away). Here, finding of fact 19 simply states that Defendant and his companion dispersed "upon spotting" Officer Brown in his marked patrol car. No finding of fact states that Defendant made eye contact with Officer Brown, and no testimony at the suppression hearing would have supported such a finding. Indeed, Officer Brown testified that, at the time he saw Defendant and his companion outside Kim's Mart, it was "dark" and that, "as soon as *they observed my police vehicle*, you had [D]efendant . . . walk east, as if he was walking into the store. And then [his companion] actually walked west, away from the store."

followed, or concealing items from the view of officers, when coupled with being present in high crime areas, *can* create reasonable suspicion.

Here, the unchallenged findings of fact reveal that the following circumstances led to Officer Brown's stop of Defendant: (1) it was approximately 9:00 p.m.;[4] (2) the area around Kim's Mart was known for illegal drug sales and had been the location of numerous drug-related arrests; (3) Defendant and a companion were standing together in front of Kim's Mart; (4) when the men saw Officer Brown's car, they began walking in opposite directions and Defendant entered Kim's Mart; (5) when Officer Brown turned his car around and returned, the two men were again standing together in front of Kim's Mart; and (6) when Officer Brown pulled into the store parking lot, Defendant and his companion again walked away from each other, with Defendant walking toward Officer Brown.

Thus, the totality of the relevant circumstances here consists of nothing more than (1) being in an area known for drug sales and (2) walking away from a companion in the presence of an officer twice. Defendant's presence with a companion at Kim's Mart, a location known for drug sales, cannot create reasonable suspicion to support a stop. *See Brown*, 443 U.S. at 52, 61 L. Ed. 2dat 365 ("There is no indication in the record that it was unusual for people to be in the alley. The fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct. In short, the [defendant's] activity was no different from the activity of other pedestrians in that neighborhood."). As discussed *supra*, that Defendant walked away from his companion after seeing Officer Brown, even in a known drug area, cannot create reasonable suspicion. *See Fleming*, 106 N.C. App. at 170, 415 S.E.2d at 785. Nothing in the findings of fact suggests that Defendant took any "evasive" action or engaged in behavior that could be construed as flight such as trying to swallow drugs, *see Watson*, 119 N.C. App. at 398, 458 S.E.2d at 522; concealing something from Officer Brown, *see*

4. The time of the stop, 9:00 p.m., cannot be considered a suspicious time to be at Kim's Mart, since that establishment was apparently open for business. *See*, *e.g.*, *State v. Rinck*, 303 N.C. 551, 555-60, 280 S.E.2d 912, 916-20 (1981) (holding that circumstances supporting a reasonable basis for a stop included the defendants walking along a road at an "unusual hour" of approximately 1:35 a.m.); *State v. Blackstock*, 165 N.C. App. 50, 59, 598 S.E.2d 412, 418 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005) (holding that reasonable suspicion existed where the defendant and a companion were observed loitering at a closed shopping center shortly before midnight, and, upon seeing law enforcement officers, hurriedly returned to their vehicle, which was parked out of general public view).

Sutton, __ N.C. App. at __, 754 S.E.2d at 466; making eye contact with the officer and then immediately walking away, *see Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23; or behaving nervously while being followed. *See Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411.

On the contrary, Defendant's actions were anything but evasive or evidence of flight. Finding of fact 27 notes that, as Defendant "was walking away from Kim's Mart, he came within 5-10 feet of . . . Brown's patrol car." Here, as in *Fleming*, Officer Brown observed no overt act by Defendant nor any contact between Defendant and his companion that would suggest Defendant was engaged in, or about to engage in, criminal activity of any kind, including illegal drug activity. He simply saw two young men standing in front of a convenience store move away from each other twice. In sum, the United States Supreme Court, our own North Carolina Supreme Court, and previous panels of this Court have consistently held that these circumstances cannot create the reasonable suspicion required to permit police intrusion upon the liberty of our State's citizens.

Having determined that the initial investigatory stop was unlawful, we need not consider whether Defendant's consent to Officer Brown's search of his person was valid. *See State v. Guevara*, 349 N.C. 243, 249, 506 S.E.2d 711, 716 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999) (noting that evidence obtained as the result of illegal police conduct must be suppressed). The order denying Defendant's motion to suppress is reversed and the judgment entered upon Defendant's guilty plea is vacated.

REVERSED and VACATED.

Judge BRYANT concurs.

DILLON, Judge, dissenting.

I agree with the majority that the trial court's Finding of Fact 5—the only finding challenged by Defendant—is not supported by the evidence of record. However, because I believe that the remaining findings are sufficient to support the court's conclusion that Officer Brown possessed the reasonable suspicion requisite to justify an investigatory stop under the circumstances, I respectfully dissent.

As the majority points out, we have held that "the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by

[a] defendant[,] are sufficient to form reasonable suspicion to stop an individual." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995). Defendant does not dispute the trial court's findings that Officer Brown was aware that Kim's Mart—where the stop in question occurred —was a high-crime area, where numerous drug transactions had taken place and where Officer Brown had made a number of drug-related arrests. The sole issue, therefore, is whether the trial court's remaining findings are sufficient to establish that Defendant engaged in "evasive actions" sufficient to give rise to reasonable suspicion.

This court has held, as the majority points out, that an individual's action in merely walking away from one's companion cannot be considered evasive action sufficient to form reasonable suspicion. *State v. Fleming*, 106 N.C. App. 165, 171, 415 S.E.2d 782, 785 (1992). However, as the majority also points out, our Supreme Court has held that there is reasonable suspicion to justify an investigatory stop where an individual who walks away from his companion in a high-crime area does so "*after making eye contact*" with a police officer. *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (emphasis added).

I believe that Defendant's actions here were more evasive than those of the defendant in *Butler*; and, accordingly, I believe that we are compelled to conclude that Officer Brown conducted a valid stop under the circumstances. Unlike *Fleming*, where the defendant simply walked away from the police, here Defendant engaged in a *sequence of suspicious behaviors* upon observing Officer Brown's patrol car. For instance, the trial court found that "Defendant . . . and [his companion] upon *spotting Officer Brown* in his marked patrol car stopped talking and dispersed [from the front of Kim's Mart]." (Emphasis added.) This unchallenged finding is comparable to the key finding in *Butler* that the defendant "upon making eye contact with the uniformed officers . . . moved away." *Butler*, 331 N.C. at 233, 415 S.E.2d at 722. Additionally, the trial court found that Officer Brown continued driving past Kim's Mart and lost sight of Defendant and his companion before executing a U-turn and driving back toward Kim's Mart, where he observed Defendant and his companion once again standing together. Finally, the trial court found that when Officer Brown pulled into the Kim's Mart parking lot, Defendant and his companion *again* dispersed.

