234 N.C. App.—No. 3 Pages 330-480

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 7, 2016

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 17 JUNE 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

viewed in the light most favorable to the State, demonstrated that the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. **In re M.J.G., 350.**

Delinquency—misdemeanor assault—The trial court did not err by failing to find that the juvenile was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. The court relied on the petition that sufficiently alleged the juvenile committed simple assault by forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps. **In re M.J.G., 350.**

Disposition hearing—terms—failure to cite authority—harmless error—failure to object—The trial court did not err by holding an alleged sham disposition hearing and allegedly violating the statutory mandate to allow the juvenile's parents to present evidence. The juvenile failed to cite to any authority to support his assumption of a sham hearing. Assuming arguendo that the trial court decided the terms of his disposition prior to allowing the juvenile's mother to be heard, any error was harmless based on the fact that the mother did not object to the condition of attending the family classes but effectively agreed with the trial court. **In re M.J.G., 350.**

MOTOR VEHICLES

Driving while impaired—multiple chemical analysis tests—implied consent rights—The trial court did not err in a driving while impaired case by granting defendant's motion to suppress the results of a chemical blood test. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C.G.S. § 20-16.2(a). **State v. Williams, 445.**

PARTITION

Jointly held leasehold—contract—no estoppel—In an action involving the partition or sale of a leasehold in lake property as well as personal property, petitioner was not estopped by the agreement between the parties. Unlike *Properties, Inc. v. Cox*, 268 N.C. 14, in this case the trial court based its finding on the language of the parties' agreement (which did not contain any express stipulation as to partition) rather than the passage of time. **Whitesell v. Barnwell, 471.**

Lake property leasehold—injury to a party—In an action involving the partition or sale of a leasehold in lake property as well as personal property, respondent did not show error on the question of whether petitioner would suffer injury or substantial injury. Respondent's argument consisted of questioning the evidence of injury, but the evidence showed that petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer wishing to share a one-half interest with respondent. **Whitesell v. Barnwell, 471.**

Relief sought under statute—defense of unclean hands—Respondent did not show error on the basis of unclean hands in an action for the partition or sale of a leasehold in lake property as well as personal property. She restated earlier equity arguments but presented no authority for an application of unclean hands in this

VENUE

Motion for change—no evidence of residency—The trial court erred in a negligence case by denying defendant's motion for change of venue. Although plaintiff alleged in his complaint that he was a citizen and resident of Harnett County where the complaint was filed, the complaint was not verified and thus, was not an affidavit or other evidence. There was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action. **Kiker v. Winfield, 363.**

WORKERS' COMPENSATION

Opinion and award—interest—benefits—The Full Industrial Commission erred in a workers' compensation case by failing to require defendant to pay interest on the benefits awarded to plaintiff in an opinion and award issued from the date of the initial hearing in this dispute, pursuant to N.C.G.S. § 97-86.2. **Lewis v. N.C. Dep't of Corr., 376.**

WRONGFUL DEATH

Officers in individual capacities—summary judgment—no showing acts were corrupt, malicious, or outside of and beyond scope of duties—The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims of wrongful death against defendant officers in their individual capacities. The evidence viewed in the light most favorable to plaintiff did not show that the acts of the officers leading to the victim's death were corrupt, malicious, or outside of and beyond the scope of their duties. **Mills v. Duke Univ., 380.**

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.

ANNE B. GOODMAN, Administrator of the Estate of RICHARD CLYDE BOST, Deceased, Plaintiff

v.

LIVING CENTERS—SOUTHEAST, INC., d/b/a BRIAN CENTER OF SALISBURY and/or BRIAN CENTER HEALTH & REHABILITATION/SALISBURY, Defendants

No. COA13-1336

Filed 17 June 2014

Statutes of Limitation and Repose—accident in nursing facility—ordinary negligence—statute of limitation rather than repose

The trial court erred in dismissing a negligence action arising from a falling IV stand in a long-term nursing facility as being in violation of the statue of repose. Defendant's acts or failure to act clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill and sounded in ordinary negligence rather than medical malpractice. Plaintiff's action was thus subject to the three-year statute of limitations set forth in N.C.G.S. § 1-52(16).

Appeal by plaintiff from order entered 25 July 2013 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 9 April 2014.

DORAN, SHELBY, PETHEL and HUDSON, P.A., by Michael Doran, for plaintiff-appellant.

HAGWOOD ADELMAN TIPTON, by Amy E. Oleska, for defendant-appellee.

ELMORE, Judge.

Anne B. Goodman (plaintiff), representative of the estate of Richard Clyde Bost (the decedent), appeals from an order dismissing her 18 January 2013 complaint against the Brian Center of Salisbury ("defendant" or "Brian Center"). The trial court's order was predicated on the grounds that plaintiff's claims were barred by the statute of repose. We conclude that plaintiff's claims were not in fact barred by the statute of repose. Accordingly, the trial court's order should be reversed, and this case should be remanded for further proceedings consistent with this opinion.

I. Procedural Background

On or about 22 April 2008, the decedent, at the age of eighty-four, became a permanent resident of the Brian Center, a long-term nursing and rehabilitation facility in Salisbury. On 13 September 2008, defendant, through its agents, allegedly caused an instrumentality for the delivery of I.V. fluids to be improperly positioned next to the decedent's bed. Due to its unstable placement, the instrumentality fell on the decedent causing serious injuries to the decedent's upper body, including blunt trauma to his head, a broken nose, and various cuts and contusions. The decedent was admitted to Rowan Regional Medical Center and treated for his injuries. Once stabilized, he was released to a different nursing home facility where he later died on 6 October 2008. The decedent did not return to the Brian Center at any point after the incident.

On 5 October 2010, plaintiff, on behalf of the decedent's estate, filed a complaint in Rowan County Superior Court seeking an award of damages on the basis of allegations sounding in negligence, wrongful death, and breach of contract. On 18 January 2012, plaintiff voluntarily dismissed her action without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. One year later, on 18 January 2013, plaintiff refiled her action against defendant, asserting the same three causes of action as set forth in her 5 October 2010 complaint. On 25 February 2013, defendant moved for dismissal of plaintiff's action and/or summary judgment in its favor on grounds that (1) defendant was an improper party to the action as it had not held a license or any interest in the requisite facility since 2005, and (2) plaintiff's claims were barred by the statute of repose. On 24 July 2013, the trial court entered an order dismissing plaintiff's action with prejudice after finding that plaintiff's action was barred by the statute of repose. Plaintiff timely appealed to this Court on 23 August 2013.

II. Analysis

On appeal, plaintiff argues that the trial court erred in dismissing her action for failing to timely file under the statute of repose when "the gravamen of the [c]omplaint is ordinary negligence." We agree.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). Further, when there are no disputed factual issues, issues regarding the application of a statute of limitations

or statute of repose are questions of law reviewable *de novo*. *Udzinski v. Lovin*, 159. N.C. App. 272, 273, 583, S.E.2d 648, 649 (2003), *aff'd*, 358 N.C. 534, 597 S.E.2d 703 (2004).

According to N.C. Gen. Stat. § 90-21.11(2)(a) (2013), a medical malpractice action is defined as a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional [health care] services." The North Carolina Court of Appeals has defined "professional services" as an act or service "arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual." *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (quotation omitted). The distinction between medical malpractice actions and ordinary negligence actions is significant for two primary reasons. First, medical malpractice actions are subject to the statute of repose, which mandates: "[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]" N.C. Gen. Stat. § 1-15(c). Second, plaintiffs filing a medical malpractice action are required to comply with the certification requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. *See* N.C. R. Civ. P. § 1A-1, Rule 9(j). Specifically, pursuant to Rule 9(j), any complaint alleging medical malpractice by a health care provider pursuant to N.C. Gen. Stat. § 90-21.11(2)(a) (2013) shall be dismissed unless:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j).

Defendant contends that plaintiff has waived her right to argue that her action sounded in ordinary negligence because she failed to allege ordinary negligence before the trial court. We disagree. After reviewing the hearing transcript, it is clear that defendant assumed plaintiff's action was one for medical malpractice and therefore based its argument for dismissal, in part, on an alleged violation of the statute of repose. However, a review of plaintiff's complaint reveals that her claims sounded in ordinary negligence. Plaintiff neither referenced "medical malpractice" in her complaint nor did she obtain expert certification pursuant to Rule 9(j). We assume that the trial court found plaintiff's claims sounded in medical malpractice, given its dismissal of the action pursuant to the statute of repose. However, the trial court need not have reached the merits of defendant's argument regarding the statute of repose. Assuming the action was for medical malpractice, the trial court was required to dismiss it on the basis that the complaint lacked a Rule 9(j) certification. *See id.* For the forthcoming reasons, this is not a case in which the statute of repose is applicable, and, accordingly, we must address plaintiff's argument that the action sounded in ordinary negligence.

The crux of the issue before us is whether plaintiff's claims, which stem from an incident in which defendant, acting through its agents, improperly placed an instrumentality for the delivery of I.V. fluids near the decedent such that it fell and injured him, constitute a medical malpractice action or an action sounding in ordinary negligence. In making such determination, we look to whether the injury resulted from the application of "specialized knowledge, labor, or skill," or from actions which were primarily "physical or manual." *Setty* at 608, 503 S.E.2d at 674. Prior case law is instructive. For example, in *Setty*, the quadriplegic plaintiff was injured when he was moved from an examination table to a wheelchair. *Id.* This Court held that the alleged negligent conduct was "predominately a physical or manual activity" which did not implicate the defendant's professional services but fell "squarely within the parameters of ordinary negligence." *Id.* Similarly, in *Norris v. Rowan Memorial Hospital*, this Court concluded that the hospital employees' failure to raise the rails of a bed or instruct the patient to ask for assistance in getting out of bed (which resulted in the patient falling

and breaking her hip) stemmed from ordinary negligence because the "alleged breach of duty did not involve the rendering or failure to render professional nursing or medical services requiring special skills." 21 N.C. App. 623, 626, 205 S.E.2d 345, 348 (1974). Finally, in *Taylor v. Vencor, Inc.*, the administrator of a patient's estate brought a wrongful death action against a nursing home, alleging that the nursing home failed "through inadequate staffing and other negligent behavior, to provide adequate observation and supervision" of a patient who died after lighting her nightgown on fire when attempting to light a cigarette. 136 N.C. App. 528, 529, 525 S.E.2d 201, 202 (2000). This Court held that "the observance and supervision of the plaintiff, when she smoked in the designated smoking area, did not constitute an occupation involving specialized knowledge or skill." *Id.* at 530, 525 S.E.2d at 203. We additionally remarked: "Preventing a patient from dropping a match or a lighted cigarette upon themselves, while in a designated smoking room, does not involve matters of medical science." *Id.*

In the instant case, plaintiff alleges that defendant breached its duty (1) to exercise due care with respect to providing reasonably safe living quarters for its residents, (2) to warn residents of unsafe conditions, and (3) to supervise patients when:

> a) Defendant placed the aforesaid instrumentality in such a position as to be unreasonably unstable so as to constitute a hazard to those in close proximity hereto, such as plaintiff's decedent;
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> b) Defendant failed to properly supervise the plaintiff's decedent's activities once defendant installed use of the instrumentality to provide intravenous fluids to plaintiff's decedent; AND
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> c) Defendant failed to warn plaintiff's decedent of the presence of the instrumentality and to warn plaintiff's decedent of the instability of the equipment.

In essence, plaintiff alleges that defendant, through its agents, failed to safely position the I.V. apparatus in the decedent's room and failed to warn the decedent accordingly. Based on prevailing case law, we hold that defendant's acts or failure to act clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill. *See, e.g.*, *Norris*, 21 N.C. App. at 626, 205 S.E.2d at 348. Accordingly, we hold that the claims asserted in plaintiff's complaint sound in ordinary negligence rather than medical malpractice.

Given that plaintiff's claims sound in ordinary negligence, her action is subject to the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(16) (2013) (providing that an action for personal injury not governed by the statute of repose, N.C. Gen. Stat. § 1-15(c), shall be brought within three years of the date upon which bodily harm to the claimant "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs"). Here, the decedent was injured on 13 September 2008. Plaintiff filed her initial complaint within the three-year period on 5 October 2010. She subsequently voluntarily dismissed the action without prejudice pursuant to Rule 41. Under Rule 41, a new action based on the same claim may be commenced within one year after such dismissal, and "the refiled case will relate back to the original filing for purposes of tolling the statute of limitations." *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 283, 648 S.E.2d 261, 264-65 (2007). Because plaintiff voluntarily dismissed her complaint on 18 January 2012 and timely refiled it on 18 January 2013, her complaint is not time barred. Further, given that plaintiff's claims sounded in ordinary negligence rather than medical malpractice, the four-year statute of repose provided for in N.C. Gen. Stat. § 1-15(c) was inapplicable. Plaintiff's claims are not barred by the statute of limitations or the statute of repose. Accordingly, the trial court erred in dismissing plaintiff's action with prejudice on grounds that plaintiff violated the statue of repose.

Reversed and remanded.

Judges McCULLOUGH and DAVIS concur.

HIGH ROCK LAKE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND JOHN DOLVEN, PETITIONERS-APPELLANTS
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT-APPELLEE

No. COA13-1010

Filed 17 June 2014

Appeal and Error—preservation of issues—failure to argue—abuse of discretion—attorney fees

Although petitioners contended that the trial court erred by denying their motion for attorney fees, petitioners failed to argue on appeal that the trial court abused its discretion, and thus, any such argument was abandoned. Further, because petitioners' second and third arguments relied upon the success of their first, those arguments also failed.

Appeal by Petitioners from order entered 22 May 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 March 2014.

Van Winkle, Buck, Wall, Starnes and David, P.A., by Craig D. Justus, for Petitioners-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., Assistant Attorney General Scott K. Beaver, and Assistant Attorney General Jennifer S. Watson, for Respondent-Appellee.

McGEE, Judge.

High Rock Lake Partners, LLC ("High Rock") purchased approximately 190 acres in Davidson County ("the property") in August 2005. High Rock intended to develop the property into a sixty-lot residential subdivision. High Rock purchased the property for $5,200,000.00. John Dolven, M.D. ("Dolven") provided $3,600,000.00 of the purchase price through a secured loan. High Rock and Dolven are petitioners ("Petitioners") in this matter. In December 2005, the Davidson County Board of Commissioners approved the preliminary plat, based on High Rock's "meeting all the County requirements for subdivision approval."

The only way to access the property was by way of State Road 1135 ("SR 1135"), which was maintained by Respondent North Carolina

Department of Transportation ("DOT"), as part of the State Highway System. As part of High Rock's initial development phase, it sought to extend SR 1135 — which dead-ended on the property — in order to provide a driveway connection into the planned subdivision.

In October 2005, High Rock applied to DOT for a permit to construct a driveway. The proposed driveway connection point was located on SR 1135, approximately one-quarter mile from a railroad crossing ("the railroad crossing"). Due to the location of a railroad yard near the railroad crossing, idling locomotives sometimes blocked the crossing.

In a letter dated 12 December 2005, Chris Corriher, DOT District Engineer for Davidson County, denied High Rock's application. High Rock timely appealed this denial to DOT Division Engineer, Pat Ivey ("Ivey"). Ivey granted High Rock's permit application, with the conditions that High Rock widen the railroad crossing and secure the necessary permissions from the railroad companies to do so. High Rock appealed DOT's conditions to the DOT Driveway Permit Appeals Committee ("DOT Appeals Committee"). The DOT Appeals Committee upheld the conditions set out by Ivey. High Rock filed a Petition for Judicial Review in Superior Court, Mecklenburg County, on 17 September 2007.

Dolven acquired the property through a foreclosure proceeding on 10 December 2007. High Rock assigned its rights in development approvals, including the driveway permit, to Dolven. High Rock sought to join Dolven as a party to the case pending in Mecklenburg County Superior Court. On 26 August 2008, the trial court ruled, *inter alia*, that Dolven could not be added as a party. The trial court also ruled that DOT's actions regarding the driveway permit were statutorily authorized but that the conditions related to High Rock's obtaining railroad consent were unconstitutional.

Dolven appealed and, on 18 May 2010, this Court vacated the trial court's 26 August 2008 ruling and remanded the case for a new hearing on the merits, with Dolven joined as a party. *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 204 N.C. App. 55, 693 S.E.2d 361 (2010) ("*High Rock I*"). The trial court, as directed by this Court, joined Dolven by order entered 1 November 2010 and, in judgment entered 24 November 2010, ruled that DOT had not acted (1) in excess of its statutory authority, (2) arbitrarily and capriciously, or (3) in violation of either the United States or North Carolina constitutions. Petitioners appealed, and this Court affirmed the judgment of the trial court. *High Rock Lake Partners, LLC v. North Carolina DOT*, __ N.C. App. __ , 720 S.E.2d 706 (2011) ("*High Rock II*"). Our Supreme Court granted discretionary review and

reversed *High Rock II*, determining that the conditions placed on the driveway permit were not authorized under the plain language of N.C. Gen. Stat. § 136–18(29), and holding that DOT had exceeded its statutory authority by imposing those conditions. *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 323, 735 S.E.2d 300, 306 (2012) ("*High Rock III*"). A more extensive factual and procedural history may be found in these prior opinions.

Petitioners filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 on 14 January 2013. The trial court heard Petitioners' motion on 8 April 2013 and, in an order entered 22 May 2013, denied Petitioners' motion. Petitioners appeal.

Petitioners argue that the trial court erred in denying their motion for attorney's fees based upon the trial court's conclusion that "DOT's positions in this case from the initial denial of the driveway permit through to the Supreme Court's decision in *High Rock* [*III*] were substantially justified under G.S. § 6-19.1." Petitioners further argue that, because of this alleged error, this Court should instruct the trial court to award Petitioners their attorney's fees. We disagree.

N.C. Gen. Stat. § 6-19.1 states in relevant part:

> (a) In any civil action, . . . unless the prevailing party is the State, *the court may, in its discretion*, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C. Gen. Stat. § 6-19.1 (2013) (emphasis added). By the clear language of the statute, once the trial court makes the appropriate findings required in subsections (1) and (2) of N.C.G.S. § 6-19.1(a), its decision on whether or not to award attorney's fees is discretionary.

> It is well settled that "[a]ppellate review of matters left to the discretion of the trial court is limited to a

> determination of whether there was a clear abuse of discretion." Furthermore, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision."

Smith v. Beaufort County Hosp. Ass'n., 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citations omitted). In *Crowell Constructors, Inc. v. State ex rel. Cobey*, our Supreme Court has recognized the prerequisites required before a trial court can exercise its discretion to award attorney's fees pursuant to N.C.G.S. § 6-19.1, as follows:

> Thus, *in order for the trial court to exercise its discretion* and award reasonable attorney's fees to a party contesting State action in one of the prescribed ways, the prevailing party must not be the State, the trial court must find the State agency acted "without substantial justification" in pressing its claim and the trial court must find no special circumstances exist which make an award of attorney's fees unjust.

Crowell Constructors, Inc. v. State ex rel Cobey, 342 N.C. 838, 843, 467 S.E.2d 675, 678 (1996) (emphasis added). Stated another way, if the trial court determines that: (1) a State agency acted "without substantial justification," and (2) no special circumstances exist which make an award of attorney's fees unjust, then the trial court's discretionary power to award attorney's fees manifests. The trial court is not, however, *required* to award attorney's fees subsequent to making these determinations, and its discretionary decision to award or not to award attorney's fees may only be overturned upon a showing that its decision constituted an abuse of its discretion. However, if the trial court determines that the State agency did not act "without substantial justification," or that some special circumstances do exist which make an award of attorney's fees unjust, then the trial court lacks discretion, and *cannot* award attorney's fees.

The trial court, in its 22 May 2013 order, acknowledged that it only had discretion to award attorney's fees pursuant to N.C.G.S. § 6-19.1 if it found that DOT acted without substantial justification and no special circumstances existed that made the award of attorney's fees unjust. The trial court found as fact that DOT did not argue the "special circumstances" prong of N.C.G.S. § 6-19.1. The trial court then concluded that

DOT "was justified [in its handling of this action] to a degree that could satisfy a reasonable person[.]" It further concluded, "in its discretion, that attorney's fees should not be awarded in this matter."

In this instance, even assuming, *arguendo*, the trial court erred in concluding that DOT acted with substantial justification, the trial court also denied the award of attorney's fees in its discretion. Because the discretion to award attorney's fees could only be present absent a conclusion that DOT acted with substantial justification, the trial court's conclusion that, "in its discretion, . . . attorney's fees should not be awarded in this matter[,]" constitutes an alternative basis for the denial of Petitioners' motion.

The standard of review for the trial court's decision not to award attorney's fees on this basis is abuse of discretion, and it is Petitioners' duty to prove abuse of discretion in order to prevail on appeal. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 610, 617 S.E.2d 40, 50 (2005) (citations omitted) ("To show an abuse of discretion and reverse the trial court's order . . . appellant[] has the burden to show the trial court's rulings are " 'manifestly unsupported by reason,' " or " 'could not be the product of a reasoned decision[.]' "). Petitioners have not argued that the trial court abused its discretion by refusing to award them attorney's fees.

It appears Petitioners believe that the trial court was *required* to award them attorney's fees if DOT acted without substantial justification in pressing its claim and no special circumstances existed which made an award of attorney's fees unjust. Petitioners cite *Crowell Constructors* for the proposition that DOT had to prove that its pursuit of this action was substantially justified; otherwise, according to Petitioners, the trial court was required to order DOT to pay Petitioners' attorney's fees. In support of their argument, Petitioners cite to a portion of *Crowell Constructors* in which our Supreme Court looked to similar language in a federal statute to define the term "substantial justification." *Crowell Constructors*, 342 N.C. at 843-44, 467 S.E.2d at 679. However, the federal statute differs from N.C.G.S. § 6-19.1 in a major respect. The federal statute states:

> "Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Crowell Constructors, 342 N.C. at 843, 467 S.E.2d at 679 (emphasis changed), (quoting 28 U.S.C. § 2412(d)(1)(A) (1994)). The federal statute makes the award of attorney's fees mandatory absent the proper showing of substantial justification or special circumstances, whereas N.C.G.S. § 6-19.1 grants the trial court discretion in making an award of attorney's fees. N.C.G.S. § 6-19.1(a) ("[T]he court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees[.]").

In *Crowell Constructors*, unlike in the present case, the trial court had already ordered the State agency to pay attorney's fees to the prevailing party. *Crowell Constructors*, 342 N.C. at 841, 467 S.E.2d at 678. Therefore, if the State agency could show on appeal that it had acted with substantial justification in pressing its claim, it would show that the trial court had lacked the discretion to impose attorney's fees and had therefore erred. Our Supreme Court held that it could not say that the State agency was "without substantial justification." *Id.* at 846, 467 S.E.2d at 681. Therefore, the award of attorney's fees had been improper. *Id.* Another opinion cited by Petitioners, *Daily Express*, *Inc. v. Beatty*, 202 N.C. App. 441, 688 S.E.2d 791 (2010), is similarly inapposite because it also dealt with an appeal where the trial court awarded attorney's fees, not an appeal from the trial court's *refusal* to award attorney's fees. *Id.* at 456, 688 S.E.2d at 802 ("[W]e conclude that [r]espondent's decision to proceed against [p]etitioner was 'substantially justified' and that the trial court erred by reaching a contrary conclusion in awarding attorney's fees to [p]etitioner pursuant to N.C. Gen. Stat. § 6–19.1"[.]).