Any one of Defendant's actions, standing alone, might not satisfy the requirements of the Fourth Amendment to conduct a *Terry* stop. However, I believe that Defendant's actions, when considered in their totality, namely: (1) that Defendant and his companion split up upon spotting Officer Brown's patrol car drive by Kim's Mart the first time;

(2) that Defendant and his companion reconvened once Officer Brown was out of site; and (3) that Defendant and his companion split up a second time upon observing Officer Brown driving back towards Kim's Mart— were certainly more evasive than the actions of the defendant in Butler. Accordingly, I believe that Officer Brown conducted a valid investigatory stop of Defendant in the present case, and I would affirm the trial court on this basis.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER AARON ROUSE

No. COA13-1104

Filed 20 May 2014

1. Appeal and Error—writ of certiorari—denial of counsel—granted

Defendant's petition for writ of certiorari was allowed and the Court of Appeals addressed the merits of defendant's argument that his constitutional right to assistance of counsel was violated when he was denied counsel at his resentencing hearing.

2. Constitutional Law—assistance of counsel—resentencing hearing

The trial court erred by denying defendant the assistance of counsel at his resentencing hearing. The trial court's judgments were vacated and the matter was remanded for resentencing.

Appeal by defendant from judgments entered 15 March 2013 by Judge Phyllis Gorham in Pender County Superior Court. Heard in the Court of Appeals 9 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

ELMORE, Judge.

Christopher Aaron Rouse (defendant) appeals from two judgments entered after a resentencing hearing. Because the denial of defendant's

right to counsel at resentencing constitutes structural error, we vacate the trial court's judgments and remand for further proceedings.

On 26 April 2011, defendant pled guilty to five counts of second-degree sexual exploitation of a minor committed in November of 2009, and to attaining habitual felon status. He was represented at this proceeding by appointed counsel Tonya Turner. As specified in the parties' plea arrangement, the trial court sentenced defendant in the mitigated range to two consecutive active prison terms of 77 to 102 months.

Defendant did not pursue an appeal. In 2012, however, he filed a motion for appropriate relief ("MAR") in superior court challenging, *inter alia*, the calculation of his prior record level ("Level"). The State conceded in response that, owing to an error on the sentencing worksheet, "[d]efendant was sentenced at Level III (5 points), but should have been sentenced at Level II (3 points)." Citing its authority to correct errors of law "on its own motion after entry of judgment[,]" *see* N.C. Gen. Stat. § 15A-1420(d) (2013), the trial court allowed defendant's MAR in part and ordered that his case "be calendared for resentencing without unnecessary delay."

At his resentencing hearing on 15 March 2013, defendant appeared "unrepresented" by counsel.[1] Upon inquiry by the prosecutor and the trial court, defendant acknowledged that he had prior misdemeanor convictions for possession of drug paraphernalia, misdemeanor larceny, and domestic criminal trespass, and that these convictions resulted in "three prior [record] points, placing [him] at level two for punishment purposes." Despite the absence of evidence or stipulation, the trial court found as a mitigating factor that defendant has a support system in the community. *See* N.C. Gen. Stat. § 15A-1340.16(e)(18) (2013).[2] After hearing from the parties, the trial court again sentenced defendant to two consecutive mitigated sentences of 77 to 102 months, as provided by his plea agreement. The judgments entered by the trial court at resentencing reflect defendant's Level II status based on three prior record points.

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1. Although the resentencing judgments list the appointed counsel who represented defendant at his plea hearing, Tonya Turner, the transcript of the 15 March 2013 resentencing hearing clearly shows he was brought into court and required to proceed without the assistance of counsel.

2. Because the pertinent materials are absent from the record on appeal, it is unclear whether this mitigating factor was also found at defendant's original sentencing proceeding in April of 2011. We further note the record on appeal lacks the trial court's written findings of aggravating and mitigating factors at resentencing.

Defendant filed a timely *pro se* notice of appeal on 22 March 2013. The trial court signed appellate entries on 15 April 2013, appointing the Appellate Defender to represent defendant on appeal. After filing the record in this Court, counsel filed a petition for writ of certiorari as an alternative basis for appellate review. While acknowledging certain technical deficiencies in defendant's notice of appeal, defense counsel asked this Court to review the judgments pursuant to N.C.R. App. P. 21(a)(1), in order to address "constitutional issues" including the violation of defendant's right to counsel at resentencing. The State opposed this Court's issuance of the writ, arguing that denial of counsel is not a cognizable claim on appeal from a guilty plea. *See* N.C. Gen. Stat. § 15A-1444(a1)-(a2), (e) (2013). We note, however, that the State did not move to dismiss defendant's appeal.

Having examined defendant's notice of appeal, we find its contents sufficient to satisfy the jurisdictional requirements of N.C.R. App. P. 4(b). Although defendant lists extraneous file numbers for charges dismissed under his plea agreement[3], his notice of appeal also refers to the relevant file numbers–10 CRS 271, 50584-88–addressed in the resentencing judgments. *See* N.C.R. App. P. 4(b). "[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." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (citations and quotations omitted). Furthermore, while the notice of appeal fails to designate the court to which his appeal is taken, as required by Rule 4(b), "defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court." *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620, *disc. review denied*, ___ N.C. ___, 747 S.E.2d 548 (2013).

[1] On appeal, defendant argues only that the failure to provide him with counsel at resentencing violated his constitutional and statutory rights under U.S. Const. amend. VI, N.C. Const. art. I, § 23, and N.C. Gen. Stat. § 7A-451(a)(1). The State responds that defendant has no

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3. Any confusion regarding the file numbers resulted from the trial court's mistaken reference to 09 CRS 53285-89 at resentencing. Defendant called attention to the court's error and noted his objection. The court ultimately corrected its judgments on 27 March 2013 to reflect the correct file numbers in 10 CRS 50584-88. It appears defendant simply exercised due caution in listing both 09 CRS 52385-89 and 10 CRS 50584-88 in his notice of appeal filed 22 March 2013.

right to appeal the denial of his right to counsel, inasmuch as his guilty plea limited his appellate rights to the issues set forth in N.C. Gen. Stat. § 15A-1444(a1)-(a2), (e) (2011).

As the State observes, the constitutional issue raised by defendant does not fall within his limited right of appeal under N.C. Gen. Stat. § 15A-1444. However, "it is permissible for this Court to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of [G.S. Chapter 15A,] Article 58 [(Procedures Relating to Guilty Pleas in Superior Court)] were violated." *State v. Rhodes*, 163 N.C. App. 191, 194, 592 S.E.2d 731, 733 (2004). Although Article 58 does not expressly address the appointment of counsel to assist an indigent defendant who pleads guilty in superior court, we believe a defendant's constitutional right to representation by counsel is implicit in these statutory procedures. *See* N.C. Gen. Stat. §§ 15A-1012(a), 15A-1022(a)(5) (2013). We therefore allow defendant's petition for writ of certiorari for the purpose of reviewing his claim.