In the present matter, even assuming *arguendo* DOT lacked substantial justification in pressing its claims, Petitioners would have had to argue on appeal and show that the trial court abused its discretion in denying Petitioners' motion for attorney's fees. *Bourlon*, 172 N.C. App. at 610, 617 S.E.2d at 50; *see also Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 193 (2005). Because Petitioners have not argued on appeal that the trial court abused its discretion in failing to award them attorney's fees pursuant to N.C.G.S. § 6–19.1, any such argument is abandoned. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Petitioners' argument is dismissed.

Because Petitioners' second and third arguments rely upon the success of their first, those arguments also fail. The 22 May 2013 order denying attorney's fees is affirmed.

Affirmed.

Judges STEELMAN and ERVIN concur.

IN RE J.D., A MINOR CHILD

No. COA14-145

Filed 17 June 2014

Termination of Parental Rights—subject matter jurisdiction —venue

The trial court lacked subject matter jurisdiction to terminate respondent's parental rights to his child. The trial court erred in concluding that the Indiana court relinquished jurisdiction to North Carolina's courts by entering an order in Indiana dismissing the paternal grandparents' motion for visitation rights. Furthermore, nothing in the record evidenced a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction over the minor child's case or that a North Carolina court would be a more convenient forum.

Appeal by respondent from order entered 25 November 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 29 May 2014.

Horack, Talley, Pharr & Lowndes, PA, by Elizabeth Johnstone James, for petitioner-appellee.

Rebekah W. Davis for respondent-appellant.

DAVIS, Judge.

B.D. ("Respondent") appeals from an order terminating his parental rights to his son, J.D. ("Josh")[1], who was born in August 2006 in Indianapolis, Indiana. On appeal, Respondent argues that the trial court lacked jurisdiction to grant the petition to terminate Respondent's parental rights. After careful review, we vacate the trial court's order and remand for entry of an order dismissing the petition.

Factual Background

K.P. ("Petitioner") is Josh's mother. At the time of Josh's birth, Petitioner and Respondent lived together in Indiana. They separated approximately two months after Josh was born. On or about

1. The pseudonym "Josh" is used throughout this opinion to protect the privacy of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

17 December 2008, Respondent filed an action ("the Indiana Action") in the Circuit Court of Marion County, Indiana ("the Indiana court") seeking custody of Josh. On or about 8 January 2009, the Indiana court entered a consent order establishing paternity, custody, child support, and visitation. In 2011, Petitioner moved with Josh to North Carolina, where she and Josh continue to reside.

On 2 August 2011, the Indiana court entered an order modifying its child custody order to permit visitation by Respondent. On 18 November 2011, the Indiana court suspended Respondent's visitation privileges. On 2 December 2011, Josh's paternal grandparents — who live in Indiana — filed a motion to intervene for the purpose of obtaining visitation rights regarding Josh. The Indiana court dismissed the grandparents' motion to intervene on 14 December 2011.

On 18 July 2012, Petitioner filed a petition in Mecklenburg County District Court seeking to terminate Respondent's parental rights to Josh. On 13 September 2012, in conjunction with his answer to the petition, Respondent filed a motion to dismiss on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted.

On 7 November 2012, Respondent filed a motion for a protective order pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure seeking to be excused from answering a set of interrogatories propounded by Petitioner until the trial court's jurisdiction was established. On 18 March 2013, Petitioner filed a motion to compel Respondent to respond to the interrogatories and also to her request for production of documents. On 4 June 2013, a consent order was entered in which the parties agreed to continue the pretrial conference until 26 June 2013. Respondent also agreed in this order to respond to Petitioner's interrogatories by 21 June 2013. The order stated that if he failed to respond to the interrogatories by this deadline, Petitioner would be "entitled to request that discovery sanctions be levied against Respondent" at the pretrial conference.

Following the pretrial conference, the trial court issued an order on 15 July 2013 in which it concluded it had jurisdiction over both the parties and the subject matter. In addition, the court sanctioned Respondent for failing to respond to Petitioner's first set of interrogatories by prohibiting him (1) "from putting on evidence regarding any of the issues contained in Petitioner's First Set of Interrogatories"; and (2) from "us[ing] in his defense any information that should have (or could have) been responsive to Petitioner's First Set of Interrogatories . . . ."

The trial court conducted adjudication and disposition hearings in connection with Petitioner's petition to terminate Respondent's parental rights on 6 November 2013 and filed an order on 25 November 2013 terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) and (7). Respondent filed a timely notice of appeal.

Analysis

Respondent contends that the order terminating his parental rights must be vacated because the Mecklenburg County District Court lacked jurisdiction over the subject matter and over Respondent's person in that (1) the child custody action regarding Josh originated in Indiana and the Indiana court has retained subject matter jurisdiction; and (2) Respondent is not a resident of North Carolina and had insufficient minimum contacts with this State to permit the trial court's exercise of personal jurisdiction over him. Petitioner argues Respondent waived any challenge to jurisdiction by not appealing the 15 July 2013 order in which the court concluded it had both subject matter and personal jurisdiction. Petitioner further argues that even if the jurisdictional arguments were not waived, the trial court did, in fact, possess subject matter and personal jurisdiction over Respondent.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). With regard to "matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

The jurisdictional statute that governs actions to terminate parental rights is N.C. Gen. Stat. § 7B-1101, which provides as follows:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or

> motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. *The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.*

N.C. Gen. Stat. § 7B-1101 (2013) (emphasis added).

The above-referenced statutes listed in N.C. Gen. Stat. § 7B-1101 are all provisions of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which defines a "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to proceedings for the termination of parental rights. *In re N.R.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004).

Because this action sought the termination of nonresident Respondent's parental rights, N.C. Gen. Stat. § 50A-204 — which confers upon a court of this State temporary emergency jurisdiction if the child is within this State and has been abandoned or the exercise of jurisdiction is necessary to protect the child from mistreatment or abuse — could not provide the trial court with subject matter jurisdiction in this case. *See* N.C. Gen. Stat. § 7B-1101 ("[B]efore exercising jurisdiction . . . regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, *without regard to G.S. 50A-204* . . . ." (emphasis added)).

Thus, pursuant to N.C. Gen. Stat. § 7B-1101 and the UCCJEA, we must determine whether the trial court possessed subject matter jurisdiction under N.C. Gen. Stat. §§ 50A-201 or -203.

N.C. Gen. Stat. § 50A-201 provides:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an *initial* child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S.50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).
>
> (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.
>
> (c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

N.C. Gen. Stat. § 50A-201 (2013) (emphasis added).

In the present case, because the initial child custody determination was made by the Indiana court, N.C. Gen. Stat. § 50A-201 is inapplicable. *See N.R.M.*, 165 N.C. App. at 298, 598 S.E.2d at 150 (concluding that N.C. Gen. Stat. § 50A-201 could not confer subject matter jurisdiction upon North Carolina court because initial custody determination had been made in Arkansas).

Thus, the only basis by which the trial court could have conceivably obtained subject matter jurisdiction was through N.C. Gen. Stat. § 50A-203. N.C. Gen. Stat. § 50A-203 provides that a court of this State may not modify a child custody determination of a court of another state

> unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:
>
> > (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
> >
> > (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203.

Therefore, either of two events would have had to occur in order for the trial court to have actually acquired subject matter jurisdiction in this action based on N.C. Gen. Stat. § 50A-203: (1) a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction or that a North Carolina court would be a more convenient forum; or (2) a determination by either court that neither Josh nor Petitioner nor Respondent presently lived in Indiana. *N.R.M.*, 165 N.C. App. at 300-01, 598 S.E.2d at 150-51.

The latter prong clearly does not provide subject matter jurisdiction in this case because Respondent continues to reside in Indiana. *See In re J.W.S.*, 194 N.C. App. 439, 448, 669 S.E.2d 850, 856 (2008) (explaining that New York did not lose continuing jurisdiction over custody of child for purposes of N.C. Gen. Stat. § 50A-203(2) because juvenile's mother continued to reside there).

Consequently, the first prong of N.C. Gen. Stat. § 50A-203 is the only possible basis for the existence of jurisdiction in North Carolina. In its

order terminating Respondent's parental rights, the trial court concluded that — for purposes of N.C. Gen. Stat. § 50A-203(1) — the Indiana court had declined jurisdiction over the custody of Josh by dismissing the motion to intervene filed by Josh's paternal grandparents. We disagree.

The order of the Indiana court dismissing the grandparents' motion consisted of three paragraphs. The first paragraph identified the motion before the court and the parties present at the hearing. The second and third paragraphs read as follows:

> The Court having considered the matters before it and after argument finds that Mother's Motion to Dismiss must be Granted. Pursuant to I.C. § 31-17-5-4 et seq., a Petition for Grandparent Visitation must be filed in a circuit, superior or probate court of the county in which the child resides for all cases filed pursuant to I.C. § 31-17-5-1(a)(3). It is undisputed that the minor child resides in Mecklenburg County, North Carolina, not Marion County, Indiana. Therefore, Marion County, Indiana is not the proper venue for this matter.
>
> Intervenor's Request for Grandparent Visitation is hereby dismissed without prejudice.

The order dismissing the grandparents' motion to intervene was based upon Indiana's Grandparent Visitation Act, I.C. 31-17-5-1 *et seq.*, which provides for grandparents to seek visitation rights in certain limited situations. The Indiana Court of Appeals has stated that "the Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children." *Hoeing v. Williams*, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (citation and quotation marks omitted). North Carolina does not have any statutory provision for an independent action for grandparents' visitation analogous to Indiana's statute, although a grandparent can be granted visitation in the context of a custody case between the parents in some circumstances. *See* N.C. Gen. Stat. § 50-13.2(b1).

It is clear that the order dismissing the grandparents' motion to intervene and request for grandparent visitation was based solely upon Indiana's venue statute, which requires that an action for grandparent visitation be filed in the county in which the child resides. *See* I.C. § 31-17-5-4 ("A grandparent seeking visitation rights shall file a petition requesting reasonable visitation rights . . . in a circuit, superior or probate court of the county in which the child resides . . . ."). Specifically, the

Indiana court concluded that "Marion County, Indiana is not the proper venue for this matter." Venue is designated by statute, and "[i]t has been well settled in this State for many years that venue is not jurisdictional . . . ." *Shaw v. Stiles*, 13 N.C. App. 173, 176, 185 S.E.2d 268, 269 (1971). In addition, the Indiana order simply dismissed the grandparents' motion "without prejudice," without any mention of relinquishing jurisdiction of the custody matter.

Accordingly, we hold that the trial court erred in concluding that the Indiana court relinquished jurisdiction to North Carolina's courts by entering the order in the Indiana Action dismissing the paternal grandparents' motion for visitation rights. Nothing in the record evidences a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction over Josh's case or that a North Carolina court would be a more convenient forum. Because the trial court lacked subject matter jurisdiction, we vacate the trial court's order terminating Respondent's parental rights and remand for entry of an order dismissing the petition. *See In re J.A.P.*, ___ N.C. App. ___, ___, 721 S.E.2d 253, 254-55 (2012) (vacating termination of parental rights order and remanding for entry of order dismissing petition in light of absence of evidence that New Jersey had determined that it "no longer ha[d] exclusive, continuing jurisdiction or that a court of this State [North Carolina] would be a more convenient forum" (internal quotation marks omitted)).[2]

Conclusion

For the reasons stated above, we vacate the trial court's order terminating Respondent's parental rights and remand for entry of an order dismissing the petition.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

2. Because we hold that the trial court did not possess subject matter jurisdiction, we need not address Respondent's argument that the court also lacked personal jurisdiction over him.

IN RE M.J.G.

[234 N.C. App. 350 (2014)]

IN THE MATTER OF M.J.G.

No. COA13-1293

Filed 17 June 2014

1. Juveniles—delinquency—misdemeanor assault

The trial court did not err by failing to find that the juvenile was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. The court relied on the petition that sufficiently alleged the juvenile committed simple assault by forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps.

2. Evidence—testimony—juvenile's defiant expression—relevancy

The trial court did not err by allowing a witness to characterize a juvenile's expression as "defiant" and alternatively, by denying his motion to dismiss the petition for misdemeanor assault. Because this testimony stemmed from the witness's personal experience combined with her observation of the juvenile, it was admissible to shed light upon the circumstances surrounding the alleged incident, and thus, was relevant and admissible. Further, there was sufficient evidence to determine that the juvenile's actions were intentional.

3. Juveniles—delinquency—disorderly conduct

The trial court did not err by denying a juvenile's motion to dismiss a petition for disorderly conduct. The facts of the case, viewed in the light most favorable to the State, demonstrated that the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school.

4. Juveniles—disposition hearing—terms—failure to cite authority—harmless error—failure to object

The trial court did not err by holding an alleged sham disposition hearing and allegedly violating the statutory mandate to allow the juvenile's parents to present evidence. The juvenile failed to cite to any authority to support his assumption of a sham hearing. Assuming arguendo that the trial court decided the terms of his disposition prior to allowing the juvenile's mother to be heard, any error was harmless based on the fact that the mother did not object to the condition of attending the family classes but effectively agreed with the trial court.

IN RE M.J.G.

[234 N.C. App. 350 (2014)]

Appeal by juvenile from adjudication and disposition orders entered 10 July 2013 and 12 July 2013, respectively, by Judge Sherry D. Prince in Brunswick County District Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Susannah P. Holloway, for the State.

Mark Hayes for juvenile-appellant.

McCULLOUGH, Judge.

The juvenile appeals from an adjudication order finding him delinquent of misdemeanor assault and disorderly conduct at school and from a level one disposition order. For the reasons stated herein, we affirm the orders of the trial court.

I. Background

On 20 May 2013, two juvenile petitions were filed against M.J.G. ("the juvenile") in Brunswick County District Court alleging offenses of misdemeanor assault in violation of N.C. Gen. Stat. § 14-33(a) and disorderly conduct in violation of N.C. Gen. State § 14-288.4(a)(6).

An adjudication hearing was held on 25 June 2013. Evidence presented at the adjudication hearing indicated that on 26 April 2013, a fundraiser volleyball game was being held in the gymnasium at Waccamaw Elementary School ("Waccamaw") in Brunswick County, North Carolina. Children from the fifth, sixth, seventh, and eighth grades were gathered in the gymnasium, watching the game. The juvenile was a sixth grade student at Waccamaw.

Emily Long, a teacher at Waccamaw, testified that she saw two boys in the bleachers "getting ready to fight" by having their "fists clenched." As Ms. Long was approaching the two boys, they were removed from the gymnasium by two other teachers, including Ms. Meagan Potts. Ms. Long testified that prior to the two boys being escorted out, she had seen the juvenile sitting next to the boys, waving at Ms. Potts and "telling her no, don't stop it, go away." Ms. Long told the juvenile she wanted to talk to him about "not waving off a fight," not "waving the teachers off[,]" and requested that he come off the bleachers to go outside with her. Ms. Long was on the floor of the gymnasium and the juvenile was on the second or third bleacher. Ms. Long testified as follows:

> [a]t that point [the juvenile] got angry, did not want to come with me. I probably repeated four or five times for

> him to come on. He stormed off the bleachers and Ms. [Susan Wood] had come up behind me and he stormed right over her, ran right over her, pushed out the gym door. I walked behind him to go ahead and talk with him and kept asking him to stop and let me talk to him.

The juvenile walked down a hallway and the school resource office, Deputy Christopher Barbour, approached the juvenile and Ms. Long. The juvenile began shouting, "I'm tired of this f'ing school, these teachers lying on me, they're always lying on me." The juvenile put his finger less than an inch away from Long's face, "postured up chest to chest" and said "[e]specially you you mother-f***ing b****[.]" Thereafter, the juvenile backed Ms. Potts against a wall and "did the exact same thing to her."

Susan Wood, an emergency medical technician with Horry County Fire Rescue, testified that she was in the Waccamaw gymnasium on 26 April 2013. She was the parent of two children attending Waccamaw and decided to watch the game. After seeing a commotion, Wood walked over to Ms. Long's location to see if there was a medical issue that needed assistance. Wood testified to the following:

> When I got to [Ms. Long], she was asking [the juvenile] to come out of the stands. Once I realized that it wasn't a medical issue, he was doing this at her – shut up, shut your mouth, go away, we don't need you, go away, shut up, go away. And I – I was shocked. . . . I decided to stand and observe.
>
> [The juvenile] finally stood up after, you know, doing this motion at her, chopping at her face, and telling her to go away, get out of here, we don't need you. Stood up — there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me. And the look on his face was very defiant, almost ha, ha.
>
> . . . .
>
> I ended up taking three or four steps back to keep from falling.

Deputy Christopher Barbour, the Waccamaw school resource officer, testified that he was standing in a hallway adjacent to the gymnasium when he spoke with Ms. Long. As Ms. Long was attempting to explain the situation to Deputy Barber, the juvenile "turned around

and [the juvenile] started walking back towards us and he was, you know, flaring his arms no, stop, don't, quit lying, you know, things of that nature." Deputy Barbour told the juvenile to leave the building but the juvenile "jumped up, stomped his feet, and then he started cussing." Deputy Barbour further testified to the following:

> I originally thought he was going to go around me to go out the door because that was the direction in which he was headed. But he just moseyed on right around me and that's when he got into Ms. Long's face, began cursing her, cursing Ms. Potts and [another teacher.]

Deputy Barbour "had to physically put [his] hands on [the juvenile] to remove him from the hallway[.]" Once the juvenile was outside of the building, he continued to "curse and holler and scream." The juvenile was escorted to the main office of the school.

On 10 July 2013, the trial court entered a "Juvenile Adjudication Order" finding the juvenile delinquent of both offenses. Following a disposition hearing held on 10 July 2013, the juvenile received a Level I disposition. The juvenile was ordered to be placed on probation for 12 months.

The juvenile appeals.

II. Discussion

On appeal, the juvenile argues that the trial court erred by (A) failing to find that he was delinquent of the offense of misdemeanor assault beyond a reasonable doubt; (B) allowing Ms. Wood to characterize his expression as "defiant" and alternatively, to deny his motion to dismiss the petition for misdemeanor assault; (C) denying his motion to dismiss the petition for disorderly conduct; and (D) holding a sham disposition hearing and violating the statutory mandate to allow the juvenile's parents to present evidence.

A. Standard of Proof

[1] First, the juvenile argues that the trial court erred by failing to find in its adjudication order, that he was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. We disagree.

It is well established that

> [t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. Further, [i]f the court finds that the allegations in the petition have

> been proved . . ., the court *shall* so state. . . . [I]t is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt.

In re D.K., 200 N.C. App. 785, 788, 684 S.E.2d 522, 525 (2009) (citations and quotation marks omitted).

Specifically, the juvenile argues that the adjudication order does not include the conclusion of law that he committed assault beyond a reasonable doubt and that the adjudication order does not include findings of fact inferring such a conclusion. The juvenile relies on *In re J.V.J.*, 209 N.C. App. 737, 707 S.E.2d 636 (2011), for his contentions. In *J.V.J.*, the juvenile argued that the trial court failed to make sufficient findings of fact to support the conclusion that the juvenile had committed the offense of assault on a government officer, and our Court agreed. *Id.* at 739, 707 S.E.2d at 637. Our Court noted that with respect to an adjudication order in the juvenile delinquency context, N.C. Gen. Stat. § 7B-2411 provided that

> [i]f the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, *which shall include, but not be limited to*, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

Id. at 739-40, 707 S.E.2d at 637 (emphasis in original). In *J.V.J.*, the trial court failed to address any of the allegations set out in the juvenile petition. It even failed to "summarily aver that 'the allegations in the petition have been proved[.]' ". *Id.* at 740, 707 S.E.2d at 638. Accordingly, our Court remanded the case to the trial court to make the statutorily mandated findings of fact as set out in N.C. Gen. Stat. § 7B-2411 (2009). *Id.* at 741, 707 S.E.2d at 638.

In the case *sub judice*, however, the facts are readily distinguishable. Our review indicates that the 10 July 2013 "Juvenile Adjudication Order" entered by the trial court states that the "petition(s) before the court" included "misdemeanor assault." It also contains a blank space where the trial court is to state findings of fact which "have been proven beyond a reasonable doubt." In this blank space, the trial court indicated "please see attached 'Adjudication Findings of Fact.' "

The attached "Adjudication Findings of Fact" included the following findings of fact:

> That on or about April 26, 2013, the Juvenile was a spectator of a fundraiser volleyball game inside the gymnasium of Waccamaw School in Ash, North Carolina. Waccamaw School is a public educational institution in Brunswick County. That during the volleyball game, which took place at the end of a half-day of school, a disturbance between two other juveniles began. After the disturbance, Ms. Emily Long, a teacher at Waccamaw School, asked the Juvenile to come down from the bleachers and leave the gymnasium as it appeared to her that he was instigating the potential fight between the other juveniles. The Juvenile at first resisted, but then came off the bleachers. While he was coming off the bleachers, he came into contact with Ms. Susan Wood, an EMT and parent of another student that was watching the volleyball game, by hitting Ms. Wood in her shoulder and chest area with his shoulder as he walked by her, causing Ms. Wood to move backwards.
>
> That after the Juvenile left the gymnasium he went to an adjacent hallway to wait for Ms. Long. Classes were not in session in this hallway. The Juvenile, Ms. Long, Ms. Wood, two other teachers, one of the students involved in the original disturbance, two [vendors], and possibly other students were present in the hallway at this time. Deputy Chris Barbour, the School Resource Officer, was present shortly after the Juvenile entered the hallway. A confrontation occurred whereby the Juvenile became angry, erratic, and unresponsive to the requests of Dept. Barbour. The Juvenile began yelling at and directing profanity at several teachers, refused to leave the area when instructed to by Dept. Barbour, and only left the hallway after being [forced] to by Dept. Barbour. The students in the gymnasium could not hear this altercation in the hallway, but this conduct did disturb the peace, order, or discipline at Waccamaw School.

The "Juvenile Adjudication Order" also states that, "[t]he Court concludes as a matter of law, that in regard to the allegations in the petition(s) before the Court" the juvenile is delinquent. Here, the petition for misdemeanor assault alleged that juvenile committed simple assault by "forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps."

Based on the foregoing, we reject the juvenile's arguments that the trial court failed to find that he had committed misdemeanor assault beyond a reasonable doubt and affirm the adjudication order of the trial court.

B. Ms. Wood's Testimony and the Juvenile's Motion to Dismiss

[2] In his second argument, the juvenile asserts that the trial court erroneously allowed Ms. Wood to testify that his expression was "defiant." Alternatively, the juvenile argues that the trial court erred by denying his motion to dismiss the petition for assault based on insufficiency of the evidence.

At the juvenile's adjudication hearing, Ms. Wood testified to the following:

> [The juvenile] finally stood up after, you know, doing this motion at [Ms. Long], chopping at her face, and telling her to go away, get out of here, we don't need you. Stood up — there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me. And the look on his face was very defiant, almost ha, ha.

The juvenile objected to this testimony and the trial court overruled his objection.

The juvenile, relying on *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978) (citation omitted), argues that ordinarily, "a witness's opinion of another person's intention on a particular occasion is generally held to be inadmissible." *Id.* at 369-70, 245 S.E.2d at 681 (citation omitted). Here, however, we believe that Ms. Wood's testimony is more appropriately characterized as describing the juvenile's demeanor on 26 April 2013.