[2] It is well-established that "sentencing is a critical stage of a criminal proceeding to which the right to . . . counsel applies." *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521, *writ denied*, 314 N.C. 670, 337 S.E.2d 583 (1985). Accordingly, "[t]his Court has held that the threat of imprisonment at a resentencing hearing triggers an absolute right to counsel under the Sixth Amendment and N.C. Gen. Stat. § 7A-451. There is no question but that Defendant was subject to a threat of imprisonment at his resentencing hearing." *State v. Boyd*, 205 N.C. App. 450, 454 & n.1, 697 S.E.2d 392, 394 & n.1 (2010) (citing *State v. Lambert*, 146 N.C. App. 360, 364-65, 553 S.E.2d 71, 75 (2001)). Indeed, defendant's plea agreement required that he serve a minimum of twelve years in prison.

The complete denial of counsel is one of the six forms of structural error identified by the United States Supreme Court. *State v. Polke*, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)). "[A] defendant's remedy for structural error is not dependant upon harmless error analysis; rather, such errors are reversible *per se*." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004). Therefore, we must vacate the trial court's judgments and remand for resentencing. *Boyd*, at 456, 697 S.E.2d at 396 ("Defendant was deprived of his right to counsel at the resentencing hearing and is entitled to be resentenced.").

Vacated and remanded for resentencing.

Judges McCULLOUGH and DAVIS concur.

JENNIFER TYLL & DAVID TYLL, PLAINTIFFS
v.
JOEY BERRY, DEFENDANT

No. COA13-512

Filed 20 May 2014

1. Appeal and Error—notice of appeal—jurisdiction

The trial court did not err in a civil contempt proceeding by dismissing defendant's notice of appeal from a 50C no contact order. The court's jurisdiction over the case gave it authority to dismiss a filing in the case that defendant himself asserted was a nullity.

2. Appeal and Error—preservation of issues—failure to seek ruling at trial—failure to attend hearing—failure to move for continuance

Although defendant contended that the trial court erred in a civil contempt proceeding by failing to consider his request for appointed counsel, the Court of Appeals did not need to determine whether defendant was entitled to counsel since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter.

3. Contempt—civil—findings of fact—sufficiency of evidence

The trial court did not err by finding in its civil contempt order that Sharon Tyll was a member of plaintiffs' family protected by a 50C no contact order, the 50C order prohibited defendant from simply "contacting" plaintiffs or their family, and defendant continued to harass and interfere with plaintiffs through electronic means following entry of the 50C order. The findings were supported by sufficient evidence.

4. Penalties, Fines, and Forfeitures—fine—civil contempt—amount

Although the trial court did not err in a civil contempt case by imposing a fine payable to plaintiffs, the amount was reversed and remanded to the trial court to make appropriate findings regarding defendant's present ability to pay the fine.

5. Appeal and Error—preservation of issues—failure to cite authority

Although defendant contended that the trial court exceeded its authority in a civil contempt proceeding by imposing additional

restrictions on defendant's contact with plaintiffs and others in the order, this issue was abandoned under N.C. R. App. P. 28(b)(6) since defendant cited no authority in support of his argument.

Appeal by defendant from orders entered 18 December 2012 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 7 November 2013.

No brief filed on behalf of plaintiffs-appellees.

Mary McCullers Reece for defendant-appellant (appeal from contempt order).

Joey Berry, pro se, defendant-appellant (appeal from order dismissing notice of appeal).

GEER, Judge.

Defendant Joey Berry appeals from the trial court's order holding him in contempt for violating a civil no-contact order entered pursuant to Chapter 50C of the General Statutes (the "50C order") and from the trial court's order dismissing his notice of appeal from the 50C order. With respect to the order dismissing defendant's notice of appeal from the 50C order, defendant contends that the paper he filed was not actually a notice of appeal, but only a "notice of intent to appeal," such that it was not untimely filed under the Rules of Appellate Procedure. We hold that whether the filing was a notice of appeal or a notice of intent to appeal, the trial court properly dismissed the filing as either untimely or a nullity.

With respect to the contempt order, defendant primarily argues that the trial court improperly ordered him to pay a fine to plaintiffs in order to purge himself of contempt. We hold that precedent authorizes a purge condition consisting of a fine payable to the complaining party. However, because the trial court failed to make findings that defendant had the present ability to comply with the purge condition, we reverse the fine and remand for further proceedings.

Facts

On 11 May 2012, plaintiffs Jennifer and David Tyll filed a verified complaint against defendant seeking a 50C order. David and Jennifer Tyll are husband and wife, and David Tyll is the brother of defendant's domestic partner, Michelle Willets.

The complaint alleged that defendant was disrespectful to Jennifer Tyll, David Tyll, and Michelle Willets' mother, Sharon Tyll, and as a result, plaintiffs told Ms. Willets that defendant was not welcome at "upcoming family events." Defendant then sent angry emails to plaintiffs and demanded that they come to South Carolina where defendant and Ms. Willets lived. When plaintiffs refused, defendant sent an email to David Tyll's employer "suggesting horrible defamatory things." Defendant told David Tyll over the phone that the email to David Tyll's employer was the " 'tip of the ice-berg.' " An email from Ms. Willets to Sharon Tyll stated that defendant, when " 'forced into a fight,' " believed in " 'total war' " and would not " 'back down . . . until [his] opponent [was] completely defeated.' "

On 23 May 2012, the trial court entered an order pursuant to N.C. Gen. Stat. § 50C-7 (2011) in which it found that plaintiffs "suffered unlawful conduct by the defendant" in that defendant sent "numerous emails to family members" and to David Tyll's employer that contained "references to war, death and never stopping, not following rules until your opponent is fully defeated," and that made "references to worst case scenarios." Based upon its findings, the court ordered defendant to, among other things, "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family." The order was effective until 23 May 2013.

On 7 September 2012, defendant, acting *pro se*, filed a document captioned "NOTICE OF APPEAL In Forma Pauperis." The filing stated that defendant "hereby gives notice of intent to appeal to the Court of Appeals of North Carolina" from the 50C order. The filing further stated: "The time for filing an appeal allowed by the NORTH CAROLINA RULES OF APPELLATE PROCEDURE having expired, the Defendant in this matter is preparing to petition the Honorable Court of Appeals of North Carolina for the writ of CERTIORARI in accordance with RULE 21 at the soonest point practical." Plaintiffs moved to dismiss defendant's notice of appeal under the Rules of Appellate Procedure, and the trial court entered an order dismissing defendant's notice of appeal as untimely on 18 December 2012.

On 11 October 2012, plaintiffs filed a verified motion to hold defendant in contempt of the 50C order. The motion alleged that defendant willfully violated the 50C order on 23 June 2012 by emailing plaintiffs' family member, Sharon Tyll. On 22 October 2012, defendant filed a "MOTION FOR PROCEEDING/APPEAL IN FORMA PAUPERIS," with an attached affidavit, requesting that the court "issue an order allowing the Defendant to proceed as an indigent" and appoint him counsel.

It appears that the Orange County Clerk of Superior Court summarily denied the motion on 23 October 2012 by handwriting "Motion is denied" on the motion itself and signing and refiling the motion. On 29 October 2012, defendant timely appealed the denial of his motion to proceed as an indigent to the district court pursuant to N.C. Gen. Stat. §§ 7A-251(b) (2011) and 1-301.1(b) (2011).

On 2 November 2012, defendant filed a response to the contempt motion in which he admitted sending the email to Sharon Tyll, but disputed that the email was harassing and that the 50C order was specific enough to bar communication with Sharon Tyll. Defendant's response also argued that the denial of his motion to proceed as an indigent, which forced him to file his response without the assistance of appointed counsel, violated his due process rights under the United States and North Carolina Constitutions.

Following an 11 December 2012 hearing on the contempt motion, at which defendant was not present, the trial court entered an order on 18 December 2012 holding defendant in contempt. The trial court found that defendant violated the 50C order by sending Sharon Tyll, a family member of plaintiffs, an email on 23 June 2012; that "the lawful purpose [of the 50C order] would still be served with compliance with same, i.e. the Defendant should continue to be restrained from any contact with Plaintiffs or their family"; and that "Defendant is in willful contempt of said order, as he has the ability to comply with same and refrain from sending the email."

The court ordered that "[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs $2500.00 on or before January 11, 2013" and that "each individual violation of the May 23, 2012 [order] shall result in at least another $2500.00 purge for each violation." In addition, the order "further restrain[ed]" defendant by (1) preventing defendant from contacting plaintiffs, their employers, or their family members, other than Michelle Willets, by any means; (2) preventing defendant from posting any information about plaintiffs or their family members, other than Michelle Willets, on the internet; and (3) ordering defendant to remove any internet posts about plaintiffs or their family members, other than Michelle Willets, within seven days from entry of the order. Defendant timely appealed the contempt order to this Court.

On 22 January 2013, defendant, still acting pro se, filed a second "MOTION FOR PROCEEDING/APPEAL IN FORMA PAUPERIS," along with the same affidavit attached to his first motion to proceed as an indigent, again requesting that the trial court "issue an order allowing the

Defendant to proceed as an indigent." On 23 January 2013, the Orange County Clerk of Superior Court entered an order allowing defendant to proceed as an indigent "[i]n accordance with NCGS § 1-288 and solely for the purposes stated therein."

Defendant filed a motion for appointment of appellate counsel on 11 April 2013. On 14 June 2013, the trial court entered an order appointing appellate counsel for defendant "with regards to any contempt motion or contempt orders." On 29 July 2013, defendant filed a pro se brief addressing his appeal from the dismissal of his notice of appeal from the 50C order, and defendant's appointed counsel filed a brief addressing his appeal from the contempt order.

I

[1] We first address defendant's appeal from the dismissal of his "notice of appeal" from the 50C order. Defendant argues on appeal that the trial court erred in dismissing his notice of appeal as untimely under the Rules of Appellate Procedure because the filing was not actually a notice of appeal but was, rather, only a "notice of intent to appeal" that was not subject to the Rules of Appellate Procedure. Defendant further argues that since the trial court's order dismissing the notice of appeal relied upon the Rules of Appellate Procedure as grounds for dismissing the appeal, the court was without jurisdiction to dismiss the filing that, he argues, did not create a valid appeal and was not, therefore, subject to the appellate rules.

Defendant's "NOTICE OF APPEAL" purported to give "notice of intent to appeal" the 23 May 2012 50C order, but recognized that the time for taking an appeal had already expired. The notice, therefore, stated defendant was "preparing" to petition this Court for a writ of certiorari to review the 50C order.

Given that defendant's filing was captioned a "NOTICE OF APPEAL" and stated that defendant gave "notice of intent to appeal to the Court of Appeals of North Carolina," the trial court reasonably treated the filing as a notice of appeal. Assuming the filing was a notice of appeal, defendant admitted in the filing itself, and again recognizes on appeal, that the notice was untimely. *See* N.C.R. App. P. 3.

Although defendant argues that plaintiffs' motion to dismiss the appeal was improper since it was not supported by affidavits or certified copies of docket entries showing defendant took untimely action as required by Rule 25 of the Rules of Appellate Procedure, we believe that Rule 25's requirements for proof of the appellant's untimely action

is satisfied when, as here, the notice of appeal itself expressly states that the appeal is untimely. The trial court's dismissal of the notice as untimely was, under these circumstances, proper. *See* N.C.R. App. P. 25(a).

Assuming, as defendant contends, that the filing was not a notice of appeal but, rather, solely a "notice of intent to appeal" that did not itself constitute a valid appeal, the trial court nonetheless properly dismissed the filing as a nullity. Defendant has pointed to, and we have found, no authority allowing defendant to file a "notice of intent to appeal" in a civil case, and no authority limiting the trial court's jurisdiction to dismiss such an ineffectual filing.

Defendant's contention that the trial court lacked jurisdiction to dismiss the filing under the Rules of Appellate Procedure fails to recognize that the trial court already had jurisdiction over the case due to the proper filing of plaintiffs' complaint and the issuance of a summons. *See* N.C.R. Civ. P. 3(a) ("A civil action is commenced by filing a complaint with the court."). *See Estate of Livesay ex rel. Morley v. Livesay*, ___ N.C. App. ___, ___, 723 S.E.2d 772, 774 (2012) ("Without a proper complaint or summons under Rule 3 of the Rules of Civil Procedure, an action is not properly instituted and the court does not have jurisdiction."). The court's jurisdiction over the case gave it jurisdiction to dismiss a filing in the case that defendant himself asserts was a nullity. We, therefore, hold the trial court did not err in dismissing defendant's notice of appeal from the 50C order.

II

[2] Defendant next contends that the trial court erred in failing to consider defendant's request for appointed counsel. Defendant argues that the trial court's failure to address his request for counsel violated his due process rights under the United States and North Carolina Constitutions.

In civil contempt proceedings, the question whether an indigent, alleged contemnor is entitled to counsel under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a determination made on a case-by-case basis. *See Turner v. Rogers*, ___ U.S. ___, ___, 180 L. Ed. 2d 452, 466, 131 S. Ct. 2507, 2520 (2011) (holding that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)").

In contrast, in criminal contempt proceedings, the Sixth and Fourteenth Amendments to the United States Constitution generally

"require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *See Scott v. Illinois*, 440 U.S. 367, 374, 59 L. Ed. 2d 383, 389, 99 S. Ct. 1158, 1162 (1979); *Turner*, ___ U.S. at ___, 180 L. Ed. 2d at 461-62, 131 S. Ct. at 2516 (observing that Sixth Amendment right of an indigent criminal defendant to appointed counsel "applies to *criminal contempt* proceedings (other than summary proceedings)").

Given the differences between an indigent individual's right to appointed counsel in a civil contempt proceeding and his right to counsel in a criminal contempt proceeding, we must initially determine whether the contempt proceeding and order in this case involved civil or criminal contempt. "Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties." *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). "Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice." *Id.*

Here, the contempt order did not specify whether the trial court held defendant in civil or criminal contempt. The order simply stated that the court was holding defendant in contempt based upon defendant's willful violation of the 50C order.