Our Court addressed this issue in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), by providing the following:

> Opinion evidence as to the demeanor of a criminal defendant is admissible into evidence. *See State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970). The rule has been stated as follows:
>
> > The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things,

> derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.
>
> A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation – a series of things – go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature.

Id. at 321, 406 S.E.2d at 900-901 (citations and quotation marks omitted).

Ms. Wood's testimony that juvenile's "look on his face" was "very defiant" related to her perception of the juvenile shortly after the alleged incident. Because this testimony stemmed from Ms. Wood's personal experience combined with Ms. Wood's observation of juvenile, it was admissible to shed light upon the circumstances surrounding the alleged incident, and thus, was relevant and admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 401 and 402 (2013) (Rule 401 states that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 states that "[a]ll relevant evidence is admissible" except as otherwise provided by the United States and North Carolina Constitutions, as well as an Act of Congress or the General Assembly, or by these rules). Therefore, we reject the juvenile's argument that the trial court erred by admitting this challenged testimony.

In the alternative, juvenile argues that the trial court should have granted his motion to dismiss because there was no other evidence to indicate that his act was intentional. We find the juvenile's arguments unpersuasive.

> Where the juvenile moves to dismiss, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense. In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence.

In re S.M., 190 N.C. App. 579, 581, 660 S.E.2d 653, 654-55 (2008) (citations omitted). An assault is "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted).

A thorough review of the record demonstrates that Ms. Wood's testimony that the juvenile was "very defiant" is not the only evidence to establish that the juvenile acted with intent. Ms. Wood testified that the juvenile stood up after arguing with Ms. Long, and "there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me." Ms. Wood also testified that she "ended up taking three or four steps back to keep from falling." Furthermore, Ms. Long testified that juvenile "stormed off the bleachers and Ms. Woods [sic] had come up behind me and he stormed right over her, ran right over her, pushed out the gym door."

In a juvenile adjudication hearing, "the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. . . . [T]he trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citations omitted). Reviewing the foregoing evidence in the light most favorable to the State, we hold that there was sufficient evidence for the trial court to determine that the juvenile's actions were intentional. Accordingly, we hold that the trial court did not err by denying the juvenile's motion to dismiss the petition for misdemeanor assault.

C. Motion to Dismiss Petition for Disorderly Conduct

[3] The juvenile argues that his actions did not amount to disorderly conduct because there was insufficient evidence that juvenile's actions amounted to a disturbance of the peace, order, or discipline at his school when no students, classes, or programs were in any way affected and his

actions minimally affected the staff's activities. Accordingly, he argues that the trial court erred by denying his motion to dismiss the petition for disorderly conduct. We disagree.

Section 14-288.4(a)(6) of the North Carolina General Statutes provides that:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:
>
> . . . .
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6) (2013). "Our Supreme Court has held that the conduct must cause a 'substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.' " *In re M.G.*, 156 N.C. App. 414, 416, 576 S.E.2d 398, 400 (2003) (citation omitted).

The juvenile cites to *In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992) as providing guidance for identifying behavior which constitutes a violation of N.C. Gen. Stat. § 14-288.4(a)(6). In *Eller*, the trial court adjudicated two students as delinquent of disorderly conduct. The respondent Greer, then a fourteen-year-old student at Beaver Creek High School, made a move toward another student with a carpenter's nail in her hand during a basic special education reading class. *Id.* at 715, 417 S.E.2d at 480. The other student dodged respondent Greer's move. This move was made while the teacher was giving a reading assignment at the chalkboard. *Id.* The teacher in the class approached respondent Greer after relating the assignment and asked her what was in respondent Greer's hand. Respondent Greer willingly gave the teacher the carpenter's nail. The other students in the class "observed the discussion and resumed their work when so requested by [the teacher]." *Id.* At a later date, respondent Greer and another fifteen-year-old student named Eller, were in a mathematics class. The respondents Greer and Eller were seated at the rear of the classroom with their peers when they at least once each, struck the metal shroud of a radiator "more than two or three times." *Id.* at 716, 417 S.E.2d at 480. Each strike produced a "rattling, metallic noise"

which caused their fellow peers to look "toward where the sound was coming from" and caused the teacher to interrupt her lecture for fifteen to twenty seconds each time. *Id.* at 716, 417 S.E.2d at 481. Our Supreme Court held that the State had not produced substantial evidence that the respondents' behavior constituted a "substantial interference" because, *inter alia*, "the radiator incident merited no intervention by the instructor other than glares of disapproval for a total of at most sixty seconds during the entire class period" and "other students were only modestly interrupted from their work and returned to their lesson upon being instructed to do so by their teacher" after "the nail incident." *Id.* at 718, 417 S.E.2d at 482.

The *Eller* court cited to two cases to support its conclusion – *State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967) and *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). These two cases illustrate the level of interference necessary to sustain a conviction of disorderly conduct. The *Wiggins* court held that a motion for nonsuit was properly overruled by the trial court where student-defendants picketed on school grounds in front of a school building. *Wiggins*, 272 N.C. at 155, 158 S.E.2d at 43. The *Wiggins* court stated that "[a]s a direct result of the [student-defendants'] activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and disorder was created in the classrooms and hallways of the school building itself." *Id.* In *Midgett*, our Court affirmed the denial of a motion for nonsuit when twelve student-defendants entered the office of the secretary to the principal of a public school. *Midgett*, 8 N.C. App. at 233, 174 S.E.2d at 127. The student-defendants told the secretary that "they were going to interrupt us that day" and "locked the secretary out of her office, moved furniture about, scattered papers and dumped some books on the floor." *Id.* Because of the student-defendants' actions, the secretary, the principal, and another teacher "were drawn or kept away from their jobs or classes" and school was dismissed early. *Id.* As such, our Court held that there was ample evidence to support all of the elements of disorderly conduct. *Id.* at 233, 174 S.E.2d at 128.

The juvenile argues that the circumstances of the present case are more similar to those found in *Eller* and distinguishable from the facts found in *Wiggins* and *Midgett*. After thoroughly reviewing the record, we disagree.

Ms. Long testified that there were 200 to 300 children in the gymnasium. Ms. Wood testified that "[e]verybody was watching what was happening between the teacher[, Ms. Long,] and the [juvenile]." Two students testified that while they were in the school's gymnasium, they

witnessed the disturbance. Ms. Long was not able to supervise students or fulfill her duties in the gymnasium because she had to assist in escorting the juvenile out of the gymnasium. When the juvenile was in the hallway, shouting at Ms. Long and Ms. Potts, at least four other students were in the hallway. In addition, Ms. Wood testified that during the incident, "there was a lot of disjointed information going on" as students "were being shoved on . . . busses." Significantly, "a group of special needs students came into the office and because of everything that had just happened they had missed their bus."

The facts of the case *sub judice*, viewed in the light most favorable to the State, demonstrate that the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. Unlike the circumstances found in *Eller* and comparable to the facts found in *Midgett*, the juvenile's conduct merited intervention by several teachers, the assistant principal, as well as the school resource officer. In addition, the juvenile's actions caused such disruption and disorder, similar to those found in *Midgett* and *Wiggins*, that a group of special needs students missed their buses. Therefore, we hold that the trial court did not err by denying the juvenile's motion to dismiss the charge of disorderly conduct.

D. Disposition Hearing

[4] In his final argument, the juvenile argues that several errors occurred at his disposition hearing.

First, the juvenile argues that the fact that his dispositional hearing on 10 July 2013 commenced at 9:47 a.m. and concluded twelve minutes later, necessarily leads to the conclusion that the conditions of juvenile's probation was signed by the trial court judge prior to the hearing, thus resulting in a "sham" hearing. We note that the juvenile cites to no authority to support his assumption. Furthermore, the juvenile's assertion is unpersuasive as the trial court judge did not sign the disposition order until 12 July 2013, two days following the day of the hearing.

In his second argument, the juvenile contends that the trial court erred by allowing his mother to be heard only subsequent to the trial court entering his disposition. After careful review, we disagree.

Section 7B-2501 of the North Carolina General Statutes provides that "(b) The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-2501 (2013).

At the disposition hearing, the trial court ordered, as a condition of the juvenile's disposition, that the juvenile's parents attend "Strengthening Families" parenting classes. Thereafter, the juvenile's counsel stated that the juvenile's mother "did want to say a few words." The trial court judge gave an opportunity to the juvenile's mother to speak. The following exchange took place:

> THE COURT: . . . I think you'll be a very beneficial member of the Strengthening Families team. I have found at that program it's very helpful to share experiences.
>
> And because you have that belief, I think you'll be a good leader possibly in that group and a good resource person and will be very beneficial not only for you but for others to see what it means to be supportive of your children and that sort of thing. And that's why I'm asking that you not as -- certainly not as punishment for you but I think it would be -- that group is a very beneficial group overall. And --
>
> [The juvenile's mother:] Maybe I can be a positive influence on somebody else.

Assuming *arguendo* that the juvenile is correct in his contention that the trial court decided the terms of his disposition prior to allowing the juvenile's mother to be heard, we find this error to be harmless based on the fact that the juvenile's mother did not object to the condition of attending the "Strengthening Families" classes but effectively agreed with the trial court.

III. Conclusion

Where we find the juvenile's challenges to the adjudication and disposition orders unpersuasive, we affirm the orders of the trial court.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

KIKER v. WINFIELD

[234 N.C. App. 363 (2014)]

WALLACE SCOTT KIKER, PLAINTIFF
v.
CEDRIC JELANI WINFIELD, DEFENDANT

No. COA13-1471

Filed 17 June 2014

Venue—motion for change—no evidence of residency

The trial court erred in a negligence case by denying defendant's motion for change of venue. Although plaintiff alleged in his complaint that he was a citizen and resident of Harnett County where the complaint was filed, the complaint was not verified and thus, was not an affidavit or other evidence. There was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action.

Judge BRYANT dissenting.

Appeal by defendant from order entered 18 November 2013 by Judge James M. Webb in Harnett County Superior Court. Heard in the Court of Appeals 22 April 2014.

Bain, Buzzard & McRae, LLP, by Robert A. Buzzard, for plaintiff-appellee.

Robert E. Ruegger for defendant-appellant.

STEELMAN, Judge.

Where there was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action, the trial court erred in denying defendant's motion for change of venue.

I. Factual and Procedural Background

On 29 March 2010, Wallace Scott Kiker (plaintiff) was a passenger in a motor vehicle operated by Cedric Jelani Winfield (defendant) in Union County, North Carolina. According to plaintiff's complaint, defendant was negligent in causing a single vehicle collision, which resulted in personal injury to plaintiff. On 31 January 2013, plaintiff filed this action, seeking monetary damages and attorney's fees. On 12 August 2013, defendant filed an answer and motion for change of venue pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, and N.C.

Gen. Stat. §§ 1-82 and 1-83. Defendant contended that he was a citizen of Union County, and that plaintiff was incarcerated in a prison located in Spruce Pine. Defendant asserted that since neither party resided in Harnett County, that venue in Harnett County was improper, and that the case had to be transferred from Harnett County. Defendant also moved that the case be transferred from the district court division to the superior court division, based upon plaintiff's prayer for monetary relief.

Plaintiff served verified responses to defendant's First Set of Interrogatories. Plaintiff was asked to list his present address, along with each address where he had lived for the last five years. Four of the five addresses listed were in Monroe, in Union County, and the fifth was the Mountain View Correctional Institution in Spruce Pine. None of these addresses were in Harnett County.

On 18 November 2013, the trial court granted defendant's motion to transfer this action from district court to superior court. The trial court denied, without prejudice, defendant's motion for a change of venue from Harnett County.

From the order denying his motion for change of venue, defendant appeals.

II. Standard of Review

"The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' " *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citations omitted).

III. Analysis

Defendant contends that the trial court erred in denying his motion for change of venue. We agree.

N.C. Gen. Stat. § 1-82 provides that, in cases such as this:

> the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint,

> subject to the power of the court to change the place of trial, in the cases provided by statute[.]

N.C. Gen. Stat. § 1-82 (2013). N.C. Gen. Stat. § 1-83 further clarifies that, upon the timely motion of defendant, the trial court may transfer venue where it is improper. *See* N.C. Gen. Stat. § 1-83 (2013). We have held that this change of venue is not discretionary, but rather is mandatory. *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279. Where venue is improper, the trial court must grant a motion for change of venue.[1]

In the instant case, the only evidence in the record that would suggest that either party was a resident of Harnett County was plaintiff's allegation in his complaint that he was a citizen and resident of Harnett County. The complaint in this action was not verified. We have previously held that "[a]n unverified complaint is not an affidavit or other evidence." *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971). The fact that plaintiff's complaint was signed by counsel does not render it a verified complaint. There is therefore no evidence in the record that plaintiff was a resident of Harnett County at the commencement of the underlying lawsuit.

Further, in his verified answers to defendant's interrogatories, plaintiff stated the following:

> 1. State the date and place of your birth, your present address, the length of time you have lived there, and each address you have used for the last five (5) years.
>
> ANSWER: August 4, 1970
>
> Monroe, Union County, North Carolina
> Mountain View Correctional Institution, Spruce Pine, NC
> 1814 John Moore Road, Monroe, NC;
> 1813 Timberlane Drive, Monroe, NC;
> 2512 Doster Road, Monroe, NC

Plaintiff's verified responses do not assert that at any time in the past five years (which covers the period of time going back to the accident) did plaintiff reside in Harnett County.

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1. We distinguish this motion for change of venue, based upon the residency of the parties, from a discretionary motion for change of venue, based upon the convenience of the witnesses. We have held that the latter form of the motion for change of venue is subject to the trial court's discretion, and reviewable only for an abuse of discretion. *See Phillips v. Currie Mills, Inc.*, 24 N.C. App. 143, 144, 209 S.E.2d 886, 886 (1974).

We hold that, in the absence of any evidence that plaintiff resided in Harnett County, the trial court erred in denying defendant's motion for change of venue. We vacate the trial court's order denying the motion, and remand with instructions for the trial court to transfer this action to Union County.

VACATED AND REMANDED.

Judge HUNTER, Robert C., concurs.

BRYANT, Judge, dissenting.

The majority vacates the trial court's order denying defendant's motion for change of venue and remands with instructions for the trial court to transfer this action to Union County. Because I believe the trial court did not abuse its discretion in denying defendant's motion, I must respectfully dissent.

North Carolina General Statutes, section 1-82, holds that where an action is not based upon real property, "the action must be tried in the county in which the plaintiff[] . . . reside[s] at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2013). A motion for change of venue must be granted where it is clear that the action has been brought in the wrong county. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55—56 (1952). Where venue is appropriate under N.C.G.S. § 1-82, a trial court's decision as to whether to permit a non-mandatory transfer is reviewed for abuse of discretion. *Centura Bank v. Miller*, 138 N.C. App. 679, 683—84, 532 S.E.2d 246, 249—50 (2000).

The majority contends the trial court erred in denying defendant's motion because plaintiff failed to provide evidence of his residency for venue purposes. Specifically, defendant contends, and the majority agrees, that plaintiff failed to provide evidence that plaintiff resided in Harnett County at the time of filing his complaint. I respectfully disagree.

The majority reasons that based on *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971) (noting that "[a]n unverified complaint is not an affidavit or other evidence"), there is no evidence in the record that plaintiff resided in Harnett County. The majority fails to recognize that the complaint was signed by plaintiff's Harnett County attorney. The first allegation in the complaint is: "1. That Plaintiff is a citizen and resident of Harnett County." Pursuant to Rule 11 of our Rules of Civil Procedure, "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of

his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law[.]" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2013). Further, plaintiff's attorney signed the affidavit of service indicating his representation of plaintiff and that service of summons and complaint had been completed upon defendant. Although the majority is technically correct in describing plaintiff's complaint as "unverified," the fact remains that plaintiff's counsel signed the complaint indicating that plaintiff's attorney believed plaintiff was a resident of Harnett County at the time the complaint was filed and filed an affidavit of service as to the complaint. Therefore, the record contains some evidence that was before the trial court as to plaintiff's residency at the commencement of the action.[1]

In its order denying defendant's motion for change of venue, the trial court made no findings of fact, noting only that: "The Court having reviewed the Defendant's motion, applicable law and after hearing arguments of counsel, HEREBY ORDERS that Defendant's motion is denied, without prejudice." The record does not contain a transcript of the hearing before the trial court. Without a transcript of the hearing, we cannot know what transpired during that hearing and it would be inappropriate to speculate as to the factors that led to the decision of the trial court.

It is well-established that "an appellate court accords great deference to the trial court . . . because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision[.]" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (2011). Further, a trial court's decision on whether to permit transfer of venue is reviewed for abuse of discretion where it appears that venue is appropriate. *Centura Bank*, 138 N.C. App. at 683-84, 532 S.E.2d at 249-50.

As such, based on the record we do have before this Court, where there does exist evidence of plaintiff's residency in Harnett County, I cannot hold that the trial court abused its discretion and erred in denying defendant's motion for change of venue. For the reasons stated herein, I would affirm the order of the trial court.

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1. Defendant points to an interrogatory in which plaintiff lists four Union County addresses, and a present location at the Mountain View Correctional Institution in Spruce Pine, as proof that venue in Harnett County is inappropriate. However, plaintiff answered defendant's interrogatory on 29 October 2013, almost ten months after plaintiff filed his complaint.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMPS.

[234 N.C. App. 368 (2014)]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, AND JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA13-1006

Filed 17 June 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—personal jurisdiction—substantial right—failure to state a claim—no substantial right

Defendant's appeal from the trial court's interlocutory order denying defendant's motion to dismiss plaintiff's claim based on sovereign immunity and personal jurisdiction was heard by the Court of Appeals on the merits as it affected a substantial right. Defendant's appeal from the trial court's interlocutory order denying defendant's motion to dismiss based on the failure to state a claim upon which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) was dismissed as it did not affect a substantial right.

2. Immunity—sovereign—allegation of valid contract—sufficient to waive defense

The trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of contract pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2). Plaintiffs sufficiently alleged a valid contract between themselves and the State in their complaint to waive the defense of sovereign immunity.

Appeal by Defendants from order entered 23 May 2013 by Judge Edwin G. Wilson, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 6 March 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the Defendants-appellants.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter, for Plaintiffs-appellees.

DILLON, Judge.

The State Health Plan for Teachers and State Employees, *et al.*, (the "Defendants") appeal from the denial of their motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6) in favor of I. Beverly Lake, *et al.*, (the "Plaintiffs"). For the foregoing reasons, we affirm in part, and dismiss in part.

I. Background

On 20 April 2012, Plaintiffs filed a complaint alleging, *inter alia*, that they are all former employees and current retirees with the State of North Carolina with at least five years of contributory service; as part of their employment, they were offered certain benefits, including a health benefit plan after retirement through the State Health Plan; this health benefit plan provided the option to each Plaintiff to participate on a non-contributory 80/20 basis or on a 90/10 basis with a contribution; they had vested by working at least five years and were eligible upon retirement to receive these health insurance benefits from the State Health Plan; Defendants stopped providing a non-contributory 80/20 health benefit in 2011 and the 90/10 plan for retirees in 2009, respectively; and that these actions by Defendants constituted a breach of contract.[1]

On 23 July 2012, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6), arguing that the trial court lacked jurisdiction based, in part, on Defendants' sovereign immunity defense and that the complaint should otherwise be dismissed because the allegations therein failed to state a claim upon which relief could be granted. On 23 May 2013, Judge Edwin G. Wilson, Jr.[2], entered an order denying Defendants' motion to dismiss in its entirety. On 14 June 2013, Defendants filed notice of appeal from the trial court's denial of their motion to dismiss.

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1. Plaintiffs also raised a number of other claims which are not at issue in Defendants' appeal.

2. On 26 November 2012, the Chief Justice of the North Carolina Supreme Court designated this case as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and assigned Judge Wilson to the case.

II. Interlocutory Appeal

[1] On 19 December 2013, Plaintiffs filed a motion to dismiss Defendants' appeal with this Court, arguing that "the appeal is an impermissible interlocutory appeal and Defendant-Appellants do not have a substantial right to immediate review[.]" Plaintiffs raised similar arguments in their brief on appeal.

We have recently stated that

> "[a]s a general rule, interlocutory orders are not immediately appealable." *Id.* (citation omitted). However, "immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Id.* (quotation omitted).

Jenkins v. Hearn Vascular Surgery, P.A., ___ N.C. App. ___, ___, 719 S.E.2d 151, 153-54 (2011). Defendants admit that their appeal is interlocutory, and we agree. Since there is no Rule 54(b) certification, we must determine whether Defendants' appeal affects a substantial right.

In North Carolina, "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 443 (2007). However, as stated by our Supreme Court, "[t]he denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) (citation omitted). Therefore, we dismiss Defendants' appeal as to any issues related to the trial court's Rule 12(b)(6) ruling regarding the validity of the alleged contract as interlocutory, and address only those issues related to sovereign immunity and Rule 12(b)(2)[3], as those issues relate to a substantial right and are

3. Our Supreme Court has stated that an order denying a motion to dismiss for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1) is not immediately appealable, but that an order denying a motion for lack of personal jurisdiction, pursuant to Rule 12(b)(2) is immediately appealable. *Teachy*, 306 N.C. at 327-28, 293 S.E.2d at 184. The Court in *Teachy* also noted that there is a split in authority around the country as to whether a motion to dismiss based on sovereign immunity is properly a motion under Rule 12(b)

immediately appealable. *See McClennahan*, 177 N.C. App. at 808, 630 S.E.2d at 199. We next turn to address Defendants' appeal and their arguments regarding sovereign immunity.

III. Rule 12(b)(2) Dismissal Based on Sovereign Immunity

[2] To survive a Rule 12(b)(2) motion to dismiss based on sovereign immunity, "the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, consistent with the concept of notice pleading, "as long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (citation omitted).

Here, Plaintiffs argue that they have sufficiently pled that sovereign immunity has been waived by alleging the existence of a valid contract; and, therefore, the trial court properly denied Defendants' Rule 12(b)(2) motion to dismiss. Specifically, Plaintiffs pled that they each had a contract of employment with the State and that these contracts included a promise to provide a guaranteed health benefit during retirement on a non-contributory 80/20 basis or a 90/10 basis with a contribution. Our Supreme Court has held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a *valid* contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (emphasis added). We have held that this waiver of immunity applies in the context of employment contracts:

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(1) or under Rule 12(b)(2) and that the determination of this issue is relevant in North Carolina in situations involving an interlocutory appeal denying a motion to dismiss based on sovereign immunity. *Id.* However, our Supreme Court did not ultimately resolve the issue in *Teachy*, deciding rather to review that appeal based on its supervisory jurisdiction. *Id.* Though our Supreme Court has not resolved the issue as to whether a motion to dismiss based on sovereign immunity is a motion under Rule 12(b)(1) or under Rule 12(b)(2), our Court has determined that the denial of a motion to dismiss based on sovereign immunity can be based on Rule 12(b)(2), and is, therefore, immediately appealable. *See, e.g.*, *Data Gen. Corp. v. City of Durham*, 143 N.C. App. 97, 99-100, 545 S.E.2d 243, 245-46 (2001), *explained in Atl. Coast Conf. v. Univ. of Md.*, ___ N.C. App. ___, __, 751 S.E.2d 612, 617 (2013). Therefore, we dismiss Defendants' appeal to the extent that it is based on the denial of their motion to dismiss for lack of subject-matter jurisdiction, pursuant on Rule 12(b)(1).

> "The existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Guided by this principle, as well as the reasoning in [*Smith v State*, 289 N.C. 303, 222 S.E.2d 412 (1976)], we hold that the County may not assert the defense of sovereign immunity in this case . . . . We agree with plaintiffs' assertion that the employment arrangement between the County and plaintiffs was contractual in nature, although the contract was implied. Employment contracts may be express or implied. An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding. . . . **We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts.**

Archer v. Rockingham Cty., 144 N.C. App. 550, 557, 548 S.E.2d 788, 792-93 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002).

We believe that Plaintiffs sufficiently pled a valid contract. For instance, Plaintiffs alleged in their complaint that the State of North Carolina acted by offering specific health plans when Plaintiffs were hired and made representations to Plaintiffs while they were employed that if they worked five years then those health plans would vest and be irrevocable upon retirement. Also, Plaintiffs alleged that they acted by accepting employment based, in part, on these health plans and working a set amount of time with the State of North Carolina so that those health plans would vest or be irrevocable upon retirement. We believe that our decision in *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. review denied*, 361 N.C. 696, 652 S.E.2d 654 (2007), is instructive.

In *Sanders*, the plaintiffs, who were employed as "temporary" employees by the State of North Carolina for more than 12 consecutive months, filed their action alleging that a rule promulgated by the State Personnel Commission prohibited individuals from being employed by the State as temporary employees for more than twelve consecutive months; that this rule was part of their contracts of employment; that by working for more than twelve consecutive months, they were entitled to be treated as "permanent" State employees; and that the State breached their contracts of employment by "wrongfully den[ying]" the plaintiffs

the employment benefits that permanent employees are entitled to receive. *Id.* at 16, 644 S.E.2d at 11. The State moved to dismiss the plaintiffs' breach of contract claim based on sovereign immunity, a motion which was granted by the trial court. *Id.* at 17, 644 S.E.2d at 11. On the plaintiffs' appeal, the State argued that the "plaintiffs' claim for relief based on a breach of contract cannot overcome sovereign immunity . . . because the alleged contract is 'implied,' 'imaginary,' and in no way 'an authorized and valid contract.' " *Id.* at 19, 644 S.E.2d at 12.

In our opinion, we stated that the plaintiffs alleged "that the State entered into employment contracts with the plaintiffs, incorporating state personnel regulations, pursuant to which they were entitled to certain benefits as a result of their employment for more than 12 months." *Id.* at 18-19, 644 S.E.2d at 13. We stated that these "allegations [were] materially indistinguishable from those found sufficient in several opinions of this Court[,]" including *Peverall v. County of Alamance*, 154 N.C. App. 426, 430-31, 573 S.E.2d 517, 519-20 (2002) (reversing the trial court's dismissal based on sovereign immunity when the plaintiff had alleged a valid employment contract in which the defendant had agreed to provide the plaintiff "disability retirement benefits . . . in exchange for five years of continuous service"), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003) and *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 150-51, 544 S.E.2d 587, 589, d*isc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001). *Id.* at 19-20, 644 S.E.2d at 13. In further comparing these cases, we held,

> [p]laintiffs allege that defendants are manipulating State personnel policies and benefit plans, which govern the terms of state employment, to avoid providing plaintiffs benefits that they rightfully earned as a result of the tenure of their employment. Plaintiffs' complaint sufficiently alleges that defendants accepted plaintiffs' services and, therefore, "may not claim sovereign immunity as a defense" to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment.

Id. at 20, 644 S.E.2d at 13 (quoting *Hubbard*, 143 N.C. App. at 154, 544 S.E.2d at 590).

In overruling the defendants' argument "that any contract was only 'implied' and, therefore, no waiver of sovereign immunity has occurred[,]" the Court relied on the holding in *Archer*, *supra*, which extended the holding in *Smith*, *supra*, regarding written contracts to

oral implied contracts and also noted that *Archer* "held that plaintiffs could assert their claims because they were 'in the nature of a contractual obligation[.]' " *Id.* at 20-21, 644 S.E.2d at 13-14.

Like *Sanders*, Defendants here essentially make an argument that their Rule 12(b)(2) motion should have been granted because Plaintiffs failed to allege an express agreement concerning the retirement health benefits. Specifically, they point to Plaintiffs' allegations that Defendants have, through representations, policies, and statutes, "avoid[ed] providing plaintiffs benefits that they rightfully earned as a result of the tenure of their employment" and because of this alleged exchange, Defendants, " 'may not claim sovereign immunity as a defense' to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment." *See id.* at 20, 644 S.E.2d at 13. However, as in *Sanders*, we believe that Plaintiffs have alleged something "in the nature of a contractual obligation" which would still amount to a valid contract under *Archer*, sufficient to survive a Rule 12(b)(2) motion to dismiss based on sovereign immunity. *See Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 13.

We further held in *Sanders* that the defendants' arguments "that the alleged contract is 'imaginary' and not 'an authorized and valid contract' " went to the merits of the plaintiffs' breach of contract claims, pointing out that

> in considering the applicability of sovereign immunity to allegations of breach of a governmental employment contract, "that we are not now concerned with the merits of plaintiffs' contract action. . . . [W]hether plaintiffs are ultimately entitled to relief are questions not properly before us." *Archer v. Rockingham County*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). *See also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 ("We are not now concerned with the merits of the controversy. . . . We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.").

Id. at 20, 644 S.E.2d at 13-14.

In the same way, Defendants here make a number of arguments which go to the *merits* of Plaintiffs' breach of contract claims. However, "[t]his Court has consistently held that we are not to consider the

merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability." *Cam Am South, LLC v. State of North Carolina*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2014 N.C. App. LEXIS 558 at *16 (N.C. App. June 3, 2014). Rather, our analysis is restricted to whether Plaintiffs have sufficiently alleged that Defendants have waived sovereign immunity. As Plaintiffs sufficiently alleged a valid contract between them and the State in their complaint to waive the defense of sovereign immunity, we affirm the trial court's order denying Defendants' motion to dismiss pursuant to Rule 12(b)(2). *See Cam Am South*, at *18 (holding that "the State waives its sovereign immunity when it *enters* into a contract with a private party, not when it engages in conduct that may or may not constitute a breach") (emphasis in original).

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order denying Defendants' motion to dismiss this action based on their sovereign immunity defense, pursuant to Rule 12(b)(2); and we dismiss Defendants' appeal of the trial court's order denying their motion to dismiss to the extent the order is based on grounds other than Defendants' sovereign immunity defense.

AFFIRMED, IN PART, and DISMISSED, IN PART.

Judge BRYANT and Judge CALABRIA concur.

JAMES J. LEWIS, EMPLOYEE, PLAINTIFF
v.
N.C. DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED
(CORVEL CORPORATION, ADMINISTRATOR), DEFENDANT

No. COA13-1348

Filed 17 June 2014

Workers' Compensation—opinion and award—interest—benefits

The Full Industrial Commission erred in a workers' compensation case by failing to require defendant to pay interest on the benefits awarded to plaintiff in an opinion and award issued from the date of the initial hearing in this dispute, pursuant to N.C.G.S. § 97-86.2.

Appeal by plaintiff-employee from Order of the Full Commission entered 5 September 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 2014.

Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff-appellant.

Roy Cooper, Attorney General, by Deborah M. Greene, Assistant Attorney General, for defendant-appellee.

MARTIN, Chief Judge.

On 26 March 1996, plaintiff-employee James J. Lewis was awarded temporary total disability benefits from 11 September 1994 until his return to work along with the cost of medical treatment for posttraumatic stress disorder arising from his employment with defendant North Carolina Department of Correction. *Lewis v. N.C. Dep't of Corr.* (*Lewis II*), 167 N.C. App. 560, 561, 606 S.E.2d 199, 200 (2004); *see also Lewis v. N.C. Dep't of Corr.* (*Lewis I*), 138 N.C. App. 526, 526–27, 531 S.E.2d 468, 469 (2000). The Full Commission entered an additional Opinion and Award dated 10 July 2003, concluding that plaintiff's "original compensable injury, post-traumatic stress disorder, exacerbated and aggravated [his] pre-existing diabetes," and awarded payment of medical expenses for treatment for plaintiff's diabetic condition and related periodontal condition. *Lewis II*, 167 N.C. App. at 562–63, 606 S.E.2d at 201–02. Plaintiff continued to receive compensation for temporary total disability pursuant to N.C.G.S. § 97-29.

On 5 February 2010, plaintiff filed a Form 33 to request a hearing because he wished to receive permanent disability benefits pursuant to N.C.G.S. § 97-31, as well as other allowances. The deputy commissioner ruled, *inter alia* as related to the matters presented by this appeal, that plaintiff had reached maximum medical improvement on 19 November 2009 and was entitled to receive permanent benefits pursuant to N.C.G.S. § 97-31, rather than temporary disability benefits under N.C.G.S. § 97-29. As a result, plaintiff was awarded permanent partial disability benefits in a lump sum based on the ratings schedule contained in N.C.G.S. § 97-31, minus the amount of temporary total disability benefits defendant had paid plaintiff since 19 November 2009, and an additional lump sum for permanent partial disability ratings to body parts and organs not specifically listed in N.C.G.S. § 97-31, pursuant to N.C.G.S. § 97-31(24).

Both parties appealed to the Full Commission which, by an Opinion and Award dated 21 February 2012 and amended 23 May 2012, affirmed the deputy commissioner's award, with the exception that the award for non-listed body parts and organs made pursuant to N.C.G.S. § 97-31(24) was reduced from $127,000 to $95,000. On 3 August 2012, plaintiff filed a motion to require defendant to pay interest on the lump sum award. The Full Commission denied the motion on 23 July 2013 and denied plaintiff's motion for reconsideration on 5 September 2013. In denying the motion, the Full Commission reasoned that the purpose of interest awarded pursuant to N.C.G.S. § 97-86.2 is to compensate an individual for the loss of the use of money to which he is entitled while an appeal is pending. During the pendency of the appeals in the present case, defendant continued to pay plaintiff weekly benefits under N.C.G.S. § 97-29. Thus, the Full Commission reasoned that because an individual cannot receive benefits under both N.C.G.S. § 97-29 and N.C.G.S. § 97-31, none of plaintiff's benefits were past due at the date of the initial hearing or the final award, and no interest was due. Plaintiff appeals.

On appeal, plaintiff argues the Full Commission should have required defendant to pay interest on the benefits awarded to plaintiff in the 23 May 2012 Opinion and Award from the date of the initial hearing in this dispute. We agree.

Generally, when we review an opinion and award of the Industrial Commission our review is limited to determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). However,

we review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

In this appeal, we address only the issue of whether defendant is required to pay plaintiff interest pursuant to N.C.G.S. § 97-86.2 on the unpaid portion of plaintiff's benefits from the date of the initial hearing giving rise to this dispute. N.C.G.S. § 97-86.2 states:

> In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer *shall pay interest on the final award or unpaid portion thereof* from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

N.C. Gen. Stat. § 97-86.2 (2013) (emphasis added).

In the past, when interpreting the word shall, our courts have stated: "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). As a result, if all of the statutory requirements are satisfied then the Commission must apply the statute and has no "discretion in making the required determination." *Puckett v. Norandal USA, Inc.*, 211 N.C. App. 565, 573-74, 710 S.E.2d 356, 362 (2011). Furthermore, we have stated that the goals of this statute are: " '(a) [T]o compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.' " *Childress v. Trion, Inc.*, 125 N.C. App. 588, 592, 481 S.E.2d 697, 699 (alteration in original) (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)), *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997).

Based on our reading of the statute, plaintiff is entitled to interest on the award in the 23 May 2012 Opinion and Award from the date of the initial hearing, 27 August 2010, until the date that the award was paid in full for the following reasons. First, the statute says that the "employer *shall* pay interest on the . . . *unpaid portion* thereof from the date of the initial hearing." N.C. Gen. Stat. § 97-86.2 (emphasis added). As discussed earlier, by its use of the word "shall" the statute compels the Commission to

award interest on the unpaid portion of an award. Second, the purpose of interest is to compensate an individual for their inability to use the awarded money while an appeal is pending. In this case, plaintiff was unable to use the full amount of his lump sum monetary award in the 6 April 2011 Opinion and Award because defendant did not pay the award while the appeal was pending; defendant did have the benefit of the use of the awarded money during the appeal. Therefore, plaintiff is entitled to interest as compensation for his inability to use the awarded money during his appeal, and defendant is foreclosed from retaining the benefit of being able to use the money during the appeal.

There is no issue of double recovery here. The Full Commission reasoned that plaintiff was not entitled to interest under N.C.G.S. § 97-86.2 because he "received weekly benefits pursuant to N.C. Gen. Stat. § 97-29 throughout the pendency of the litigation," and it would be a double recovery for plaintiff to receive benefits under N.C.G.S. § 97-31 and N.C.G.S. § 97-29 for the same time period. The 23 May 2012 Opinion and Award, however, prevented this result. The Opinion and Award made the following awards:

> 1. Subject to a reasonable attorney's fee approved herein and *the credit owed defendant for the temporary total disability compensation benefits paid to plaintiff after November 19, 2009*, defendant shall pay permanent partial disability compensation to plaintiff for permanent partial disability ratings to body parts specifically listed in N.C. Gen. Stat. Section 97-31 at the rate of $293.64 per week for a total of 285.6 weeks. This amount shall be paid in a lump sum.
>
> 2. Subject to a reasonable attorney's fee approved herein, defendant shall pay equitable compensation in the total amount of $95,000.00 for permanent injury to important internal or external organs and body parts pursuant to N.C. Gen. Stat. Section 97-31(24). This amount shall be paid in a lump sum, subject to the attorney fee hereinafter approved.

(Emphasis added.) The Opinion and Award is clear that defendant is entitled to a credit for the total amount of the temporary total disability benefits paid to plaintiff under N.C.G.S. § 97-29. Thus, a double recovery does not occur because the amount paid to plaintiff under N.C.G.S. § 97-29 is deducted from the balance of the permanent partial disability benefits awarded to plaintiff under N.C.G.S. § 97-31. Plaintiff is not

collecting benefits under N.C.G.S. § 97-29 and N.C.G.S. § 97-31 at the same time.

In addition, the Full Commission erred in reasoning that none of plaintiff's award was past due. The Full Commission reasoned that because none of plaintiff's benefits were past due at the time of the initial hearing in this matter or when the 23 May 2012 Opinion and Award was entered, plaintiff was not entitled to interest. N.C.G.S. § 97-86.2 states that the "employer shall pay interest on the final award or *unpaid portion* thereof from the date of the initial hearing on the claim." N.C. Gen. Stat. § 97-86.2 (emphasis added). Thus, it does not matter that defendant had made weekly payments to plaintiff during the pendency of the appeal and that none of those payments were past due because the full amount of the lump sum award "became due" as of the date of the initial hearing. Therefore, the statute entitles plaintiff to interest on the unpaid portion of the award from the date of the initial hearing in this matter.

For the reasons stated herein we reverse the 5 September 2013 Order of the Full Commission and remand this case to the Full Commission for issuance of an order consistent with this opinion.

Reversed and remanded.

Judges STEELMAN and DILLON concur.

WILLIAM S. MILLS, Ancillary Administrator of the Estate of AARON LORENZO DORSEY, Deceased, Plaintiff-Appellant

v.

DUKE UNIVERSITY, a Not for Profit Corporation, LARRY CARTER, and JEFFREY LIBERTO, Jointly and Severally, Defendants-Appellees

No. COA13-1164

Filed 17 June 2014

1. Immunity—public official immunity—campus police officers

Campus police officers are entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties.

2. Wrongful Death—officers in individual capacities—summary judgment—no showing acts were corrupt, malicious, or outside of and beyond scope of duties

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims of wrongful death against defendant officers in their individual capacities. The evidence viewed in the light most favorable to plaintiff did not show that the acts of the officers leading to the victim's death were corrupt, malicious, or outside of and beyond the scope of their duties.

3. Appeal and Error—preservation of issues—failure to obtain ruling at trial court—false arrest

Although plaintiff contended the trial court erred in a wrongful death case by granting summary judgment in favor of defendants on plaintiff's claim of false arrest, plaintiff failed to preserve this issue based on failure to obtain a ruling at the trial court.

Appeal by Plaintiff from judgment entered 6 June 2013 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 17 March 2014.

Law Office of Michael R. Dezsi, PLLC, by Michael R. Dezsi, pro hac vice; and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog, LLP, by Dan M. Hartzog and Katie Weaver Hartzog, for Defendants-Appellees.

McGEE, Judge.

Aaron Lorenzo Dorsey ("Mr. Dorsey") was shot and killed by a Duke University Police officer at approximately 1:00 a.m. on 13 March 2010, just outside the main entrance to Duke University Hospital in Durham ("the hospital"). When the shooting occurred, Preston Locklear was being treated for a serious injury in the intensive care unit of the hospital. A number of members of Preston Locklear's family ("the Locklear family") were at the hospital that morning visiting him. The Locklear family members included: Charles Brayboy, Krecia Ann Brayboy, Alena Hull, Christine Locklear, Debbie Locklear, Justin Locklear, Shawn Locklear, Lenora Locklear, and Billie Jo Locklear.

In his deposition, Mondrez Pamplin ("Mr. Pamplin"), testified that he was a hospital security guard working in the front lobby of the hospital

on the night shift between 12 and 13 March 2010. Shortly before 1:00 a.m. on 13 March 2010, a member of the Locklear family approached him to complain about a man panhandling near the entrance of the hospital. Mr. Pamplin went outside and saw Mr. Dorsey. He asked Mr. Dorsey if he was visiting someone in the hospital, and Mr. Dorsey replied that he was not. Mr. Pamplin then suggested to Mr. Dorsey that he leave Duke University property. Mr. Dorsey did not leave, so Mr. Pamplin contacted Duke University Police to report Mr. Dorsey as a suspicious person. Duke University Police officers Larry Carter ("Officer Carter") and Jeffrey Liberto ("Officer Liberto") (together, "the officers") responded, arriving at the entrance of the hospital shortly after 1:00 a.m. Mr. Pamplin asked the officers to "check [Mr. Dorsey] out."

The officers approached Mr. Dorsey and asked for identification. Mr. Dorsey turned away from the officers and started walking away. At this point, according to the officers' testimony, Officer Liberto grabbed Mr. Dorsey and a struggle ensued. Officer Carter went to assist Officer Liberto, and Mr. Dorsey grabbed Officer Carter's holstered weapon and attempted to remove it from Officer Carter's holster. Officer Carter pressed down on Mr. Dorsey's hand or hands, attempting to prevent Mr. Dorsey from obtaining the weapon. Officer Carter was yelling: "He's got my gun. He's getting my gun." Officer Liberto let go of Mr. Dorsey and first began hitting Mr. Dorsey with his fists and then with his police baton. Officer Carter ended up struggling with Mr. Dorsey on the ground. Officer Liberto repeatedly asked if Mr. Dorsey had Officer Carter's gun, and both officers commanded Mr. Dorsey to let go of the weapon.

Some members of the Locklear family testified by deposition that they saw Mr. Dorsey grab Officer Carter's weapon and struggle with Officer Carter in an attempt to take that weapon. Other members of the Locklear family testified they could not see Mr. Dorsey's hands and, therefore, could not say if Mr. Dorsey was grabbing Officer Carter's weapon. However, they did hear someone yelling things like: "He's grabbed the gun[,]" "[l]et go; let go; let go," and "let go of the gun." Some of the Locklear family deposition testimony differed from State Bureau of Investigation ("SBI") reports written after SBI agents had interviewed those family members immediately following the shooting. The officers were not able to subdue Mr. Dorsey and, at some point during the struggle, Officer Liberto drew his service weapon and shot Mr. Dorsey in the head at close range. Mr. Dorsey died at the scene.

This action was filed on 16 September 2011 by William S. Mills, administrator of Mr. Dorsey's estate ("Plaintiff"). Plaintiff's complaint named as defendants Duke University ("Duke"), Officer Carter, and

Officer Liberto (together, "Defendants"). Plaintiff's complaint included as causes of action: (1) wrongful death/negligence, (2) wrongful death/assault and battery, and (3) wrongful death/willful and wanton conduct. Defendants filed a motion for summary judgment on 2 May 2013, alleging that the officers: (1) were "legally justified in using reasonable force to protect the lives and safety of themselves and other innocent bystanders[,]" (2) were "entitled to public official immunity[,]" (3) "acted reasonably at all times and there [was] no negligence or other grounds for liability which can be imputed to Duke[,]" (4) committed no acts justifying punitive damages, and (5) that "[Mr.] Dorsey's actions at the time of the incident . . . were the sole proximate cause of his death and constitute contributory negligence[.]"

The trial court entered judgment on 6 June 2013 granting summary judgment in favor of Defendants on all claims, and dismissing the action with prejudice. Plaintiff appeals. There are additional relevant facts that will be discussed in the body of the opinion.

I.

Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendants. We disagree.

We first note that all Plaintiff's arguments on appeal concern Officers Carter and Liberto in their individual capacities, and that Plaintiff does not argue that summary judgment, with respect to Duke, was improper. Therefore, summary judgment in favor of Duke is affirmed. Likewise, to the extent, if any, that Plaintiff's complaint contained claims against Officers Carter and Liberto in their official capacities, summary judgment on those claims is affirmed.

Summary judgment is proper only " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 578-79, 573 S.E.2d 118, 123 (2002) (citation omitted).

> This Court has recognized that deciding what constitutes a bona fide issue of material fact is seldom an easy task. Nonetheless, we have instructed that "an issue is genuine if it is supported by substantial evidence," which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion. Further, we have said that "[a]n issue is material if the facts alleged would

> constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial. "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." "All inferences of fact must be drawn against the movant and in favor of the nonmovant."

Id. at 578-79, 573 S.E.2d at 123-24 (citations omitted).

II.

[1] We must first address whether Officers Carter and Liberto are protected by public official immunity. " '[P]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties.' Police officers are public officials." *Clayton v. Branso*n, 153 N.C. App. 488, 492, 570 S.E.2d 253, 256 (2002) (citations omitted). "A public official can be held individually liable if it is prove[n] that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Id.* (citation and quotation marks omitted).

Plaintiff contends that the officers cannot be covered by public official immunity because they were hired by, and were working for, a private institution – Duke University. We disagree.

"[A] policeman is an officer of the State." *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (citations omitted). "It is not the method by which a policeman becomes a member of the police force of a municipality that determines his status but the nature and extent of his duties and responsibilities with which he is charged under the law." *Id.* "To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question." *Id.* "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *Id.*; *see also State v. Ferebee*, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462 (2006) (citation omitted) ("Under

. . . the Campus Police Act, campus police officers have the same statutory authority granted to municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions within their jurisdictions. As such, they qualify as 'public officers' pursuant to N.C. Gen. Stat. § 14-223.").

Our General Assembly granted certain private universities the power to create campus police agencies through the enactment of Chapter 74G, the Campus Police Act. N.C. Gen. Stat. §§ 74G-1 to 13 (2013). "As part of the Campus Police Program, the Attorney General is given the authority to certify a private, nonprofit institution of higher education . . . as a campus police agency and to commission an individual as a campus police officer." N.C.G.S. § 74G-2(a). "The principal State power conferred on campus police by this Chapter is the power of arrest[.]" N.C.G.S. § 74G-2(b)(6). "In exercising the power of arrest, these officers apply standards established by State and federal law only[.]" N.C.G.S. § 74G-2(b)(8). "Campus police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions" on campus and other property as allowed by the Campus Police Act. N.C.G.S. § 74G-6(b).