N.C. Gen. Stat. § 50C-10 (2013) provides that "[a] knowing violation of an order entered pursuant to [Chapter 50C] is punishable as contempt of court." Accordingly, all Chapter 50C orders "shall include the following notice, printed in conspicuous type: 'A knowing violation of a civil no-contact order shall be punishable as contempt of court which may result in a fine or imprisonment.' " N.C. Gen. Stat. § 50C-5(c) (2013).

Civil contempt proceedings are initiated, among other ways, "by motion pursuant to G.S. 5A-23(a1)." N.C. Gen. Stat. § 5A-23(a) (2013). "Failure to comply with an order of a court is a continuing civil contempt as long as: (1) The order remains in force; (2) The purpose of the order may still be served by compliance with the order; (2a) The noncompliance by the person to whom the order is directed is willful; and (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." N.C. Gen. Stat. § 5A-21(a) (2013).

Further, "[i]f civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the

action which the contemnor must take to purge himself or herself of the contempt." N.C. Gen. Stat. § 5A-23(e). With regard to punishment for civil contempt, N.C. Gen. Stat. § 5A-22(a) (2013) provides: "A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt."

Here, plaintiffs initiated the contempt proceeding with a motion for contempt, pursuant to the procedures for civil contempt set out in N.C. Gen. Stat. § 5A-23(a1). The trial court's order likewise indicates the court was holding defendant in civil contempt, as the order included each of the requisite findings for civil contempt specified in N.C. Gen. Stat. § 5A-21(a) and expressed the court's intent to include a "purge" clause pursuant to N.C. Gen. Stat. § 5A-23(e).

At the contempt hearing, the trial court's statements indicate it was rendering a civil contempt order in an effort to force defendant to comply with the 50C order:

> [PLAINTIFF'S COUNSEL:] I do want the Court to be aware that there have been other emails sent since that one, and we are now seeking some different relief. We're asking you to consider to bar him from any Internet communication about the Tyll family, to or from them or about them, in any form including a website.
>
> So, we want him to stay off the Internet to or from any family member of the Tyll's, and we want him to stop posting about this family. We don't want any other contact, through telephone or personal, and that's all ready [sic] been ordered, and we are asking you [sic] consider to allow an order against him, a monetary order of $2,500.
>
> THE COURT: *Well, I think that's what's gonna [sic] be necessary because he's obviously -- has no boundaries.*
>
> Okay. The Court will find him in contempt, [indecipherable], enter a purge amount -- a bond amount in the amount of $2,500 to be doubled each -- for each violation.

(Emphasis added.)

Finally, construing the order as an order for civil contempt is consistent with N.C. Gen. Stat. § 50C-10's provision for contempt sanctions for a violation of a 50C order and N.C. Gen. Stat. § 5A-25 (2013) general rule that "[w]henever the laws of North Carolina call for proceedings as

for contempt, the proceedings are those for civil contempt . . . ." The trial court's order was, therefore, an order for civil contempt. *Cf. Reynolds v. Reynolds*, 147 N.C. App. 566, 576-81, 557 S.E.2d 126, 132-35 (2001) (John, J., dissenting) (treating order as one for criminal contempt based on, among other factors, lack of purge condition in sanction imposed, trial court's characterization of contempt as criminal and not civil, and trial court's apparent desire to punish contemnor as shown by trial court's statements at hearing and nature of sanctions imposed), *rev'd per curiam sub nom. Reynolds v. Reynolds (now Flynn) for reasons stated in the dissent*, 356 N.C. 287, 569 S.E.2d 645 (2002).

Turning to defendant's arguments on appeal, after plaintiffs filed their contempt motion, defendant moved the trial court to be allowed to proceed as an indigent and attached an affidavit of indigency to his motion. The clerk of superior court summarily denied defendant's motion, and defendant appealed that denial to the district court judge. Defendant then filed a response to plaintiffs' contempt motion that again declared defendant's indigency and asserted as an "ADDITIONAL DEFENSE[]" that the denial of defendant's motion to proceed as an indigent, forcing defendant to respond to the contempt motion without appointed counsel, violated defendant's state and federal constitutional rights to due process.

N.C. Gen. Stat. § 7A-451(a)(1) (2013) provides that "[a]n indigent person is entitled to services of counsel in . . . [a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." "The clerk of superior court is authorized to make a determination of indigency and entitlement to counsel, as authorized by this Article." N.C. Gen. Stat. § 7A-452(c)(1) (2013). However, a "judge of superior or district court having authority to determine entitlement to counsel in a particular case . . . may, if he finds it appropriate, change or modify the determination made by the clerk . . . ." N.C. Gen. Stat. § 7A-452(c)(2).

Given defendant's appeal to the district court judge from the denial of his motion to proceed as an indigent, and his separate request for appointment of counsel in his response to the contempt motion, the trial court in this case had the authority to modify the clerk's denial of defendant's motion to proceed as an indigent, to find defendant indigent, and to appoint defendant counsel. However, we need not determine whether defendant was entitled to counsel in this civil contempt proceeding since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter.

Our Supreme Court has held that "a lawyer cannot properly represent a client with whom he has no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). This is so because " 'North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency,' and '[t]wo factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent.' " *Id.* at 577, 515 S.E.2d at 444 (quoting *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995)).

Here, the trial court could not appoint counsel to represent defendant at the hearing since defendant was not present and could neither authorize a particular attorney to be his agent nor exercise control over that attorney. *See id.* at 575, 578, 515 S.E.2d at 443, 445 (holding law firm hired by insurer could not represent defendant insured who had absconded since insured had never authorized firm to represent him). Since defendant also failed to move to continue the matter, there was no relief requested of the court pursuant to which defendant could be appointed counsel whose representation he could authorize.

In addition, defendant's argument is not properly preserved for appeal since, although defendant appealed the denial of his motion to proceed as an indigent and requested the appointment of counsel in his response to the contempt motion, defendant failed to attend the contempt hearing and, therefore, failed to obtain a ruling on his appeal and request for counsel after the initial denial of his motion to proceed as an indigent. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (holding plaintiff failed to preserve argument that court erred in failing to grant plaintiff's motion to strike paragraphs from affidavits since plaintiff never obtained ruling on motion), *aff'd per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006). We, therefore, hold that the trial court did not violate defendant's due process rights by conducting the contempt hearing, in defendant's absence, and holding defendant in contempt without further considering defendant's request for appointed counsel.

III

[3] Defendant additionally argues that the trial court erred in finding in its contempt order that (1) Sharon Tyll was a member of plaintiffs' family protected by the 50C order; (2) the 50C order prohibited defendant

from simply "contacting" plaintiffs or their family; and (3) defendant continued to harass and interfere with plaintiffs through electronic means following entry of the 50C order. "The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

The 50C order ordered defendant to, among other things, "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family." The trial court found that "Sharon Tyll is a family member of the Defendants [sic] who is protected from harassment and interference by the May 23, 2012 Order." Sharon Tyll testified at the hearing that she was plaintiff David Tyll's mother and considered herself his family member.