It is clear that campus police such as Officers Carter and Liberto, like municipal police officers, act pursuant to authority granted by our General Assembly, and that their duties involve "the exercise of some portion of the sovereign power." *Hord*, 264 N.C. at 155, 141 S.E.2d at 245. We hold that Officers Carter and Liberto are entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties. *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256.

III.

[2] Plaintiff first contends there existed "genuine issues of material fact such that summary judgment was improper." All three of Plaintiff's claims were for wrongful death. Specifically, Plaintiff argues:

> A genuine issue of fact clearly exists here, where one witness is claiming that Mr. Dorsey had a hold of Officer Carter's gun throughout the entire duration of the struggle, which was said to last *more than three minutes*, and where several other witnesses, those who were in close proximity to the events, testified that Mr. Dorsey *did not*, *at any time*, reach for or grab Officer Carter's gun. The

> contradictory nature of the testimony of these witnesses is simply too glaring.

Plaintiff contends in his brief that the deposition testimony of Mr. Pamplin, Duke security guard Mark Golby, and Christine Locklear support the above argument. However, none of these witnesses testified that: "[Mr.] Dorsey *did not*, *at any time*, reach for or grab Officer Carter's gun." None of these witnesses testified in any manner to even a suspicion that Mr. Dorsey never grabbed Officer Carter's gun. These witnesses testified that, from where they were located during the incident, they could not see Mr. Dorsey's hands or Officer Carter's weapon. Because they could not see what was happening with Officer Carter's weapon during the struggle, they could not honestly state that they ever saw Mr. Dorsey grab Officer Carter's weapon. They did, however, provide the following testimony.

Mr. Pamplin testified, *inter alia*, that during the several-minute struggle, he heard the officers yell "[s]top resisting[,]" heard Officer Carter say: "He has my gun[,]" saw Officer Carter and Mr. Dorsey struggling –both standing up and on the ground –and heard the officers repeatedly command Mr. Dorsey to: "Let go of the gun; let go of the gun." When Mr. Pamplin was asked if he had "any reason to doubt that Mr. Dorsey was holding the gun," he answered: "No." When asked if he thought Mr. Dorsey did grab Officer Carter's weapon, he answered: "Yes." Mr. Pamplin's testimony was generally consistent with that of both Officer Carter and Officer Liberto. This testimony is directly contrary to the following statement made by Plaintiff in his brief: "[Mr.] Pamplin testified that . . . Officer Carter yelled to Officer Liberto that Mr. Dorsey had a hold of Officer Carter's weapon, *although* [*Mr.*] *Pamplin denied that Mr. Dorsey ever actually had a hold of Officer Carter's gun.* (Pamplin Dep., p. 45)." (Emphasis added). Nowhere on page forty-five—or anywhere else in Mr. Pamplin's deposition—does he testify that Mr. Dorsey never "had a hold" of Officer Carter's weapon.

In his deposition, Duke security guard Mark Golby ("Mr. Golby"), testified as follows:

> Q. Okay. You gave some testimony in which you said you never saw [Mr.] Dorsey's hands on the gun; you never saw those sorts of things. From [where] you were standing, you were not able to see [Officer] Carter's gun, were you?
>
> A. No.
>
> Q. And you were not able to see [Mr.] Dorsey's hands or [Officer] Carter's hands at that time, were you?

A. No, I couldn't see.

Q. So when you're saying you never saw this, what you're really saying is you couldn't see it?

A. Right.

Mr. Golby further testified that, during the struggle, Officer Carter said Mr. Dorsey had a hold of Officer Carter's weapon, that Officer Liberto told Mr. Dorsey several times to let go of the weapon, and that Officer Liberto finally told Mr. Dorsey that if he did not release the weapon, Officer Liberto would shoot him. Nowhere did Mr. Golby indicate that Mr. Dorsey did not reach for or grab Officer Carter's weapon. Mr. Golby's deposition testimony is generally consistent with that of both Officer Carter and Officer Liberto.

Christine Locklear testified she saw the officers talking to Mr. Dorsey, but did not hear what was said. She saw them begin to scuffle and saw Mr. Dorsey and Officer Carter fall to the ground. She then went inside the hospital, and was inside when the shot was fired. As she was about to enter the hospital, immediately before she heard the shot, she "heard somebody say 'he's got his hands on the [weapon.]' " At Christine Locklear's deposition, when asked, she agreed she did not "know whether or not Mr. Dorsey got his hand on the officer's weapon[,]" she "just didn't see that[,] . . . if when he fell, that was going on – if when he fell that Mr. Dorsey did reach for it, I did not see it. Honey, I got away from that." Christine Locklear did not say it did not happen. Plaintiff's attorney asked her if, when Mr. Dorsey and the officers were struggling on the ground, she thought "that Mr. Dorsey presented a serious risk of harm to the police officers?" She answered:

> I did. . . . I thought he could have grabbed his gun. . . . I mean, it was like he got in a rage or something when they asked him. You know, or I assumed they asked him to leave the premises, and it was like he got in a rage and real angry, I mean, just because of the assumptions or whatever. He was real, real upset. He was really angry.

Christine Locklear testified that, immediately after the shooting, she heard people talking about what had just happened, and she heard people saying things like:

> Yeah, that he did grab the Law's gun and that's the reason and I heard that – I assumed that the white man did hit him with the baton to get him off the Law but no way – I mean, it was said that he was beat with the baton, and he

> would not let go of the officer's gun that he had; so after [the officer] beat [him] so long and he wouldn't let go, that's when, I reckon, they drew the gun. And it was said that, you know, they told him to let go and he wouldn't and so he shot him.

Christine Locklear stated she didn't specifically remember if any of her family members said they saw Mr. Dorsey grab the gun. Nowhere in the testimony of Mr. Pamplin, Mr. Golby, or Christine Locklear did either of them state that Mr. Dorsey did not grab Officer Carter's weapon, or that they believed Mr. Dorsey never grabbed Officer Carter's weapon.

Multiple other witnesses testified by deposition that they did see Mr. Dorsey attempting to take Officer Carter's weapon from Officer Carter's holster. Alena Hull ("Ms. Hull") testified:

> A And they went to fighting and stuff, and the black officer [Carter], he was down on the ground; but the white officer [Liberto], now, he had out his gun.
>
> . . . .
>
> A And telling the boy [Mr. Dorsey] to give up – he kept telling the boy to give up because they were already fighting him and beating him and he never would give up, and the black Law and him, they went down to the ground; and he had his hand on the Law's pistol.
>
> Q Okay. Who did?
>
> A The guy that was shot.
>
> . . . .
>
> Q Okay. When you saw that, did you think he [Mr. Dorsey] was trying to take [Officer Carter's] gun?
>
> A Yes, sir because he was in a rage.
>
> . . . .
>
> A My opinion, the black guy that was down on the ground and the one that was shot, the white officer had no other choice but to shoot him where he shot, being honest, because if he would have done anything else, he would have shot the other officer.
>
> . . . .

> A He was hitting him in his back, his head, [with what looked like a "blackjack"] and he never would turn loose.

It is true that a report made by SBI Special Agent B.S. Fleming following an on-site interview with Ms. Hull shortly after the incident does not include the same detail. According to Agent Fleming's report, Ms. Hull told him "she heard someone scream that someone had a gun[,]" saw two officers fighting with a man, and saw a white officer with his weapon drawn. According to this report, Ms. Hull could not see what was happening with Officer Carter's weapon or Mr. Dorsey's hands.

Krecia Ann Brayboy ("Ms. Brayboy") testified that Mr. Dorsey grabbed the black officer's weapon with his right hand and she thought at that time the black officer "threw his hand on top of [Mr. Dorsey's] hand trying to keep [Mr. Dorsey] from pulling [the officer's weapon]; getting it out of [the holster]." Ms. Brayboy testified,

> to me, if he would have fired anywhere else below the shoulders, the black officer would have gotten shot. . . . . Truthfully, to be honest, I'm sorry for what happened, but the officer really had no other choice because if this man would have gotten this weapon unhooked, it would have been chaos there. There isn't any telling who all would have been killed[.]

Ms. Brayboy heard the white officer saying: "Let it go, let it go. Let it go, let it go." Further, according to Ms. Brayboy, Mr. Dorsey

> just would not let that weapon go. . . . . [t]hey could not get him to break that grip. . . . . All I know is Mr. Dorsey had a grip of that man's weapon and would not let go. They begged and begged and begged this man to let this weapon go and he wouldn't.

Ms. Brayboy admitted she had withheld most of this information from the SBI agent who interviewed her on the night of the incident; instead, stating that she had been inside at the time and had not seen anything.

Charles Brayboy ("Mr. Brayboy") testified that Mr. Dorsey grabbed Officer Carter's weapon and would not let it go.

> I don't know how in the world [Officer Carter] held onto that guy and held his hand. The cop was telling him to let it go, man; let it go. . . . . He begged him, man. He begged him to let it go, man. He tried his best. . . . He told him to let it go, man. He said let it go, man; let it go; let it go, man;

> let it go. He didn't want to do it, man. . . . . I was scared if he got that gun out, man, there wasn't any telling what he might have done.

Mr. Brayboy testified he had withheld information from the original investigating officer, but, after thinking about the situation, he realized had it been his child who had been shot, he would have wanted to know why it happened.

Debbie Locklear first told investigators she saw the officers struggling with Mr. Dorsey, and heard them yelling, " 'put it down' and 'let it go' over and over again." She told investigators she did not see what was in Mr. Dorsey's hands. In her opinion, the officers "did what they had to do" because Mr. Dorsey "refused to surrender" and the officers were "in danger." In her deposition testimony, Debbie Locklear stated:

> [Mr. Dorsey] was very, very – he was on something. This black guy, his eye balls were that big. They tussled. They fought. They tussled. I mean, they had a black – some kind of thing. I mean, they were just trying to make him – you know. When he got his hand on that gun – his gun was in the holster. The black guy got his hand on that gun and would not let that gun go, and when I gave this statement, I was throwing up. I was so disgusted. I was scared, crying, and everything else, and when you get in a state of mind like that there and you know when your life is on the line, too, your mind goes blank.

Plaintiff agrees that Mr. Dorsey and Officer Carter became engaged in a struggle; that Officer Liberto hit Mr. Dorsey multiple times with his fist and his standard issue baton; that Mr. Dorsey and Officer Carter fell to the ground, still locked in a struggle; and that Officer Liberto finally drew his service weapon and shot Mr. Dorsey in the head. Both officers testified that Mr. Dorsey grabbed Officer Carter's weapon and would not let it go. They both testified that Officer Liberto attempted to get Mr. Dorsey to release the weapon by hitting Mr. Dorsey with his fist. Officer Liberto testified when that did not work, he removed his baton and began hitting Mr. Dorsey with the baton, but that Mr. Dorsey still would not release Officer Carter's weapon. The officers testified that Officer Liberto repeatedly commanded Mr. Dorsey to let go of the weapon. According to both officers, after Officer Carter and Mr. Dorsey fell to the ground, Officer Carter called out that Mr. Dorsey was pulling on the weapon. Officer Carter testified that his weapon was pulled partially out of his holster. Officer Liberto testified that Officer Carter yelled

that Mr. Dorsey was "getting [his] gun." Both officers testified they believed Mr. Dorsey was an immediate threat because he was pulling on the weapon, would not release it, and might have gained control of it.

Plaintiff's own expert, Francis Murphy ("Mr. Murphy"), testified he believed Mr. Dorsey grabbed Officer Carter's weapon, though he believed it happened after Officer Liberto had hit Mr. Dorsey with his fists and the baton. Mr. Murphy also testified he believed the reason Officer Liberto shot Mr. Dorsey "was because he was inadequately trained. He didn't know how to control the situation. He didn't know how to break the situation up." Mr. Murphy testified he didn't believe Officer Liberto wanted to shoot Mr. Dorsey; his opinion was that the officers were trying to arrest Mr. Dorsey without legal justification and that, due to poor training, the officers used unnecessary force and Mr. Dorsey responded. When asked: "But once [attempts to subdue Mr. Dorsey] had failed and they got to this point where the deadly force appeared to be imminent to be used against them, that's why [Officer Liberto] shot [Mr. Dorsey]?" Mr. Murphy replied: "Sure."

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff provided no evidence tending to show that Mr. Dorsey did not attempt to gain control of Officer Carter's weapon. "At the summary judgment stage, plaintiffs cannot rely on the allegations of the complaint; rather, plaintiffs need to present specific facts to support their claim." *Haynes v. B & B Realty Grp., LLC*, 179 N.C. App. 104, 109, 633 S.E.2d 691, 694 (2006) (citation omitted).

Our Supreme Court has long held:

> It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. True the right of a person to use force in resisting an illegal arrest is not unlimited. He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty. And where excessive force is exerted, the person seeking to avoid arrest may be convicted of assault, or even of homicide if death ensues[.]
>
> In applying this rule of law, this Court has engaged in the following analytical framework:
>
> > Since the initial arrest . . . [was] illegal, plaintiff was entitled to use a reasonable amount of force to resist.

> Under this analysis, if the amount of force used by plaintiff was unreasonable . . ., then the officers had probable cause to arrest him under G.S. § 14-33(b)(8) [the statute criminalizing an assault on a law enforcement or government officer].
>
> Moreover, the General Assembly has also provided that an individual "is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force," when the individual knows that it is a true law enforcement officer who is attempting to make the arrest. N.C. Gen. Stat. § 15A-401(f)(1) (2005).

State v. Branch, 194 N.C. App. 173, 177, 669 S.E.2d 18, 20-21 (2008) (citations omitted). This Court has applied the same analysis when reviewing detentions not amounting to arrest. *Id.* at 178, 669 S.E.2d at 21.

Assuming, *arguendo*, the officers had no legal basis to detain Mr. Dorsey, Mr. Dorsey was not justified to resort to deadly force in response to that detention. Once Mr. Dorsey grabbed Officer Carter's weapon, he exceeded any "force as reasonably appear[ed] to be necessary to prevent the unlawful restraint of his liberty." *Id.* at 177, 669 S.E.2d at 20. Mr. Dorsey's response was excessive, and became unlawful. *Id.* at 177, 669 S.E.2d at 20-21. Had the officers managed to subdue Mr. Dorsey without the use of deadly force, they could have, and almost certainly would have, arrested Mr. Dorsey.

An officer may resort to the use of deadly force "[t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force[.]" N.C. Gen. Stat. § 15A-401(d)(2)(a) (2013). "This portion of the statute 'was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability.' " *Turner v. City of Greenville*, 197 N.C. App. 562, 567, 677 S.E.2d 480, 484 (2009) (citation omitted).

Although Plaintiff presented expert testimony in support of his claim that Mr. Dorsey's hands were not on Officer Carter's weapon at the time Officer Liberto shot Mr. Dorsey, "[a] public official can [only] be held individually liable if it is 'prove[n] that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.' " *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256 (citations omitted). John Eric Combs ("Mr. Combs"), an instructor for the North Carolina Justice Academy, testified concerning the required "subject control and arrest techniques lesson plan for law enforcement

officers" in North Carolina. Mr. Combs testified he did not know if Mr. Dorsey's hands were on the gun at the time Officer Liberto fired the shot, but it would not have changed his opinion that Officer Liberto's use of deadly force was justified. Mr. Combs stated: "We specifically teach in the subject control arrest techniques training program that any attack that includes an attempt to disarm an officer is a deadly force attack." Mr. Combs was asked: "So an officer would be entitled to counter that deadly force with the use of deadly force?" Mr. Combs responded: "Yes, sir." Mr. Combs further opined: "As far as a situation where two officers are around, an assailant grabs an officer's weapon, my suggestion at that point is for the other officer to do exactly what [Officer] Liberto did and use deadly force."

Former SBI Agent Steven Carpenter testified that in his opinion:

> Looking at all the depositions and stuff, and applying North Carolina's General Statute 15a-401, they very, very early in this struggle had every reason in the world to believe [Mr. Dorsey] intended to take that gun and harm somebody. They were responsible for protecting a large number of citizens around them that night. . . . . As a police officer they had a responsibility to protect those people, and, if anything, I don't think they reacted quick enough to ensure that these people did not meet with serious injury or death.

We hold that the evidence, viewed in the light most favorable to Plaintiff, does not show that the acts of the officers leading to Mr. Dorsey's death were " 'corrupt or malicious, or . . . outside of and beyond the scope of [their] duties.' " *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256 (citations omitted). We affirm the grant of summary judgment in favor of Officer Carter and Officer Liberto on Plaintiff's claims of wrongful death against the officers in their individual capacities.

[3] Plaintiff also argues the trial court erred in granting summary judgment on Plaintiff's claim of false arrest. Plaintiff's complaint did not contain a claim for false arrest. Plaintiff filed a motion for leave to file first amended complaint, adding a claim for false arrest, four days before the hearing on Defendants' motion for summary judgment. The trial court heard Plaintiff's motion after it had heard Defendants' motion for summary judgment and, at the close of the hearing, stated: "I'm going to take the motion to amend the complaint, as well as the motion for summary judgment under advisement." As Plaintiff acknowledges in his brief, "the [trial court] failed to rule on the motion to amend."

"[G]enerally, the failure to obtain a ruling on a motion presented to a trial court renders the argument raised in the motion unpreserved on appeal. *See* N.C.R. App. P. 10(a)(1) (2012)." *Dep't of Transp. v. Webster*, __ N.C. App. __, __, 751 S.E.2d 220, 223 (2013) *disc. review denied*, __ N.C. __, 755 S.E.2d 618 (2014). The present issue does not fall outside the general rule. Plaintiff has failed to preserve this argument for appellate review. *Id.*

Because of our holdings above, we do not reach Plaintiff's argument concerning contributory negligence.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA ON RELATION OF CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF-APPELLEE
v.
HIDDEN VALLEY KINGS AKA HVK OR ICEE MONEY, WENDELL MCCAIN, KEVIN FUNDERBURK AND CORDELL BLAIR, DEFENDANTS-APPELLANTS

No. COA14-72

Filed 17 June 2014

Appeal and Error—interlocutory orders and appeals—preliminary injunction—no substantial right

Defendant's appeal from a preliminary injunction in a North Carolina Street Gang Nuisance Abatement Act case was dismissed. Defendant did not argue any substantial right that would be irrevocably lost if the preliminary injunction was not immediately reviewed.

Appeal by Defendant Kevin Funderburk from preliminary injunction entered 26 August 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 3 June 2014.

Charlotte-Mecklenburg Police Department, by Assistant City Attorney Richard R. Perlungher and Deputy City Attorney Mark H. Newbold, for Plaintiff-Appellee.

Arnold & Smith, PLLC, by L. Bree Laughrun and Kyle Frost, for Defendant Kevin Funderburk.

McGEE, Judge.

The State of North Carolina, on relation of the City of Charlotte, ("Plaintiff") filed a complaint and motion for preliminary and permanent injunction against Hidden Valley Kings, also known as HVK or ICEE Money, Wendell McCain, Kevin Funderburk, and Cordell Blair (together, "Defendants") on 12 August 2013. In its complaint, Plaintiff cited N.C. Gen. Stat. §§ 14-50.41 et seq., the "North Carolina Street Gang Nuisance Abatement Act" (hereinafter "the Act") and N.C. Gen. Stat. § 19-2.1, which provides for an action for abatement of a nuisance. The Act provides: (1) that a gang that regularly engages in criminal street gang activities constitutes a public nuisance, (2) that a trial court may enter an order enjoining a defendant from engaging in criminal street gang activity, and (3) that a trial court may "impose other reasonable requirements to prevent the defendant or a gang from engaging in future criminal street gang activities." N.C. Gen. Stat. § 14-50.43(b),(c) (2013).

The trial court held a hearing on Plaintiff's motion for preliminary injunction on 22 August 2013. Counsel for both Plaintiff and for Defendant Kevin Funderburk (hereinafter "Defendant Funderburk") were present and gave arguments to the trial court. The trial court found that Plaintiff had "no adequate remedy at law to prohibit" Defendants from "associating together for the purpose of regularly engaging in criminal street gang activity." The trial court further found that, without a preliminary injunction, Plaintiff and citizens and residents of the Hidden Valley Neighborhood and greater Charlotte area would "suffer irreparable harm from the criminal street gang activity regularly engaged in by" Defendants. The trial court also found that Plaintiff "demonstrated a likelihood of success on the merits of the case."

The trial court ordered that Defendants were restrained and enjoined from the following:

> a. Engaging in criminal street gang activity as defined in North Carolina Gen. Stat. § 14-50.16(c);
>
> b. Driving, standing, sitting, walking, gathering or appearing, anywhere in public view or any place accessible to the public within Mecklenburg County, with any member of the HVK gang that he or she knows to be a member of the HVK gang, including but not limited to those members identified by name in this Preliminary Injunction, except when directly traveling to or from the following locations and where their presence is required: (1) inside a school or

other educational facility where they are attending a class or on school business; (2) inside a church or other place of worship; (3) at a location where they are actively engaged in a legitimate business, employment, trade, training, profession or occupation; or, (4) at a location where they are attending counseling sessions or community meetings at community centers or other established organizations;

c. Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or battering any person that he or she knows to be a witness to any criminal street gang activity of HVK, to be a victim of any criminal street gang activity of HVK, or to have complained about any criminal street gang activity of HVK;

d. Possessing any firearm, imitation firearm, ammunition, or deadly weapon, knowingly remaining in the presence of anyone who is in possession of such firearm, imitation firearm, ammunition or illegal weapon, or knowingly remaining in the presence of such firearm, imitation firearm, ammunition or illegal weapon, anywhere in public view or any place accessible to the public;

e. Knowingly remaining in the presence of anyone who is in possession of any illegal drugs, narcotics or paraphernalia;

f. Recruiting, soliciting, enticing, or encouraging individuals to join HVK or to perform any acts that will support HVK or its members;

g. Taking any action that prevents a member from leaving HVK, including, but not limited to, threatening or intimidating by any means, the person attempting to leave HVK or any member of that person's family or friends;

h. Participating in the unlawful possession, use or sale of any controlled substance as defined by state or federal law or the possession or use of any drug paraphernalia; and,

i. Being present on or in any private property within Mecklenburg County not open to the general public with any person that he or she knows to be a member of the HVK gang, including, but not limited to, those members identified by name in this Preliminary Injunction, except when the members are relatives of the same family and

> are on or in private property of a family member they share in common.

Defendant Funderburk appeals from the entry of the above preliminary injunction.

We first address whether this appeal must be dismissed as premature. "A preliminary injunction is an interlocutory order." *Looney v. Wilson*, 97 N.C. App. 304, 307, 388 S.E.2d 142, 144 (1990). There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right. N.C. Gen. Stat. §§ 1-277, 7A-27(b)(3) (2013).

Issuance "of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order 'escape appellate review before final judgment.' " *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (quoting *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980)). "If no such right is endangered, the appeal cannot be maintained." *School*, 299 N.C. at 358, 261 S.E.2d at 913. In *School*, the defendants offered "no evidence of any substantial right which will be irrevocably lost if the state's entitlement to the preliminary injunction is not now reviewed." *Id.* The order in *School* restrained the defendants "from operating day-care centers without complying with the licensing requirements of the [Day-Care Facilities] Act." *Id.* Our Supreme Court held that the defendants' contention that "compliance with the Act's requirements violates their constitutionally guaranteed religious freedoms goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all the facts upon which such resolution must rest can be fully developed." *Id.*

Our Supreme Court further stated that its "refusal to allow [the] defendants' appeal is not a surrender to technical requirements of finality." *Id.* "The statutes and rules governing appellate review are more than procedural niceties. They are designed to streamline the judicial process, to forestall delay rather than engender it." *Id.* " 'There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.' " *Id.* (quoting *Veasey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950)); *see also Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 586 S.E.2d 548 (2003).