Defendant, however, argues that he was in a relationship with Michelle Willets, David Tyll's sister, throughout the life of this case and that a reading of the 50C order that prohibited certain contact with Sharon Tyll would be unreasonable because such an interpretation could just as easily prohibit defendant's contact with Ms. Willets. Defendant's argument fails to recognize that the substance of the email he sent to Sharon Tyll, for which defendant was found in contempt, demonstrates defendant understood Sharon Tyll to be a member of plaintiffs' family covered by the relevant provision of the 50C order. Defendant wrote: "Please stop harassing us. *You*, David and Jenny *have gotten a court order severing Michelle (and me) from your family for at least eleven more months*. Your attempts to call us are torturous to Michelle. Under no circumstance is any form of communication welcome to either Michelle or me." (Emphasis added.) As an attachment to defendant's response to plaintiffs' contempt motion, this email was evidence before the trial court that supported the court's finding that Sharon Tyll was considered part of plaintiffs' family for purposes of the 50C order.

Defendant further challenges the trial court's finding that the 50C order prohibited defendant "from *contacting*, visiting, molesting, or otherwise interfering with the Plaintiffs or the Plaintiff's [sic] family." (Emphasis added.) Defendant asserts that the relevant provision of the 50C order only ordered him to "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family." He argues that he was, therefore, not barred from merely "contacting" plaintiffs' family.

Even assuming that the trial court's description of the underlying order was not completely consistent with the actual terms of the order,

that specific finding, describing the underlying order, was not necessary to support the trial court's conclusion that defendant wilfully violated the 50C order by emailing Sharon Tyll. Defendant does not challenge the court's finding that "Defendant violated the Order on June 23, 2012, by sending an email from [defendant's email address] to [Sharon Tyll's email address]. That email was received by Sharon Tyll and it bothered her."

This unchallenged finding regarding Sharon Tyll being "bothered" by the email falls within the undisputed term of the 50C order that defendant not "interfere with" plaintiffs' family. Because the finding as to "contacting" was unnecessary to the trial court's conclusions, any error did not prejudice defendant. *See Blalock Elec. Co. v. Grassy Creek Dev. Corp.*, 99 N.C. App. 440, 445, 393 S.E.2d 354, 357 (1990) ("[A]ny error with regard to this finding would not affect the court's judgment where other findings supported by competent evidence would be sufficient to support the judgment.").

Defendant also challenges the finding that "Defendant has continued to harass and interfere with the Plaintiffs through electronic means since the entry of the May 23, 2012 restraining order." Having already observed that the trial court was presented with evidence of the email sent from defendant to Sharon Tyll, we note that in that email, defendant told plaintiff David Tyll's mother, Sharon Tyll, to stop "harassing" defendant, and stated that Sharon Tyll's "attempts to call" her daughter, Michelle Willets, were "torturous." Defendant further told Sharon Tyll that "[u]nder no circumstance" was "any form of communication welcome to" her daughter. Sharon Tyll testified that the email continued to bother her.

The email also specifically referred to both plaintiffs, by name, and Sharon Tyll as "hav[ing] gotten a court order severing Michelle (and [defendant]) from your family for at least eleven more months." This evidence permitted a reasonable inference that plaintiff David Tyll, Sharon Tyll's son, would feel "harass[ed]" and "interfere[d] with" by defendant's email to his mother, sent after entry of the 50C order sought by plaintiffs to prevent just such communications. We, therefore, hold that the court's finding was supported by competent evidence.

IV

[4] Defendant's final argument is that the trial court erred in imposing sanctions for civil contempt that exceeded the trial court's statutory contempt powers. First, defendant contends that the court erred in requiring defendant to pay a "purge" amount of $2,500.00 since that sanction actually operated as a fine or monetary award against defendant, and,

he asserts, there is no legal basis for imposing a fine or monetary award against a civil contemnor.

The contempt order in this case ordered that "[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs $2500.00 on or before January 11, 2013." The order further provided, with respect to any future violations of the 50C order, that "each individual violation of the May 23, 2012 [order] shall result in at least another $2500.00 purge for each violation."

As observed by defendant, N.C. Gen. Stat. § 5A-21(b) provides that "[a] person who is found in civil contempt may be imprisoned as long as the civil contempt continues." However, defendant's argument that there are no further statutorily permitted sanctions for civil contempt fails to recognize that (1) N.C. Gen. Stat. § 50C-10 provides that "[a] knowing violation of an order entered pursuant to [Chapter 50C] is punishable as contempt of court"; (2) N.C. Gen. Stat. § 5A-25 provides that "[w]henever the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt"; and (3) N.C. Gen. Stat. § 50C-5(c) provides that all Chapter 50C no-contact orders "shall include the following notice, printed in conspicuous type: 'A knowing violation of a civil no-contact order shall be punishable as contempt of court which *may result in a fine* or imprisonment.' " (Emphasis added.) We believe that these statutes, read together, support the inference that fines are statutorily permitted sanctions for civil contempt proceedings based upon violations of Chapter 50C no-contact orders.

Our Supreme Court has indicated that fines are appropriate sanctions for civil contempt in North Carolina:

> The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose *fines* or imprisonment as a method of coercing the defendant to comply with an order of the court. . . . Accordingly, defendant in a civil contempt action will be *fined* or incarcerated only after a determination is made that defendant is capable of complying with the order of the court. The imprisonment or *fine* is lifted as soon as defendant decides to comply with the order of the court, or when it becomes apparent that compliance with the order is no longer feasible. . . . In the recently enacted contempt statute, civil contempt is carefully defined along these lines. G.S. 5A-21, *et seq*. and Official Commentary.

Jolly v. Wright, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (emphasis added), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). *See also McBride*, 334 N.C. at 130, 431 S.E.2d at 18 (observing that "a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying").

This Court has similarly referred to the propriety of a fine as a sanction for civil contempt: "'A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court.'" *Oakley v. Oakley*, 165 N.C. App. 859, 864, 599 S.E.2d 925, 929 (2004) (quoting *Reece v. Reece*, 58 N.C. App. 404, 406–07, 293 S.E.2d 662, 663–64 (1982)).

Defendant further contends, however, that even if a fine is a permissible sanction for civil contempt, this Court has held that a court may not award damages or costs to a private party in a civil contempt proceeding. In support of his argument, defendant cites *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905 (2006) and *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990). *See Baxley*, 179 N.C. App. at 640, 634 S.E.2d at 908 ("Because contempt is considered an offense against the State, rather than an individual party, 'damages may not be awarded to a private party because of any contempt[.]'" (quoting *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 102, 370 S.E.2d 431, 434 (1988))); *Green*, 96 N.C. App. at 659, 386 S.E.2d at 760 ("'[C]ontempt proceedings are *sui generis* and criminal in nature. Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply.'" (quoting *United Artists Records, Inc. v. E. Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E.2d 598, 601 (1973))).