In the present case, Defendant Funderburk offered in his brief that there is "no evidence of any substantial right which will be irrevocably lost if the state's entitlement to the preliminary injunction is not

now reviewed." *School*, 299 N.C. at 358, 261 S.E.2d at 913. As discussed above, the "rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for determination in a single appeal from a final judgment." *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 146 (1982). "Additionally, appellate courts are almost always better able to decide the legal issues when they have before them a fully developed record." *Id.*

The record before this Court contains only a brief transcript of the short hearing before the trial court and an affidavit from a detective with the Charlotte-Mecklenburg Police Department Gang Unit. Defendant Funderburk offered no evidence during the hearing before the trial court. Defendant Funderburk has not argued any substantial right that will be irrevocably lost if the preliminary injunction is not now reviewed, and his appeal is dismissed.

Dismissed.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
ELWOOD WARREN COLLINS

No. COA13-1043

Filed 17 June 2014

1. Jurisdiction—subject matter—order—post-conviction DNA testing—entered out of session—without consent of parties

The trial court did not lack subject matter jurisdiction to enter an order denying defendant's motion for post-conviction DNA testing. Pursuant to N.C.G.S. § 7A-47.1, a trial court may exercise in chambers jurisdiction in a nonjury matter arising in his or her district to enter an order out of session and without the consent of the parties.

2. Criminal Law—post-conviction proceedings—motion for DNA testing—no newer and more accurate tests

The trial court did not err by denying defendant's motion for post-conviction DNA testing under N.C.G.S. § 15A-269. Defendant

failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results.

Appeal by Defendant from Order entered 11 April 2013 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 22 January 2014.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.

Richard J. Costanza for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

This case arises from Defendant Elwood Warren Collins's motion for post-conviction DNA testing. On 22 October 2003, Defendant was indicted for first-degree murder in the death of Christina Lee. On 6 May 2005, Defendant pled guilty to second-degree murder pursuant to the United States Supreme Court's opinion in *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (determining that a court may accept a plea of guilty to second-degree murder when the State has strong evidence of guilt of first-degree murder even though the defendant claims that he is innocent, if the defendant, represented by competent counsel, intelligently concludes that he should plead guilty to second-degree murder rather than be tried for first-degree murder). As a result, the trial court sentenced Defendant in the presumptive range to an active term of 157 to 198 months in prison.

More than four years later, on 28 December 2009, Defendant filed a *pro se* motion seeking post-conviction DNA testing on certain items of evidence related to Lee's death. The trial court appointed counsel to represent Defendant on 10 February 2010, and Defendant filed an amended affidavit in support of his motion for genetic testing on 24 March 2010. The State filed an answer contesting Defendant's motion on 7 December 2012.[1] A proceeding on the motion was held on 12 March 2013, and counsel appeared for both sides. According to the trial court, the proceeding was conducted to determine "whether . . . [Defendant's] motion meets the threshold requirements of the statute, and if so, record a hearing [at]

1. The record contains no explanation for the remarkable delay in the filing of the State's answer.

which time the State and [D]efendant will be allowed to present further evidence in support of their positions."

The parties have stipulated that they appeared before the trial court two days later, on 14 March 2013, "to address the request for post[-] conviction DNA testing." According to this stipulation, "[t]he parties agreed that [the trial court] could make a ruling based on the motion itself and the State's response." That afternoon, the trial court contacted counsel for the parties by e-mail, indicating that Defendant's motion was denied and stating that

> Defendant has failed to show how the DNA material to be tested is material to his defense or what th[e] 'newer and more accurate testing' consists of or how said results would be significantly more accurate and probative of the identity of the perpetrator. The mere mouthing of these conclusory statements, absent more, [is] insufficient to carry . . . [D]efendant's burden on this issue.

The e-mail directed the State to draft an order denying the motion, which would be circulated to defense counsel and then executed by the trial court. The court entered its written order denying the motion on 11 April 2013. Defendant appeals.

Discussion

On appeal, Defendant argues (1) that the trial court's 11 April 2013 order is null and void for lack of jurisdiction, or, alternatively, (2) that the trial court erred in denying Defendant's motion for post-conviction DNA testing. We disagree.

I. Jurisdiction

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.

McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citations and internal quotation marks omitted; italics added).

[1] Defendant argues that the trial court's 11 April 2013 order is null and void for lack of jurisdiction because it was filed out of session and without his consent. In making this argument, Defendant points out that the proceedings on 12 and 14 March 2013 were held during the 11 March 2013 Criminal Session of Craven County Superior Court, which concluded well before the trial court filed its 11 April 2013 written order.[2] For support, Defendant cites our Supreme Court's opinion in *State v. Trent*, which held that:

> [A]n order of the superior court, in a criminal case, must be entered during the term, during the session, in the county[,] and in the judicial district where the hearing was held.[3] Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect.

359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005). We are not persuaded by Defendant's argument.

In *Trent*, the defendant was charged with and convicted of robbery with a dangerous weapon. *Id.* at 584, 614 S.E.2d at 499. Before trial, the defendant filed two motions to suppress. *Id.* A hearing on the motions was held on 11 October 2001 and continued to 17 January 2002. *Id.* The trial court declined to rule at the end of the January hearing and announced its determination seven months later, in the following term, denying the defendant's motions. *Id.* The defendant appealed, and our Supreme Court granted a new trial because the court's order was "null and void since it was entered out of term and out of session." *Id.* at 586, 614 S.E.2d at 500.

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2. For purposes of addressing Defendant's argument, we take judicial notice of the Division II calendar of superior courts for the spring 2013 term, available at http://www.nccourts.org/Courts/CRS/Calendars/Documents/spring2013-statewide.pdf. *See generally Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 761–62 (1954) (taking judicial notice of the assignment of trial judges to hold court). According to the information in that calendar, Judge Alford was assigned to Superior Court Division II, judicial district 3B. The spring term was set to begin January 7 and end July 1. Beginning 11 March 2013, Judge Alford was scheduled to hold the criminal and civil sessions of Craven County Superior Court, which were set to last for one week. Judge Alford was also scheduled to preside over the 18 March 2013 civil and criminal sessions of Craven County Superior Court, which were set to last for another week. Craven County Superior Court was not in session during the week of 8 April 2013, and Judge Alford was assigned instead to preside over the criminal and civil sessions of Carteret County Superior Court.

3. "The use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignments within the term." *Capital Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. 150, 154 n. 1, 446 S.E.2d 289, 291 n. 1 (1994).

In so holding, the *Trent* Court relied on its previous opinion in *State v. Boone*, 310 N.C. 284, 287–88, 311 S.E.2d 552, 555 (1984). The defendant in *Boone* was charged with felonious manufacturing of a controlled substance and felonious possession of more than one ounce of marijuana. *Id.* at 284–85, 311 S.E.2d at 553. He was convicted of the latter. *Id.* at 285, 311 S.E.2d at 553. Prior to trial, he moved to suppress the marijuana in a motion heard on 16 and 18 June 1981. *Id.* at 286, 311 S.E.2d at 554. The trial court denied the motion by order signed in the following session, on 25 June 1981. Because the order was signed outside the session in which the motion was heard, our Supreme Court determined that the defendant was entitled to a new trial. *Id.* at 286–87, 311 S.E.2d at 554–55. In so holding, the Court cited the following general rule:

> Judgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

Id. at 287, 311 S.E.2d at 555 (citation and brackets omitted) (noting that this rule has been consistently applied in both criminal and civil cases).

In the time between the Court's opinions in *Boone* and *Trent*, our Supreme Court authored a third opinion, *Capital Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. at 159, 446 S.E.2d at 294 [hereinafter *Capital Outdoor*]. In *Capital Outdoor*, the plaintiffs filed a complaint challenging the constitutionality of a city ordinance. *Id.* at 153, 446 S.E.2d at 291. The defendant moved to dismiss the complaint under Rule 12(b)(6), and the motion was heard on 29 October 1991, during the 28 October 1991 session. *Id.* at 154, 446 S.E.2d at 292. The trial court granted the motion on 4 November 1991, after the expiration of the previous session. *Id.* Relying on the "ample power" of the legislature "to establish, define[,] and limit the jurisdiction of the Superior Courts," the Supreme Court affirmed the trial court's out-of-session order under section 7A-47.1 and Rule 6(c) of the Rules of Civil Procedure as "two separate statutes authorizing the execution and entry of the dismissal order of the trial judge out of session . . . ." *Id.* at 155–59, 446 S.E.2d at 292–94. *Capital Outdoor* is controlling precedent in this case.

As a preliminary matter, we note the apparent contradiction in these three cases. *Boone* stated that orders entered out of session and out of

term are invalid based on absence of the trial court's jurisdiction and held that the out-of-session order in that case was invalid for the same reason. *Boone*, 310 N.C. at 287–88, 311 S.E.2d at 555. *Capital Outdoor* implicitly overruled *Boone* as it pertains to orders entered out of session. *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294. *Trent* later applied *Boone* to determine that the trial court erred by entering its order "out of term and out of session."[4] Though the language in *Trent* suggests that it was reinstating *Boone* in its entirety, the holding in that case is limited to an order entered out of term. *Trent*, 359 N.C. at 586, 614 S.E.2d at 500.

Relying on established principles of stare decisis, we read these cases together to the extent that they represent a reasonable, practicable, and stable interpretation of the law. S*ee Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 473, 206 S.E.2d 141, 145–46 (1974) ("The law must be characterized by stability if [people] are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases."). Applying those principles to *Boone*, *Capital Outdoor*, and *Trent*, the resulting rule is that the superior court is divested of jurisdiction when it issues an out-of-term order substantially affecting the rights of the parties unless that order is issued with the consent of the parties. If the court issues an order out of session, however, the court is not divested of jurisdiction as long as either section 7A-47.1 or Rule 6(c) is applicable. *See Trent*, 359 N.C. at 586, 614 S.E.2d at 500; *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294.

Rule 6(c) has no bearing on this case. It is a rule of civil procedure, and this is a criminal matter. However, section 7A-47.1 is a general rule of judicial procedure and applies to both criminal and civil cases. *See* N.C. Gen. Stat. § 7A-2(1) (stating that the purpose of Chapter 7A is to create a place for "all statutes concerning the organization, jurisdiction[,] and administration of each division of the General Court of Justice"). In *Capital Outdoor*, the Court stated that section 7A-47.1 and Rule 6(c) are separate authorities for an order entered out of session. Therefore, either may be used to establish the trial court's jurisdiction, if applicable. Here, section 7A-47.1 applies to validate the trial court's out-of-session order.

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4. The *Trent* Court was clearly aware of the *Capital Outdoor* opinion, citing it for the definition of "term" and "session." *Trent*, 359 N.C. at 585, 614 S.E.2d at 499.

Section 7A-47.1, entitled "[j]urisdiction in vacation or in session," provides as follows:

> In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. Any regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a)[5] and any special superior court judge residing in the district or set of districts and the judge regularly presiding over the courts of the district or set of districts have concurrent jurisdiction throughout the district or set of districts in all matters and proceedings in which the superior court has jurisdiction out of session; provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, any regular resident superior court judge of the district or set of districts and any special superior court judge residing in the district or set of districts shall have concurrent jurisdiction throughout the district or set of districts with the judge holding the courts of the district or set of districts and any such regular or special superior court judge, in the exercise of such concurrent jurisdiction, may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court.

N.C. Gen. Stat. § 7A-47.1 (2013) (re-codified in 1969 from N.C. Gen. Stat. § 7-65).

"[I]n vacation" jurisdiction, as described in section 7A-47.1, arises from the trial court's

> general jurisdiction of all "in chambers" matters arising in the district. The general "vacation" or "in chambers" jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that [the judge] is at the time presiding over a designated term of court or in a particular county. As to [the judge], it is limited, ordinarily, to the district to which he is assigned by statute.

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5. "Regular resident superior court judge of the district or set of districts" means a regular superior court judge who is a resident judge of any of the superior court districts established under section 7A-41. N.C. Gen. Stat. § 7A-41.1 (2013).

Baker v. Varser, 239 N.C. 180, 188, 79 S.E.2d 757, 763 (1954) (citations and internal quotation marks omitted). The *Baker* court's description is based on a prior version of section 7A-47.1, then-codified as section 7-65. *See Baker*, 239 N.C. at 187–88, 79 S.E.2d at 763; *see also* 1969 N.C. Sess. Laws 1377, ch. 1190, sec. 47 (re-codifying section 7-65 as section 7A-47.1). Section 7-65 is substantially similar to section 7A-47.1 except that the word "session," as used in 7A-47.1, was written as "term" or "term time" in section 7-65. *See Baker*, 239 N.C. at 187–88, 79 S.E.2d at 763. The change from "term" and "term time" to "session" tracks the 1962 amendments to the North Carolina Constitution, which "changed the word 'term' to 'session' when referring to the period of time during which superior court judges are assigned to court . . . ." *See Capital Outdoor*, 337 N.C. at 154 n.1, 446 S.E.2d at 291 n.1; *see also* N.C. Const. art. IV, § 9(2). This change comports with the rule discussed above, *i.e.*, that in vacation jurisdiction applies only to orders entered out of session, not those entered out of term.

We note that *Baker*'s description of in chambers jurisdiction, stating that the exercise of such jurisdiction is not dependent on the judge's presence in the county, conflicts in part with our opinion in *House of Style Furniture Corp. v. Scronce*, where we cited the

> uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the [s]uperior [c]ourt, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending.

33 N.C. App. 365, 369, 235 S.E.2d 258, 260 (1977) (citing *Bisnar v. Suttlemyre*, 193 N.C. 711, 138 S.E. 1 (1927)) [hereinafter *House of Style*]. Nonetheless, *House of Style* is not controlling in this case.

The plaintiffs in *House of Style* filed their complaint in Alexander County on 24 September 1975. *Id.* at 366, 235 S.E.2d at 259. The following year, the defendants moved to dismiss the plaintiff's claims and for entry of default judgment. *Id.* That motion was heard in Iredell County before a judge of judicial district 22, which included both Alexander County and Iredell County. *Id.* Six days after the hearing, the trial court filed its order dismissing the plaintiffs' claims and entering default judgment.[6]

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6. Neither our opinion in *House of Style* nor the record on file for that case specifies whether the trial court filed its order in Alexander County or Iredell County. *See id.*; 909 N.C. App. Records and Briefs No. 7622SC901, 59–65 (1976).

Id. at 367, 235 S.E.2d at 259. On appeal, we vacated the trial court's order and judgment because we could not find any statute authorizing the trial judge to conduct a hearing out of county. *Id.* at 369, 235 S.E.2d at 261 ("[The parties] did not consent for the motion to be heard in Iredell County[,] and our research fails to disclose any statute authorizing [the judge]'s action in that county.").

Though *House of Style* was filed seventeen years after *Baker*, it does not discuss that opinion. *See id.* In addition, neither *House of Style* nor its cited authority, *Bisnar*, discusses section 7A-47.1 or its predecessor, section 7-65. *See id.*; *see also Bisnar*, 193 N.C. at 711, 138 S.E. at 1. Instead, the *House of Style* Court relies on the "uniform holding" described above. *See House of Style*, 33 N.C. App. at 369, 235 S.E.2d at 260. This Court is bound by *House of Style* as it pertains to orders in criminal cases arising from hearings occurring out of county.[7] *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989). *House of Style* provides no direction, however, on the validity of an order in a criminal case arising from a valid hearing, but entered while the judge is sitting in another county. *See House of Style*, 33 N.C. App. at 369, 235 S.E.2d at 260. Therefore, pursuant to our discussion, *supra*, we conclude that section 7A-47.1 constitutes statutory authority to justify an order entered in a criminal case while the judge who heard the case in the proper county is sitting in another county within the district when the order is entered. *See* N.C. Gen. Stat. § 7A-47.1. As a result, *House of Style* has no impact on this case because Defendant's motion was properly heard in Craven County. Accordingly, Judge Alford's out-of-session order is proper even though it was issued while he was sitting in Carteret County.

Finally, we point out that in chambers jurisdiction under section 7A-47.1 does not require the consent of the parties. *E-B Grain Co. v. Denton*, 73 N.C. App. 14, 24, 325 S.E.2d 522, 528–29 (1985) ("We believe [the trial court judge] clearly had authority under [section] 7A-47.1 to hear [the] plaintiff's motion . . . , even though [the] defendant's counsel objected. To interpret the statute [according to Defendant's argument] would mean that no superior court judge could hear any matter, whether

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7. Rule 7(b) of the North Carolina Rules of Civil Procedure was amended in 2005 to allow motions heard out of county. 2005 N.C. Sess. L. 163, H.B. 514, section 1. The wording was changed in 2011 to specifically allow motions "in a civil action in a county that is a part of a multicounty judicial district" to be heard in another county "which is part of that same judicial district with the permission of the senior resident superior court judge of that district . . . ." 2011 N.C. Sess. Laws 317, S.B. 586, section 1. Therefore, our opinion in *House of Style* is no longer applicable in civil cases as long as the senior resident superior court judge permits the case to be heard out of county. *See* N.C.R. Civ. P. 7(b)(4) (2013).

in or out of session, without 'all the parties uniting in the proceedings.' "). Therefore, as provided by section 7A-47.1, a trial court may exercise in chambers jurisdiction in a nonjury matter arising in his or her district to enter an order out of session and without the consent of the parties. *See* N.C. Gen. Stat. § 7A-47.1; *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294.

Here, there is no evidence in the record to indicate that the parties consented to the trial court's entry of its 11 April 2013 order out of session. Nonetheless, Defendant's motion for post-conviction DNA testing did not require the presence of a jury, the hearing on the motion was conducted while Judge Alford was sitting in Craven County Superior Court, and Judge Alford remained in District II at the time he filed the written order. For these reasons, section 7A-47.1 operated to allow the trial court to issue this out-of-session order. Accordingly, Defendant's first argument is overruled.

II. Defendant's Motion for Post-Conviction DNA Testing

The standard of review for the denial of a motion for post-conviction DNA testing is

> analogous to the standard of review for a motion for appropriate relief. Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*.

State v. Gardner, __ N.C. App. __, __, 742 S.E.2d 352, 354 (2013). At the hearing on a motion for appropriate relief, the defendant has "the burden . . . of establishing the facts essential to his claim by a preponderance of the evidence." *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001) (citation and internal quotation marks omitted). A conclusory statement, alone, is not sufficient to satisfy this burden. *Gardner*, __ N.C. App. at __, 742 S.E.2d at 356 (stating that the defendant's burden of showing materiality in a motion for post-conviction DNA testing "requires more than [a] conclusory statement that the ability to conduct the requested DNA testing is material to [his] defense") (citations, internal quotation marks, and brackets omitted).

[2] On appeal, Defendant argues that the trial court's order should be reversed because his motion and amended affidavit, together, demonstrated the necessary conditions for the court to grant his motion for post-conviction DNA testing under section 15A-269. In response, the State asserts that section 15A-269 is not applicable in this case.

Alternatively, the State contends that Defendant failed to show how DNA testing was material to his case and failed to demonstrate that there are "newer and more accurate tests that would be significantly more accurate and probative of the identity of the [true] perpetrator." Finally, the State argues that — even if the allegations in the affidavit support a finding of materiality — Defendant waived his right to test any evidence before a jury by entering an *Alford* guilty plea. We affirm the trial court's order on grounds that Defendant failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results. We do not address the State's argument that Defendant is not entitled to post-conviction DNA testing because he entered an *Alford* plea.

(1) Background

Under section 15A-269,

> (a) A defendant may make a motion . . . for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> > (1) [The evidence is] material to the defendant's defense.
> >
> > (2) [The evidence is] related to the investigation or prosecution that resulted in the judgment.
> >
> > (3) [The evidence meets] either of the following conditions:
> >
> > > a. It was not DNA tested previously.
> > >
> > > b. It was tested previously, but the requested DNA test would provide results that are *significantly more accurate* and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> > (1) The conditions set forth in . . . subsection (a) . . . have been met;
> >
> > (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable

> probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added).

Given the allegations in Defendant's motion and amended affidavit,[8] the trial court made the following pertinent findings of fact and conclusion of law:

> 10. . . . [D]efendant has failed stated [sic] how . . . additional DNA testing would be material to his defense. . . . [D]efendant merely makes a conclusory statement.
>
> 11. . . . [D]efendant has failed to show how "newer and more accurate testing" [w]ould be significantly more accurate and probative of the identity of the perpetrator.
>
> . . . .
>
> . . . [D]efendant has failed to meet all requirements of § 15A-269.

On appeal, Defendant concedes that the statements in his *pro se* motion are insufficient to justify post-conviction DNA testing under section 15A-269, but argues that the additional statements in his amended affidavit sufficiently "discuss [his] reasoning for entering his *Alford* plea, the DNA mixture that did not exclude or isolate him, his cohabitation with the victim, and his understanding that more accurate methods of DNA testing are now available" to justify relief under section 15A-269. We disagree.

(2) Applicability of Section 15A-269

The State argues that section 15A-269 is not applicable in this case because Defendant seeks testing to show a *lack* of biological evidence. For support, Defendant cites to our opinion in *State v. Brown*, where we commented that section 15A-269 "provides for testing of 'biological evidence' and not evidence in general." 170 N.C. App. 601, 609, 613 S.E.2d 284, 289 (2005), *superseded by statute on other grounds*,

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8. Though the State does not contest the propriety of Defendant's amended affidavit, we note that amendments to the analogous motion for appropriate relief are permissible under N.C. Gen. Stat. § 15A-1415. Thus, amendments to a motion for post-conviction DNA testing are similarly permissible pursuant to standards prescribed in section 15A-1415.

State v. Norman, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010). This argument is without merit.

In *Brown*, the defendant, a former assistant principal, was indicted for and convicted of attempted second-degree rape of a former student. *Id.* at 602, 613 S.E.2d at 285. Defendant did not appeal that conviction. *Id.* at 603, 613 S.E.2d at 285. As a result, evidence in the form of a torn blouse and pants was turned over to the local police department. *Id.* Five months later, Defendant filed a motion for post-conviction DNA testing of a torn blouse, a pair of pants, an undergarment, nail clippings and hair samples, and other items related to his conviction. *Id.* at 603, 609, 613 S.E.2d at 285, 288–89. Despite this motion, the blouse and jeans were destroyed after the victim indicated that she did not want them returned. *Id.* The other evidence had never been collected and was not available for testing. *See id.* at 603–04, 613 S.E.2d at 286. One month later, the trial court denied the defendant's motion because "no . . . testing could be conducted." *Id.* at 603, 613 S.E.2d at 286.

On appeal, this Court declined to review the trial court's decision because Article 13, which deals with the DNA database and databank, did not at that time include a provision for appellate review of an order denying post-conviction DNA testing.[9] *Id.* at 607, 613 S.E.2d at 287. After concluding that we had no authority to review the defendant's petition for writ of *certiorari*, we also declined to review the matter pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *Id.* at 608, 613 S.E.2d at 288. In so holding, we explained that no manifest injustice was present in the case because the defendant was asking for testing to "show a lack of DNA evidence, thereby corroborating his testimony [, which denied the allegations made at trial]." *Id.* at 609, 613 S.E.2d at 288–89. Commenting that section 15A-269 did not apply when a defendant seeks to demonstrate a "lack of biological evidence" and noting that the defendant was only charged with *attempted* rape, not actual rape, we concluded that "the absence of DNA evidence would not necessarily exonerate [the] defendant." *Id.* at 609, 613 S.E.2d at 289.

Unlike the defendant in *Brown*, Defendant here is seeking "[a] conclusive test on the biological and other samples taken into evidence in this matter." He is not seeking to show a lack of DNA evidence. Accordingly, *Brown* does not operate to bar Defendant's motion.

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9. Appellate review of an order denying a defendant's motion for DNA testing is now appealable as of right under section 15A-270.1 (2013).

(3) Accuracy and Probative Value of Newer Tests

The State also argues that the trial court properly denied Defendant's motion because Defendant failed to demonstrate "how 'newer and more accurate testing' would be significantly more accurate and probative of the identity of the perpetrator." We agree.

In his *pro se* motion for post-conviction DNA testing, Defendant referenced discussions with "DNA [e]xperts," described a "new technique known as 'Touch DNA' that allows [f]or the amplification and analysis of very minute amounts [o]f cellular / DNA material," and alleged that the items sought to be tested "can now be subjected to newer and more accurate testing which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results." In his amended affidavit, Defendant provided the following additional information:

> 7. It is my understanding that, since 2003 when this case was initiated, more accurate methods of DNA testing have been developed and put in place in forensic laboratories, and such methods would have a reasonable probability of contradicting the prior test results.
>
> 8. Had more accurate DNA testing methods excluded me as the perpetrator of this crime, the result of this case would have been different, inasmuch as I would not have entered an *Alford* guilty plea, but would have submitted the matter to a jury at trial.

These allegations do not establish that the requested DNA tests are "significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results" under section 15A-269(a)(3)(b).

As we noted in *State v. Foster*, a mere conclusory statement is insufficient to establish materiality. __ N.C. App. __, __, 729 S.E.2d 116, 120 (2012). Similarly, such a statement is insufficient to establish that a requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results. *See id.* Rather, the defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a

reasonable probability of contradicting the previous test results. *See* N.C. Gen. Stat. § 15A-269.

In this case, Defendant's mere allegations that "newer and more accurate testing" methods exist, "which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results" are incomplete and conclusory. Even though he named a new method of DNA testing, he provided no information about how this method is different from and more accurate than the type of DNA testing used in this case. Without more specific detail from Defendant or some other evidence, the trial court could not adequately determine whether additional testing would be significantly more accurate and probative or have a reasonable probability of contradicting past test results. For these reasons, we conclude that the court properly denied Defendant's motion for post-conviction DNA testing. Accordingly, Defendant's second argument is overruled, and the trial court's order is

AFFIRMED.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
HOWARD JUNIOR EDGERTON

No. COA13-1235

Filed 17 June 2014

Domestic Violence—violating a protective order with deadly weapon—jury instructions—violating a protective order

The trial court committed plain error in a violating a domestic violence protective order ("DVPO") case. Because the trial court concluded that the knife used in this case was not a deadly weapon per se, the trial court should have instructed the jury on the lesser-included misdemeanor offense of violating a DVPO. Failing to instruct the jury on the lesser-included misdemeanor offense likely affected the outcome in the case.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 21 March 2013 by Judge Gary M. Gavenus in Rutherford County Superior Court. Heard in the Court of Appeals on 20 March 2014.

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

Michael E. Casterline, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Howard Junior Edgerton ("Defendant") appeals from a 21 March 2013 judgment sentencing him as a level VI offender for violating a domestic violence protective order ("DVPO") with a deadly weapon. Defendant argues that the trial court erred by failing to instruct the jury on the lesser-included misdemeanor offense of violation of a DVPO. We agree and order a new trial.

I. Facts & Procedural History

Defendant was indicted on 9 July 2012 for violating a DVPO with a deadly weapon in 11 CRS 052801, and with assault with a deadly weapon with intent to kill ("AWDWIK"), assault by strangulation, and second-degree kidnapping in 11 CRS 052829. Defendant was indicted with AWDWIK and second-degree kidnapping in 11 CRS 052830 and 11 CRS 052831. On 9 July 2012, Defendant was charged with habitual felon status in 12 CRS 1594. Defendant stood trial on 18–21 March 2013 in Rutherford County Superior Court. The record and trial transcript tended to show the following facts.

Brandon Hamilton ("Mr. Hamilton") testified first for the State. Mr. Hamilton said Jacquie King ("Ms. King"), Amber Harkless ("Ms. Harkless"), and Dianna Moore ("Ms. Moore") drove to pick up Defendant around 9:30 or 10:00 p.m. on 27 August 2011. The group was traveling to the "Boom Boom Room," which Mr. Hamilton described as a "bootlegger" in Lake Lure, where the group "had a few drinks." Mr. Hamilton said he knew that Defendant and Ms. King were previously in a relationship before the evening's events took place.

Mr. Hamilton described Defendant as "cool" and "laid back" initially, but then said Defendant became angry after Mr. Hamilton "complimented [Ms. King] on her weight loss." After Mr. Hamilton made these remarks, Mr. Hamilton said the situation escalated and that Defendant threatened him. After Defendant levied these threats, the group got into

the car to take Defendant home, whereupon Defendant started hitting Ms. King and brandished a pocket knife. After the group stopped the car, Defendant left the vehicle, re-entered, and then began "sawing [Ms. King's] neck with a dull knife." Mr. Hamilton said he knew it was a dull knife because "if it was a sharp knife, I am pretty sure – he was sawing at it – she would be dead right now."

Mr. Hamilton told Ms. Harkless and Ms. King to leave the car, and Defendant continued to threaten them both. Ms. Harkless then drove Defendant to his home and later called police, who met Defendant at his home. Mr. Hamilton spoke with police when they arrived but did not give a statement at that time. Mr. Hamilton said Ms. King had "road rash and scars on her neck. She had a few knots on her." Mr. Hamilton said that Defendant's sawing of Ms. King's neck produced only scratches because the knife was "completely dull." Mr. Hamilton eventually gave a statement to police.

Ms. King testified at trial, saying she was in an abusive relationship with Defendant. Ms. King said she was afraid of Defendant and that Defendant

> beat me, punch[ed] me in my face. One time he kicked me down probably a 20-foot embankment. It was so many things. It was abuse every day. Hit me. He would get drunk and punch me in my face, kick me. He tried to burn my trailer one time. He pulled my mattress into the middle of my trailer. I had people staying with me that had a baby, and he said get your baby out of the house because I am about to burn this down.

Ms. King said she stayed in a relationship with Defendant because she was "scared of him" Ms. King later obtained a one-week temporary restraining order in April 2011 after she said Defendant "pulled a shotgun on" her and her friend. Ms. King later received a year-long DVPO requiring Defendant to avoid all contact with Ms. King.

After the DVPO was granted, Ms. King said Defendant continued to seek contact with her. Eventually Ms. King "went back to him" because she said Defendant "acted like he had changed – like he wasn't going to be abusive anymore." Ms. King said Defendant was "[c]alm, respectful, not aggressive at all" when he visited her home the two weeks prior to the evening at issue.

Ms. King said the trip to the Boom Boom Room was the first time that she went out to a club with Defendant since obtaining the DVPO.

Ms. King also said Defendant was calm at first during the group's time at the Boom Boom Room, but that Defendant became aggressive and began to accuse her of having sexual relations with other members of the group. Ms. King said she began to get nervous and wanted to leave Defendant at the Boom Boom Room, but that Defendant was insistent that he be brought home. After the group allowed him to travel with them, Ms. King said Defendant became "wild" and that he began punching Ms. King in the face.

Ms. Harkless stopped the vehicle when she realized that Defendant was hitting Ms. King. Mr. Hamilton, Ms. Moore, and Defendant exited the vehicle and Mr. Hamilton and Ms. Moore confronted Defendant. Ms. King said that Defendant began to chase Ms. Moore and Mr. Hamilton with a knife and that Defendant was trying to inflict injuries with the knife. Ms. King said Defendant then reentered the vehicle, ordered Ms. Harkless to drive, and began "cutting [Ms. King's] throat." Ms. King said Defendant continued to choke her and told her she would die that evening. Ms. King also said Defendant wasn't "slicing [her] throat" but that Defendant was "digging in with the knife and cutting knicks on my neck, cutting parts of my neck." Ms. King said the cuts on her neck bled, but she did not know the amount of blood produced by the cuts.

Ms. King said she was able to dislodge a car door while the vehicle was still traveling around 40 to 50 miles per hour toward Defendant's father's home, where Defendant lived. As the car approached the home at around 5 to 10 miles per hour, Ms. King said she was pushed by Defendant from the vehicle. Twenty minutes later, Ms. King said a number of police officers returned with Defendant in custody. Ms. King said Defendant was "beating his head against the police window and screaming [her] name" while officers took photos of her injuries.

Ms. King also described her interview with Detective Ricky McKinney ("Detective McKinney") of the Rutherford County Sheriff's Department. Ms. King initially told Detective McKinney that she met Defendant at the Boom Boom Room rather than that the group had picked Defendant up beforehand. Ms. King said her statement was not true and that she told Detective McKinney this because she did not want to disappoint her family. Ms. King also gave a statement to Detective McKinney, which also contained an incorrect statement about the composition of the group who traveled to the Boom Boom Room.

Corporal Stephen Ellis ("Corporal Ellis") testified next at trial. Corporal Ellis responded to a 911 hang-up call and information that Defendant "was assaulting people" in a vehicle. Corporal Ellis traveled

toward Defendant's residence and located Ms. King laying on the ground alongside Grassy Knob Road. Corporal Ellis spoke with Ms. King about the evening's events and said she was afraid and "visibly upset." Ms. King led Corporal Ellis to Defendant's residence because Corporal Ellis had information that Defendant was possibly holding Ms. Harkless against her will. Corporal Ellis arrested Defendant, whom Corporal Ellis said became belligerent after being arrested.

Corporal Ellis took Defendant back to where he originally found Ms. King and began to complete an incident report, to photograph Ms. King's injuries, and to take statements from Ms. King and Ms. Harkless. Corporal Ellis also said Defendant became irate in the back of his patrol vehicle and hit his head against the car's windows. Corporal Ellis said Ms. King had "lots of red marks on her chest and around her neck area, . . . visible nicks or cuts to the top of her throat" and several bruises. Corporal Ellis also observed blood on Ms. King's shirt.

Officer Tyler Greene ("Officer Greene") was with Corporal Ellis on the evening at issue in this case. Officer Greene recounted similar statements as Corporal Ellis. Officer Greene said he observed cuts on Ms. King's neck and chin, but that they were difficult to see in the photograph presented at trial.

Detective McKinney testified at trial. Detective McKinney interviewed Ms. King, Ms. Harkless, and Ms. Moore two days after the events in question at the sheriff's office on 29 August 2011. Mr. Hamilton did not provide a statement at that time. Forensics Investigator Bruce Green testified that Ms. King brought a shirt to the sheriff's office on 31 August 2011, which Mr. Green identified as a shirt with blood staining.

The State rested its case and Defendant made a motion to dismiss. The trial court granted Defendant's motion with respect to all charges involving Ms. Harkless (11 CRS 52830) and Ms. Moore (11 CRS 52831). The trial court also dismissed the kidnapping charge involving Ms. King in 11 CRS 52829, but denied the motion as relating to the remaining charges. Defendant did not present any evidence. The jury found Defendant guilty of violating the DVPO with a deadly weapon in 11 CRS 52801, but not guilty of the remaining offenses. Defendant then entered a guilty plea to Habitual Felon status and was sentenced in the aggravated range for a Class C felony as a prior record level VI. Defendant was sentenced to an active term of 168 to 211 months. Defendant filed written notice of appeal on 16 April 2013.

II. Jurisdiction & Standard of Review

Defendant appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). However, Defendant did not timely file his notice of appeal in violation of N.C. R. App. P. 4. Failure to comply with Rule 4 constitutes a jurisdictional default, which "precludes the appellate 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). Accordingly, we dismiss Defendant's appeal, but, in our discretion, we allow Defendant's petition for writ of certiorari to review the merits of his arguments pursuant to N.C. R. App. P. 21.

On appeal, Defendant argues that the trial court erred in refusing to instruct the jury on a lesser-included misdemeanor offense of violating a DVPO when it instructed the jury on violating a DVPO with a deadly weapon. Defendant did not object to the jury instruction at issue here, meaning that it was not preserved for appeal. However, "[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

"To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Analysis

We hold that because the trial court concluded that the knife used in this case was not a deadly weapon *per se*, the trial court should have instructed the jury on the lesser-included misdemeanor offense of violating a DVPO. We also hold that failing to instruct the jury on the lesser included misdemeanor offense was plain error because it likely affected the outcome in this case.

In *State v. Weaver*, our Supreme Court adopted a definitional test for determining whether one crime is a lesser included offense of another crime. 306 N.C. 629, 635, 295 S.E.2d 375, 378–79 (1982), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993).

That test requires that

> all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 535, 295 S.E.2d at 379.

Under the definitional test, the misdemeanor crime of violating a DVPO[1] is a lesser included offense of the felony crime of violating a DVPO with a deadly weapon.[2] Both crimes have identical elements of (i) knowingly (ii) violating a (iii) valid DVPO, except that the felony offense includes an additional element that the perpetrator be in "possession of a deadly weapon on or about his or her person or within close proximity to his or her person." *Compare* N.C. Gen. Stat. § 50B-4.1(a) *with* N.C. Gen. Stat. § 50B-4.1(g). The felony offense also explicitly references the misdemeanor offense. N.C. Gen. Stat. § 50B-4.1(g) ("Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.").

As the misdemeanor violation of a DVPO is a lesser included offense of the felony violation of a DVPO, Defendant was also entitled to a jury instruction on that charge " 'if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The dispositive factor is the presence of evidence to support a conviction of the lesser-included offense. *Id.* As such, we must determine whether the jury could have rationally found that the knife used by the Defendant did not constitute a deadly weapon and also whether there is evidence to support a conviction of misdemeanor violation of a DVPO.

In North Carolina, a "deadly weapon is one which, under the circumstances of its use, is likely to cause death or great bodily harm." *State v. Walker*, 204 N.C. App. 431, 444, 694 S.E.2d 484, 493 (2010). Generally,

1. N.C. Gen. Stat. § 50B-4.1(a) (2013).

2. N.C. Gen. Stat. § 50B-4.1(g) (2013).

a weapon is determined to be "deadly" depending on its use and its characteristics. However, North Carolina courts have found some weapons to constitute deadly weapons *per se*. "Some weapons are *per se* deadly, e.g. a rifle or pistol: others, owing to the great and furious violence and manner of use, become deadly." *State v. Cauley*, 244 N.C. 701, 707, 94 S.E.2d 915, 920 (1956). This Court has found that knives are not always dangerous weapons *per se* and that the circumstances of each case are determinative. *See State v. Smallwood*, 78 N.C. App. 365, 368, 337 S.E.2d 143, 144–45 (1985).

In this case, the trial court concluded that the knife used by the Defendant was not a deadly weapon *per se*, as evidenced by the trial court's decision not to instruct the jury that the weapon used by the Defendant was deadly as a matter of law. The trial court instructed the jury that in order to find the Defendant guilty of violating a DVPO while in possession of a deadly weapon, the jury must "consider the nature of the knife, the manner in which it was used, and the size and strength of the defendant as compared to the victim." The record also shows conflicting evidence as to whether or not the knife used by the Defendant on the victim was capable of producing death or great bodily harm. For example, Mr. Hamilton stated that the knife was so dull that even though Defendant was "sawing" Ms. King's neck with the pocket knife, Ms. King was left with only "knicks" on her neck. However, the jury may also consider the nature of the knife's use, the size of the knife, and the strength of the party when determining whether the knife is a deadly weapon. *State v. Palmer*, 293 N.C. 633, 643, 239 S.E.2d 406, 413 (1977) ("If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict."). Therefore, the trial court correctly determined that the knife used by the Defendant in this case was not a deadly weapon *per se*, and properly left this determination to the jury.

Having instructed the jury to determine whether the knife used in this case constituted a deadly weapon, the trial court should have next instructed the jury on the lesser-included misdemeanor offense. This Court was presented with a similar issue in *Tillery*.

In *Tillery*, the Defendant used a 2x4 board in the course of an assault. 186 N.C. App. at 447, 651 S.E.2d at 292. The trial court instructed the jury on the offense of assault with a deadly weapon inflicting serious injury, but refused to instruct on the lesser-included offense of misdemeanor

assault inflicting serious injury. *Id.* at 448, 651 S.E.2d at 293. On appeal, the Defendant argued that the trial court erred in refusing to instruct on the lesser-included misdemeanor. *Id.* at 449, 651 S.E.2d at 293. This Court agreed, holding that because the trial court did not find the 2x4 board to be a deadly weapon *per se*, the trial judge should have instructed the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. *Id.* at 451, 651 S.E.2d at 294; *see also State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (finding plain error for the trial court's failure to instruct the jury on the lesser-included misdemeanor assault charge, when "[t]here is sufficient evidence from which the jury could find that the [weapons used] were not used as deadly weapons").

Here, as in *Tillery*, the evidence presented at trial conflicted over whether the weapon used by the Defendant constituted a deadly weapon. In both cases, the only element that distinguished the felony offense from the misdemeanor offense was the Defendant's use of a deadly weapon in the course of the crime. We hold that, in this case, based on conflicting evidence of the knife's deadly qualities, a jury could have rationally found the Defendant guilty of the lesser-included offense of misdemeanor violation of a DVPO.

We must next consider whether the trial court's failure to instruct the jury on the lesser-included misdemeanor offense rose to the level of plain error. "In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378–79 (1983) (quotation marks and citation omitted).

Here, the State presented a strong case for the lesser-included violation of the DVPO. Defendant signed the DVPO. The timeframe for the DVPO was in effect at the time of the incident. The DVPO was filed on 18 May 2011, was effective until 18 May 2012, and the incidents at issue occurred on 27 August 2011, clearly within the time period of the DVPO. There was also extensive testimony that Defendant contacted and sought contact with Ms. King, which concerns whether he knowingly violated the DVPO.

At trial, Defendant was found guilty of violating the DVPO with a deadly weapon; all other charges were dismissed or Defendant was found not guilty by the jury. The jury returned a not guilty verdict for two charges that included an element of a deadly weapon, including assault with a deadly weapon under N.C. Gen. Stat. § 14-32(b) (2013). It is unclear whether the jury considered the knife a "deadly weapon"

as to that charge, or whether the jury did not consider the injuries Ms. King sustained to be "serious" under § 14-32. However, the record shows there was extensive testimony about bruising, cuts, and other injuries to Ms. King, as well as testimony that Defendant's knife was very dull. Whether the jury did or did not believe the knife was a deadly weapon, however, there was not a sentencing option to find Defendant guilty solely of violating the DVPO. With the elements of the misdemeanor DVPO violation likely met, the jury's only method to sentence Defendant for violating the DVPO was through the felony violation of a DVPO with a deadly weapon. The lack of the misdemeanor sentencing option, in light of the jury's finding that Defendant was not guilty of assault with a deadly weapon or AWDWIK, likely impacted the jury's finding of guilt on the felony charge. Accordingly, the trial court's failure to instruct on the misdemeanor of violating the DVPO rose to the level of plain error. As such, we remand this matter for a new trial. In light of our decision, we decline to address Defendant's remaining assignments of error.

IV. Conclusion

For the reasons stated above, we order a

NEW TRIAL.

Judge STROUD concurs.

Judge DILLON dissenting.

I do not agree with the majority that any error by the trial court in failing to instruct the jury on the lesser-included misdemeanor domestic violence protective order ("DVPO") violation rose to the level of plain error; and, therefore, I respectfully dissent.

A person who knowingly violates a DVPO commits a misdemeanor, *see* N.C. Gen. Stat. § 50B-4.1(a) (2013); unless the person who violates the DVPO does so "while in the possession of a deadly weapon on or about his or her person or within close proximity to his or her person[,]" in which case that person is guilty of a felony. N.C. Gen. Stat. § 50B-4.1(g). As the majority correctly points out, the question is whether any error by the trial court in failing to instruct the jury on the lesser misdemeanor DVPO in the present case rose to the level of plain error; that is, whether the jury **probably** would have convicted Defendant of misdemeanor DVPO, thereby concluding that the State had failed to prove that the knife was a "deadly weapon." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

The pocketknife, which Defendant brandished in the victim's face and about her neck while choking her and threatening to kill her, had a blade which was described at trial as a "little duller than average." I certainly believe it is *possible* that the jury could have determined that the knife was not a deadly weapon, and would have, therefore, convicted Defendant of only a misdemeanor DVPO violation had it been instructed on this lesser-included offense. However, I also believe that the evidence was sufficient to sustain the finding that the knife was, indeed, a deadly weapon. Accordingly, I cannot say that the jury "probably" would have convicted Defendant of a misdemeanor DVPO if given that option.

The majority argues that the failure to instruct on a misdemeanor DVPO violation had a "probable impact" because the jury's verdict to convict on the felony DVPO violation was inconsistent with their decision to acquit Defendant of assault with a deadly weapon and AWDWIK, crimes which require a finding that Defendant possessed a deadly weapon. In explaining inconsistent verdicts, our Supreme Court has stated as follows:

> [Inconsistent verdicts] should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, probably reached its conclusion on [one offense], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [other offense].
>
> . . . .
>
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given the uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

State v. Mumford, 364 N.C. 394, 399-400, 699 S.E.2d 911, 915 (2010) (quoting *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461 (1984)). Therefore, following our Supreme Court's rationale in *Mumford*, I cannot say that, in the present case, it is **probable** the jury would have acquitted Defendant of a felony DVPO violation based on its acquittal of the assault charges. It is "equally possible" that the jury was convinced of Defendant's guilt of the Chapter 50B charge, but that it reached an

inconsistent verdict on the Chapter 14 assault charges – assuming that the verdicts were, indeed, inconsistent[1]– through "mistake, compromise or lenity[.]" *Id.*

STATE OF NORTH CAROLINA
v.
MARKEITH RAYSHOUN MITCHELL, DEFENDANT

No. COA13-1080

Filed 17 June 2014

1. Breaking or Entering—State's burden of proof—either breaking or entering—acting in concert

The State's burden of proof in a prosecution for breaking or entering a motor vehicle is satisfied by evidence of *either* a breaking *or* an entering. Where the trial court instructs the jury on the acting in concert doctrine, the State's burden as to the element of breaking can be satisfied by showing either that defendant personally committed the breaking or that he acted in concert with someone to commit the breaking.

2. Breaking or Entering—motor vehicle—intent to steal vehicle—no intent to steal contents

The trial court did not err by denying defendant's motion to dismiss a charge of breaking or entering a motor vehicle where defendant argued that there was intent to steal the vehicle, but no intent to steal anything inside the vehicle. Defendant's argument, however, was rejected in *State v. Clark*, 208 N.C. App. 388.

3. Breaking or Entering—motor vehicle—jury instructions—disjunctive

The trial court did not commit reversible error by instructing the jury on a theory of breaking *or* entering a motor vehicle when the indictment alleged that defendant broke *and* entered the vehicle.

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1. It is possible that the jury's verdicts were not inconsistent. Specifically, whether a weapon is deadly in the context of the Chapter 14 assault crimes for which Defendant was acquitted might depend on the "circumstances of [the weapon's] use," *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002), whereas the Chapter 50B felony for which Defendant was convicted does not require that the defendant "use" the weapon at all, but only that he *possessed* it when he violated the DVPO. Accordingly, the jury may have determined that the knife was a deadly weapon, but that he did not use it in a manner which was likely to cause death.