"The word 'damages' is defined as compensation which the law awards for an injury[;] 'injury' meaning a wrongful act which causes loss or harm to another." *Cherry v. Gilliam*, 195 N.C. 233, 235, 141 S.E. 594, 595 (1928). *See also Black's Law Dictionary* 445 (9th ed. 2009) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"). "[C]ompensation," in turn, has been defined as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another." *Id.* at 322. "In theory, compensation makes the injured person whole." *Id.*

While damages or costs may not be awarded to plaintiffs in a civil contempt proceeding, this Court has expressly acknowledged that a person found in civil contempt may be required to pay a fine to the opposing party. In *Bishop v. Bishop*, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988), this Court looked to the character of the relief ordered in a contempt proceeding to determine whether that proceeding involved civil or criminal contempt. This Court held that civil contempt could involve a monetary payment "if the monies are either paid to the complainant or defendant can avoid payment to the court by performing an act required by the court." *Id.* The Court specifically held that civil contempt can involve a fine " 'when it is paid to the complainant' " or if payable to the court " 'when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.' " *Id.* at 504, 369 S.E.2d at 108-09 (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 99 L. Ed. 2d 721, 731, 108 S. Ct. 1423, 1429 (1988)).

In this case, there is no indication in the record that the award of $2,500.00 payable to plaintiffs for defendant's contempt, or the possibility of future payments of "at least another $2500.00" for future violations of the 50C order, were intended to compensate plaintiffs for loss or injury from defendant's contempt or to pay the costs of the action incurred by plaintiffs. The payments were denominated "purge" conditions in the order, indicating the court intended the payments to coerce defendant into compliance with the 50C order rather than to compensate plaintiffs for defendant's contempt. *See Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999) ("A court order holding a person in civil contempt must specify how the person may purge himself or herself of the contempt. The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." (internal citations omitted)).

Further, at the hearing, in response to plaintiffs' counsel's request for a "monetary order of $2,500" in response to defendant's contempt, the trial court stated: "Well, I think that's what's gonna [sic] be necessary because he's obviously—has no boundaries. Okay. The Court will find him in contempt, [indecipherable], enter a purge amount—a bond amount in the amount of $2,500 to be doubled each—for each violation." The foregoing indicates that, in this case, the court entered a monetary award for civil contempt payable to plaintiffs in order to coerce defendant into compliance with the 50C order and not in order to compensate plaintiffs for defendant's contempt. The trial court, therefore, did not err in ordering defendant to pay a fine to plaintiffs.

Defendant further argues that the sanction imposed for civil contempt was invalid because there was no effective purge condition. To hold

a person in civil contempt, "the judicial official must enter an order . . . specifying the action which the contemnor must take to purge himself or herself of the contempt." N.C. Gen. Stat. § 5A-23(e). Here, the trial court ordered that in order "[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs $2500.00 on or before January 11, 2013."

Defendant contends that although "this Court has considered cases involving monetary awards payable on findings of civil contempt, the instances of such awards are limited to those cases where the underlying order imposed an obligation of payment, as in a child support case." He then argues that "[i]n the case of the child support obligor, the payment of arrears is partial compliance with the order being enforced. Thus, the obligor may avoid incarceration by making payment in compliance with the underlying child support order."

However, our courts have also held that requiring a contemnor to pay attorneys' fees in order to purge himself of contempt may be an appropriate purge condition. These cases do not involve payments that would have been required by the underlying order that the contemnor violated. *See*, *e.g.*, *Eakes v. Eakes*, 194 N.C. App. 303, 312, 669 S.E.2d 891, 897 (2008) ("North Carolina courts have held that the contempt power of the trial court includes the authority to require the payment of reasonable attorney's fees to opposing counsel as a condition to being purged of contempt for failure to comply with a child support order."); *Middleton v. Middleton*, 159 N.C. App. 224, 227, 583 S.E.2d 48, 49-50 (2003) ("This Court has held that the contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order."). *See also Hartsell v. Hartsell*, 99 N.C. App. 380, 392, 393 S.E.2d 570, 577 (1990) (observing that when party has been held in contempt for violating order requiring transfer of property, trial court had authority to order contemnor to transfer property or its present value as condition of purging contempt), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

We see no basis for distinguishing a fine payable to the moving party from these types of payments. Therefore, the trial court included a proper purge condition when it required defendant to pay the fine to plaintiffs in order to purge himself of contempt.

Defendant next argues that the contempt order's $2,500.00 payments for present and any future violations of the 50C order were invalid because the trial court made no findings concerning defendant's ability to pay, at the time of the contempt hearing or at any point in the future, respectively, the amount of $2,500.00. We agree.

This Court has held that North Carolina's civil contempt statutes "require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). We see no reason why a monetary sanction should be treated differently. *See Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 ("[D]efendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court.").

The contempt order in this case contains no findings that defendant, at the time of the contempt hearing or otherwise, had the ability to pay a $2,500.00 award to plaintiffs. In fact, the only evidence in the record regarding defendant's ability to pay is defendant's affidavit of indigency attached to his two motions to proceed as indigent. That affidavit stated that defendant and his partner, Ms. Willets, each have no direct source of income and receive room and board in exchange for caring for defendant's mother. The affidavit further stated defendant owned no real property; defendant owned some personal property but any requirement to liquidate that property would "substantially affect[]" defendant's ability to care for his mother; and the total value of defendant's "cash" was "less than $2500.00." The trial court, therefore, erred in requiring the monetary payments without first finding defendant was presently able to comply with the $2,500.00 fine imposed as a result of defendant's past contempt or would be able to comply in the future with any $2,500.00 fines imposed as a result of any further violations of the 50C order.

[5] Finally, defendant contends that the trial court exceeded its authority in this contempt proceeding by imposing additional restrictions on defendant's contact with plaintiffs and others in the contempt order since defendant was not given notice of any request for sanctions beyond those allowed for contempt or of a hearing to modify the 50C order. We do not agree.

The 23 May 2012 50C order ordered defendant to "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family"; to "cease harassment of the plaintiff"; to "not abuse or injure the plaintiff"; to "not contact the plaintiffs by telephone, written communication, or electronic means"; and to "not enter or remain present at the plaintiff's residence . . . [or] place of employment."

The contempt order contained the following provisions in the decretal portion of the order:

4. The Court hereby further restrains the Defendant from the following acts:

   a) Defendant, Joey Berry, shall not contact by phone, internet, mail or any other means any employer or family member of Jennifer and David Tyll, except Michelle Willets, directly or indirectly or through a third party, even by using a pseudonym or by acting as power of attorney or attorney in fact for any other person.

   b) Defendant, Joey Berry, shall not post or allow to be posted any information of any kind whatsoever referring to, referencing, or stating the names of the Plaintiffs or any member of their family, except Michelle Willets, on the internet, on any blog, forum, in any email, in any electronic newspaper or magazine, on any social website such as Facebook, using his name or any pseudonym.

   c) Within 7 days from the date of entry of this order, the Defendant shall remove from any internet posting, web sites and/or postings, blogs, social media, and other communications not limited to the internet, if these communications relate to or reference the Plaintiffs or the names of the Plaintiffs or any of their family members other than Michelle Willets, even if the communication, posting, blog, email, ect. [sic], was published using a pseudonym or by acting as power of attorney or attorney in fact for any other person.

We initially note that these provisions do not necessarily place any further restrictions on defendant beyond those set out in the original 50C order. They may be viewed as simply specifying the behaviors that reasonable people would understand to be subsumed within the terms of the original order -- a clarification that the trial court likely viewed as necessary given defendant's apparent intention to try to avoid compliance with the 50C order by a restrictive reading of the order.

Defendant cites no authority in support of his argument that the trial court erred by including decretal paragraph 4. Therefore, he has not properly presented this issue for our review, and we do not address

it. *See Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, __ N.C. App. __, __, 746 S.E.2d 13, 18 (2013) ("With regard to her substantive due process claim, plaintiff, in her brief, fails to cite any legal authority in support of her contention on this issue. We, therefore, deem this argument abandoned on appeal pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.").

Conclusion

In sum, we affirm the trial court's order dismissing defendant's notice of appeal from the 50C order. We hold that the court did not violate defendant's right to due process by not further considering defendant's request for appointed counsel and that the challenged findings of fact in the contempt order were either supported by the evidence or unnecessary to support the court's conclusion that defendant was in contempt of the 50C order. We also affirm the trial court's decision to impose a fine payable to plaintiffs, but we reverse as to the amount and remand for the trial court to make appropriate findings regarding defendant's present ability to pay the fine.

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 MAY 2014)

ABDELAZIZ v. ASMAR No. 13-1424	Mecklenburg (11CVS19947)	No Error
AMOS v. MOORE No. 13-963	Forsyth (12CVS4964)	Reversed
BEST v. GALLUP No. 13-1148	Wake (10CVD1893)	Affirmed in Part and Reversed in Part
CHURCH v. DECKER No. 13-771	Caldwell (01CVD1391)	Reversed and Remanded
FIA CARD SERVS., N.A. v. CAVINESS No. 13-1442	Wake (11CVD16592)	Affirmed
HAUGH v. NATIONWIDE MUT. FIRE INS. CO. No. 13-768	Mecklenburg (10CVS19441)	AFFIRMED in part, MODIFIED in part.
IN RE A.R.S. No. 13-1300	New Hanover (11JT73-75)	Affirmed
IN RE E.I.O. No. 13-1341	Mitchell (13JT07)	Reversed and Remanded
IN RE J.M. No. 13-1154	Johnston (12JA135-136)	Affirmed
IN RE JEMSEK No. 13-801	Wake (12CVS9321)	Affirmed
IN RE K.K. No. 13-1385	Swain (12JA22-23)	Affirmed
IN RE K.M.C. No. 13-1414	Randolph (10JA34) (13JA5)	Affirmed in part; reversed in part
IN RE L.B.B. No. 13-1260	Harnett (13J29)	Affirmed
IN RE M.A.H. No. 13-1379	Guilford (10JT555)	Affirmed
IN RE S.M.W. No. 13-1362	Pasquotank (13JT17)	Affirmed

IN RE STANBACK No. 13-1295	Durham (13CVS3898)	Dismissed
KING v. ORR No. 13-621	Pender (05SP146) (07CVS617)	Dismissed
KING v. PENDER CNTY. No. 13-618	Pender (12CVS794)	Dismissed
LCA DEV., LLC v. WMS MGMT. GRP., LLC No. 13-1467	Pitt (12CVS3376)	Dismissed
MORALES v. GARCIA No. 13-983	Cabarrus (12CVD1061)	Affirmed in part; reversed and remanded in part
N.C. STATE BAR v. BERMAN No. 13-1249	N.C. State Bar (12DHC31)	Affirmed
NELSON v. ALLIANCE HOSPITALITY MGMT., LLC No. 13-1325	Wake (11CVS3217)	Dismissed
ROBERSON v. ROBERSON No. 13-1196	Vance (12CVD1019) (12CVD809)	Affirmed
STATE v. ADAMS No. 13-1202	Johnston (12CRS50894)	No Error
STATE v. BROWNING No. 13-892	Franklin (12CRS50024-25)	Reversed and Remanded
STATE v. CASH No. 13-935	Onslow (12CRS50104) (12CRS50106) (12CRS50120-22) (12CRS50124)	No error in part; reversed in part and remanded
STATE v. CHAPIN No. 13-897	Wake (10CRS201603-604)	No Prejudicial Error
STATE v. CRADDOCK No. 13-997	Rockingham (11CRS50150) (11CRS817) (13CRS354)	No Error
STATE v. DAVIS No. 13-1110	Mecklenburg (12CRS225761) (12CRS230370) (12CRS44899)	No Error

STATE v. EDMONDS No. 13-1219	Buncombe (11CRS64718)	No Error
STATE v. GASPAR No. 13-970	Wayne (11CRS55331) (11CRS55332)	No prejudicial error
STATE v. GILLIS No. 13-1203	Cabarrus (09CRS3474)	No Error
STATE v. GRAVES No. 13-1299	Guilford (12CRS78766-67)	No Error in Part; Vacated in Part; Remanded for resentencing.
STATE v. KAPEC No. 13-1236	New Hanover (12CRS52513)	New Trial
STATE v. LEMON No. 13-1144	Forsyth (11CRS57557)	No Error
STATE v. LINK No. 13-1171	Person (12CRS1727-29)	Reversed and Remanded
STATE v. McMILLAN No. 13-1045	Hoke (12CRS50141) (12CRS895) (13CRS229)	No Error
STATE v. MILLER No. 13-1368	Wake (11CRS11876) (11CRS221347-50)	Affirmed
STATE v. MORGAN No. 13-1227	Union (09CRS55490-94) (09CRS55496-98) (09CRS55500-01)	Affirmed
STATE v. PITTMAN No. 13-765	Halifax (11CRS54905-06) (11CRS54968)	No Error
STATE v. POLK No. 13-849	Rowan (11CRS51259-61) (11CRS55416)	No Error
STATE v. REYNOSA No. 13-1160	Graham (12CRS360-361) (12CRS50484)	No Error

STATE v. ROBERTS No. 13-1111	Brunswick (07CRS52264-79)	Affirmed
STATE v. SEXTON No. 13-1086	Wake (12CRS213765)	No Error
STATE v. SIMPSON No. 13-776	Guilford (10CRS72489)	No Error
STATE v. SPENCER No. 13-1158	Tyrrell (11CRS295-296)	Dismissed
STATE v. TURNER No. 13-1157	Duplin (08CRS51563) (08CRS51567)	Affirmed
STATE v. WATTS No. 13-1145	New Hanover (11CRS54439)	Dismissed
STATE v. WILSON No. 13-969	Cleveland (11CRS1130-31) (11CRS1186)	Affirmed
STATE v. WOOD No. 13-1258	Rutherford (12CRS294)	Affirmed in part; remanded in part.
TRICEBOCK v. KRENTZ No. 13-852	Mecklenburg (11CVD1704)	Affirmed in part; reversed and remanded in part

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