4. Trespass—first degree—belief of right to enter property—instruction denied

There was no plain error in a prosecution for first-degree trespass where the trial court refused to instruct the jury on defendant's affirmative defense of a reasonable belief that he was entitled to enter the property. The jury's verdict as to larceny charges precluded a finding that defendant believed he had a legal right to enter the property.

Appeal by defendant from judgments entered 16 May 2013 by Judge Marvin K. Blount, III in Nash County Superior Court. Heard in the Court of Appeals 22 January 2014.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

William B. Gibson for defendant-appellant.

GEER, Judge.

Defendant Markeith Rayshoun Mitchell appeals from his convictions of felonious breaking or entering a motor vehicle, first degree trespass, injury to real property, and attempted larceny. On appeal, defendant primarily contends that the trial court erred in denying his motion to dismiss the charge of breaking or entering and in instructing the jury on a charge of "breaking or entering" when the indictment charged "breaking *and* entering." We hold that because of the disjunctive language of N.C. Gen. Stat. § 14-56 (2013), the State need not prove both a breaking and an entering and the instruction was not erroneous. The State's evidence that defendant opened the car door with intent to steal the car itself was substantial evidence that defendant committed a breaking with intent to commit a felony therein. Because defendant does not challenge the sufficiency of the State's evidence as to the remaining elements of the charge, we hold that the trial court did not err in denying the motion to dismiss.

Facts

The State's evidence tended to show the following facts. On 26 March 2012, defendant offered Marcus Lucas $50.00 to "help him get a car." The two men drove in defendant's Jeep Cherokee to 1021 Russell Street, the property where the vehicle was located. When they arrived, the fence around the property was locked. Defendant and Lucas tore the fence down and entered the property.

Once inside, defendant backed his Jeep up to a shelter in the backyard where a 1979 Dodge Aspen was parked. Defendant and Lucas exited the Jeep, and defendant opened the door of the Dodge. Lucas stood back as defendant retrieved the tire pump from his Jeep and began pumping up the flat tire on the Dodge.

Meanwhile, Officer J.K. Richardson of the Rocky Mount Police Department received a call that a breaking and entering was in progress on 1021 Russell Street. Officer Richardson arrived at the scene a short time later and announced his presence as he approached the garage. Although Lucas immediately fled, defendant, who was at the rear of the Dodge pumping the tire, did not see the police arrive. Defendant was arrested at the scene, while Lucas was arrested later.

After taking defendant into custody, Officer Richardson returned to the garage. The Jeep was backed up to the garage approximately five feet from the Dodge, and the trunk and driver's door of the Jeep were open. Inside the Jeep, Officer Richardson saw an air compressor and a metal pipe with pieces of rope on each end, an apparatus that is normally used for towing vehicles. There was a rope attached to the back of the Jeep that went toward the Dodge, but was not yet hooked up to the Dodge.

The driver's side door of the Dodge had been left open. Officer Richardson concluded that the door had recently been opened because it was pollen season and the outside of the Dodge and the garage were both very dusty, but there was no pollen on the interior of the Dodge or on the tool kits and tarps stored inside the Dodge.

The Dodge and the property where it was parked belonged to Brenda Simmons, who had inherited it from her deceased parents. Ms. Simmons had never opened the driver's door of the Dodge after her father passed away. She had visited her property the evening prior to defendant's arrest while it was still daylight out and, from her vantage point in the backyard, she had not noticed the car door of the Dodge being open. Ms. Simmons did not know defendant or Lucas and did not consent to either of them coming on her property or taking the Dodge.

On 4 June 2012, defendant was indicted for attempted larceny, first degree trespass, injury to real property, and breaking and entering a motor vehicle. At trial, defendant testified on his own behalf. He claimed that, on the morning of 26 March 2012, he was out driving when he saw Lucas motion for him to stop. Lucas told defendant that a friend had given him a car and that he needed someone to help him get the car home. He offered defendant $50.00 to help, and defendant agreed. Lucas

already had a chain for towing, but they went to defendant's uncle's house to get a towing bar and an air compressor. When they arrived at the property where the car was located, defendant saw that there was a locked fence, but Lucas pulled the fence over to one side with his hands.

Once they gained entry onto the property, defendant backed the Jeep up to the Dodge while Lucas retrieved a chain off the dog house in the backyard. At that point, the police arrived and Lucas fled. Defendant did not flee because he did not know that they were stealing a car. Defendant denied having ever touched the Dodge, having opened the car door, or having noticed that the door was ajar.

The jury found defendant guilty of attempted larceny, first degree trespass, injury to real property, and breaking or entering a motor vehicle. The trial court sentenced defendant to 60 days imprisonment on the consolidated charges of attempted larceny, first degree trespass, and injury to real property. The trial court also sentenced defendant to six to 17 months imprisonment for breaking or entering a motor vehicle, but suspended the sentence and imposed 24 months of supervised probation. Defendant timely appealed to this Court.

I

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

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). We must "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Defendant was charged with breaking and entering a motor vehicle in violation of N.C. Gen. Stat. § 14-56. In order to obtain a conviction for breaking and entering a motor vehicle,

> "the State must prove the following five elements beyond a reasonable doubt: (1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein."

State v. Clark, 208 N.C. App. 388, 390-91, 702 S.E.2d 324, 326 (2010) (quoting *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004)). Defendant contends that the State presented insufficient evidence of the first and fifth elements.

As to the first element, evidence of *either* a breaking or an entering satisfies the State's burden of proof. *See State v. Myrick*, 306 N.C. 110, 114, 291 S.E.2d 577, 579 (1982) (holding, under identical language in N.C. Gen. Stat. § 14-54(a) (1979), State "need not show both a breaking and an entering").

This Court has held that

> "[b]reaking is defined as any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. A breaking may be actual or constructive. A defendant has made a constructive breaking when another person who is acting in concert with the defendant actually makes the opening. Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Baskin, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (2008) (quoting *State v. Graham*, 186 N.C. App. 182, 196-97, 650 S.E.2d 639, 649 (2007)). A breaking may be established by a " 'mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key.' " *State v. Garcia*, 174 N.C. App. 498, 502, 621 S.E.2d 292, 296 (2005) (quoting *State v. Bronson*, 10 N.C. App. 638, 640, 179 S.E.2d 823, 825 (1971)).

Where, as here, the trial court instructs the jury on the acting in concert doctrine, the State's burden as to the element of breaking can be satisfied by showing either the defendant personally committed the breaking or that he acted in concert with someone to commit the breaking. *See Baskin*, 190 N.C. App. at 109-10, 660 S.E.2d at 572 (holding that

sufficient evidence of breaking and entering by defendant existed when passenger in car driven by defendant reached inside victim's car and stole victim's satchel).

In this case, the evidence viewed in the light most favorable to the State is sufficient to show that defendant, or, alternatively, Lucas acting in concert with defendant committed a breaking by opening the door of the Dodge. Officer Richardson testified that when he arrived on the scene, defendant was standing near the Dodge and the Dodge's driver-side door was open. The State also presented evidence that the door must have been recently opened because there was no pollen inside although the outside of the car was covered in pollen and the owner of the Dodge never opened the doors of the Dodge and its door was not open the previous afternoon. Moreover, defendant testified that Lucas opened the car door, while Lucas testified that defendant opened the door. From this evidence, a reasonable juror could infer that defendant opened the car door, or, alternatively, that Lucas opened the door and was acting in concert with defendant.

[2] Defendant also argues that there was insufficient evidence of the fifth element -- that the act was committed "with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-56. Defendant argues that while the evidence presented by the State may be sufficient to show that defendant intended to steal the car itself, it was not sufficient to show intent to steal the "thing[s] of value" found therein. *Id.*

Defendant's argument, however, was rejected by this Court in *Clark*, 208 N.C. App. at 393, 702 S.E.2d at 327-28. In *Clark*, this court held that the intent to steal the motor vehicle itself may satisfy the intent element under N.C. Gen. Stat. § 14-56. 208 N.C. App. at 393, 702 S.E.2d at 327-28. Defendant concedes that the State presented sufficient evidence that defendant, or Lucas acting in concert with defendant, intended to steal the vehicle itself. Under *Clark*, such evidence is sufficient. We, therefore, conclude that the State presented substantial evidence of each of the elements of the charge of breaking or entering a motor vehicle. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

II

[3] Defendant next argues that the trial court committed reversible error by instructing the jury on a theory of breaking or entering a motor vehicle when the indictment alleged that defendant broke and entered the vehicle. "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*,

202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Defendant's argument has previously been rejected regarding the offense of breaking or entering a building under N.C. Gen. Stat. § 14-54 (2013). Under this statute, where an indictment alleging a violation of N.C. Gen. Stat. § 14-54 charges the defendant with "breaking *and* entering," it is not error for the trial court to instruct on breaking *or* entering. *State v. Boyd*, 287 N.C. 131, 145, 214 S.E.2d 14, 22 (1975), s*uperseded by statute on other grounds as stated in State v. Silhan*, 302 N.C. 223, 239, 275 S.E.2d 450, 464 (1981). As explained in *Boyd*:

> It has long been the law in this State in prosecutions under [N.C. Gen. Stat. § 14-54] and its similar predecessors that where the indictment charges the defendant with breaking *and* entering, proof by the State of either a breaking or an entering is sufficient; and instructions allowing juries to convict on the alternative propositions are proper.

Id. See also State v. Reagan, 35 N.C. App. 140, 143, 240 S.E.2d 805, 808 (1978) (holding no error when the defendant was indicted for breaking and entering and the trial court's charge to the jury referenced breaking or entering). The act of "breaking or entering" is an element of a charge pursuant to both N.C. Gen. Stat. § 14-54 and N.C. Gen. Stat. § 14-56. We therefore find that the rule under *Boyd* is applicable to the element of "breaking or entering" regardless whether the defendant "breaks or enters" a motor vehicle under N.C. Gen. Stat. § 14-56 or a dwelling house under N.C. Gen. Stat. § 14-54. Accordingly, we hold that the trial court did not err in instructing the jury on "breaking or entering."

III

[4] Defendant's final argument on appeal pertains to the charge of first degree trespassing. Defendant argues that the trial court erred by failing to instruct the jury on defendant's affirmative defense that he reasonably believed he had a right to enter the property. Because defendant did not request the instruction at trial, we review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must

> establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

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

For a trial court to be required to instruct the jury on an affirmative defense, the defendant must present substantial evidence, when viewed in the light most favorable to the defendant, of each element of the defense. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000). Here, defendant needed to present substantial evidence that (1) defendant believed he had a right to enter the property and (2) defendant had reasonable grounds to support this belief. *State v. Baker*, 231 N.C. 136, 140, 56 S.E.2d 424, 427 (1949).

Defendant argues that his testimony constitutes substantial evidence of this affirmative defense. Defendant testified that when he met up with Lucas on the morning of 26 March 2012, Lucas told him that a friend had given him a car, that he needed someone to help him get the car home, and that he would pay defendant $50.00 for his assistance in retrieving the car. Although the property where the car was located was enclosed by a locked fence, defendant testified that Lucas was easily able to pull the fence to one side. Under these circumstances, defendant contends, his belief that they had permission to be on the property remained reasonable.

However, even assuming, without deciding, that defendant presented substantial evidence of each element of this defense, he cannot show that the failure of the trial court to instruct the jury on this defense had a probable impact on its finding of guilt. The jury's verdict as to the larceny charges required a finding that defendant intended to steal the vehicle, or that Lucas intended to steal the vehicle and defendant acted in concert with him. In either scenario, such a finding precludes a finding by the jury that the defendant believed that he had a legal right to enter the property. Defendant has therefore failed to show that he was prejudiced by the alleged error.

No Error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
GREGORY PARKS

No. COA13-1283

Filed 17 June 2014

1. Appeal and Error—preservation of issues—failure to raise at trial—substance of article sufficiently presented

Defendant's contention regarding the corpus delicti rule was heard on appeal where the exact words were not used at trial, but the substance of the argument was sufficiently presented.

2. Criminal Law—prostitution of minor—evidence not sufficient—corpus delicti rule

The record in a prosecution for participating in the prostitution of a minor was insufficient where the State erroneously relied solely on defendant's extrajudicial statement to prove his guilt, without providing other corroborating evidence. Although the two victims gave several differing accounts of events, both testified at trial that defendant did not solicit sex from them in exchange for money or marijuana. Furthermore, defendant's extrajudicial statement regarding an alleged exchange of sex for money or marijuana was vague.

Appeal by defendant from judgments entered 11 February 2013 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 5 March 2014.

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

M. Alexander Charns for defendant-appellant.

McCULLOUGH, Judge.

Defendant Gregory Kent Parks appeals the denial of his motion to dismiss two counts of participating in the prostitution of a minor. Where the State failed to produce substantial, independent corroborative evidence to support the facts underlying defendant's extrajudicial statement, in violation of the *corpus delicti* rule, we reverse defendant's challenged convictions.

I. Background

On 10 September 2012, defendant was indicted on two counts of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4 and attaining habitual felon status. On 14 January 2013, defendant was charged by superseding indictment with two counts of participating in the prostitution of a minor in violation of N.C. Gen. Stat. § 14-190.19(a).

On 16 November 2013, Wilson County Superior Court Judge Milton F. Fitch entered an order, *sua sponte*, which provided the following:

> Upon review, the Court determined that in order to prevent any further delay of the Defendant's cases and guarantee Defendant's right to a speedy trial that the SBI laboratory expedite and conduct any and all testing of any materials submitted and held relating to these cases.
>
> This Court hereby orders that the N.C. SBI laboratory expedite and perform DNA analysis and any other requested testing on any and all materials submitted to and held by the N.C. SBI Laboratory in these cases; and a laboratory report of the results to these ordered analysis be returned to the submitting parties and to District Attorney's Office of the Seventh Prosecutorial District no later than December 21, 2012.

Prior to trial, on 1 February 2013, defendant filed a motion to dismiss the charges against him for failure by the State to test or properly preserve DNA specimens in his case and for failure to follow a 16 November 2012 order requiring the SBI laboratory to conduct any and all testing of any materials submitted and held relating to defendant's case. The trial court denied this motion.

Defendant's trial commenced at the 4 February 2013 criminal session of Wilson County Superior Court. A.J. testified that on the evening of 15 June 2012, she was at home with her friend, D.T.[1] D.T. was on the phone with defendant. D.T. told A.J. that defendant "was going to give her some marijuana for free if I walked down there with her, so I walked with her down the street." Defendant lived "three houses down, right up the street." When A.J. and D.T. arrived at defendant's house, defendant answered the door and said, "[w]ill you come in?" After they

1. Because A.J. and D.T. were minors during the commission of the alleged crimes, both seventeen years old in 15 June 2012, initials are used to protect their identities.

walked inside, defendant closed the door behind them. A.J. testified to the following:

> Well, we got in the home, there was an older man [(defendant's father)] in a wheelchair in there, and he said, "Well, y'all can walk on back here, follow me to my room." He said, "I'm not going to give you the marijuana out here." [So] I followed [D.T.] and [defendant] back to his room. And when we got in the bedroom, he pulled out a knife.

Defendant had closed his bedroom door. Defendant put the knife to A.J.'s neck and said "he was going to kill me if I didn't take my clothes off. . . . He told both of us to take our clothes off before he killed us."

A.J. testified that defendant went into an adjoining bathroom, returned with pills, and told the girls "to take the pills or he was going to kill us." A.J. took one pill.

> After [defendant] got the pills and made us take them, he told us — well, we were lying on the bed, and he just got on top of us — on me first, and he started licking me on my vagina, and then he went over to [D.T.], and he started licking on her vagina, and then he told me to just wait until he finished her.

Defendant went back and forth between A.J. and D.T. until A.J. stabbed him with a scalpel in the head. A.J. testified that she had brought a scalpel from her house and kept it in her coat pocket. After stabbing defendant, A.J. and D.T. ran out of the bedroom and unsuccessfully attempted to exit the house through a locked side door. Defendant's father was telling defendant "to stop and to let us go and that he was tired of him doing it." While A.J. and D.T. were standing by the back door, defendant stated, "[w]ell, you made my dad mad, I'm going to kill you[.]" Defendant's father followed A.J. and D.T. back to the bedroom "to get [our] clothes." After they put their clothes back on, defendant opened the door and A.J. and D.T. went home.

A.J. called the police. A.J. initially reported to police that she and D.T. were on their way to McDonald's when defendant "grabbed" them, pulled out a knife, forced them to take drugs and pills, and sexually assaulted them. She admitted at trial that when she first spoke with police, she did not "tell the truth at first, because I was afraid that I might get in trouble because I'm going to get some marijuana with a friend." In addition, A.J. testified that defendant did not solicit sex in exchange for money or marijuana.

D.T. testified that on the evening of 15 June 2012, she was at A.J.'s house when defendant called her. Defendant said "he was going to give [A.J.] a bag of some weed[.]" D.T. testified that there was no agreement between defendant and herself for sex, an exchange of marijuana for sex, or an exchange of money for sex. A.J. and D.T. walked to defendant's house. Defendant took them into his bedroom. The three sat on his bed and defendant took out pills from his pocket. Defendant then proceeded to pull out a pocketknife and stated, "I'm crazy, I've been doing this for years, and y'all — y'all take off y'all's clothes now. I ain't playing with y'all." D.T. used the bathroom that was adjoined to the bedroom and called the police.

Defendant forced D.T. and A.J. to take their clothes off and lay on the bed. Defendant put his "tongue in [their] vagina[s]." D.T. grabbed a scalpel from a pocketbook, passed it to A.J., and A.J. stabbed defendant in the back of his head. A.J. and D.T. ran out of the bedroom, but encountered a locked door. Defendant's father told defendant, "Gregory, just let them go, just let them go." Defendant began shouting, "[d]addy, shut up. Y'all going to make my daddy have a heart attack. You shut up." Defendant's father then followed A.J. and D.T. back to defendant's bedroom and they put on their clothes. Afterward, A.J. and D.T. left defendant's home, returned to A.J.'s house, and called the police.

D.T. admitted that she lied in her first statement to the police when she reported the following:

> Well, the first time I told -- I told that we had went — we was on the way to McDonald's and he had snatched us up; which, it was a lie. I knew it was a lie when we told y'all that we was going to McDonald's and stuff and he snatched us up. That ain't it. It really was that we had went to go do some weed, like, he had called the phone and said he was gonna give us [weed.]

Detective Michael Thomas Harrell of the Wilson Police Department testified that on the morning of 16 June 2012, defendant gave the following statement to police:

> On Wednesday, I called [A.J.] for the first time. I see her around the neighborhood and say, 'Hey,' when I see her. She had some drama on Wednesday, so I called her to see what happened. We talked for about an hour before she asked me if I could get any weed. I told her I might could get some weed. She said she would get back up with me on Friday. I tried to call her . . . She called me back, and I told

> her I had something for her. She asked if I had any money. I said, 'Yeah, I got some money.' She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, "You are supposed to have something waiting on me." I said, "Why, did you bring something?" We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn't have much money for them. They told me to get them going, so I was touching on them and eating them out, switching back and forth. When I went back down on [D.T.], [A.J.] hit me in the back of the head, and I said, 'What the f***?' She went for the door. I think she went in the drawer where I had pointed to earlier when I said I got some money. I don't know if they set me up or not.

On 11 February 2012, a jury found defendant guilty of both counts of participating in the prostitution of a minor and not guilty of both charges of first-degree sexual offense. Defendant pled guilty to having attained habitual felon status. Defendant was sentenced to two consecutive terms of 127 to 165 months. Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) denying his motion to dismiss two counts of participating in the prostitution of a minor based on insufficiency of the evidence and based on a fatal variance between the indictments, jury charge, and proof at trial; (B) admitting evidence in violation of Rule 404(b) of the North Carolina Rules of Evidence; (C) violating his constitutional rights under the Sixth Amendment of the United States Constitution; (D) denying his motion to dismiss based on a failure to obey a court order to test evidence; and (E) allowing amendment of the superseding indictments.

A. Motion to Dismiss the Charges of Participating in the Prostitution of a Minor

Defendant argues that the trial court erred by denying his motion to dismiss the charges of participating in the prostitution of a minor charges for insufficiency of the evidence. Specifically, defendant contends that the State failed to present sufficient evidence that defendant "patronized a minor prostitute." Defendant argues that the State erroneously relied solely on defendant's extrajudicial statement to prove his

guilt, without providing other corroborating evidence in violation of the *corpus delicti* rule. We agree.

[1] Before reaching the merits of defendant's arguments, we address the State's contention that defendant failed to raise the issue of a violation of the *corpus delicti* rule at trial and that, as a result, he has failed to preserve this issue for appellate review. Pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, we note that in order to preserve an issue for appellate review,

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

N.C. R. App. P. Rule 10(a)(1) (2013). However, after thoroughly reviewing the transcript of defendant's trial, we hold that although defense counsel did not use the exact words "*corpus delicti*" in arguing that the trial court grant defendant's motion to dismiss the charges of promoting the prostitution of a minor based on the insufficiency of the evidence, the substance of the argument was sufficiently presented to the trial court. Accordingly, we proceed to the merits of defendant's arguments. *See State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (holding that "[a]lthough defendant did not raise his double jeopardy argument using those exact words, the substance of the argument was sufficiently presented, and more importantly, addressed by the trial court in finalizing its instructions to the jury").

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (citation omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo* and views the evidence in the light most favorable to the State, giving the State every reasonable inference therefrom, and resolving any contradictions or discrepancies in the State's favor." *State v. Miles*, __ N.C. App. __, __, 730 S.E.2d 816, 822 (2012) (citation omitted).

[2] In light of these principles, we consider the elements of the offense of participating in the prostitution of a minor. Pursuant to N.C. Gen. Stat. § 14-190.19[2],

> [a] person commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute. As used in this section, "patronizing a minor prostitute" means:
>
> (1) Soliciting or requesting a minor to participate in prostitution;
>
> (2) Paying or agreeing to pay a minor, either directly or through the minor's agent, to participate in prostitution; or
>
> (3) Paying a minor, or the minor's agent, for having participated in prostitution, pursuant to a prior agreement.

N.C. Gen. Stat. § 14-190.19 (2011).

Defendant relies on the North Carolina Supreme Court's holding in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008). In *Smith*, the issue before the Court was whether there was substantial corroborating evidence independent of the defendant's extrajudicial confession sufficient to sustain a conviction for first-degree sexual offense. *Id.* at 585, 669 S.E.2d at 301. The Court noted that in order to find a defendant guilty of first-degree sexual offense, the State must prove, beyond a reasonable doubt, that

> (1) the defendant engaged in a sexual act with a victim who is under the age of thirteen, and (2) the defendant is at least twelve years old and at least four years older than the victim. A sexual act, as defined by statute, means "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" Fellatio is defined as "any touching of the male sexual organ by the lips, tongue, or mouth of another person."

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2. We note that, effective 1 October 2013, N.C. Gen. Stat. § 14-190.19 was repealed by Session Laws 2013-368, s. 4. The current statute is applicable to offenses committed on or after 1 October 2013. However, because the events of this case took place on 15 June 2012, the former statute applies.

Id. at 592-93, 669 S.E.2d at 306 (citations omitted). The *Smith* Court stated that "[u]nder the *corpus delicti*[3] rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession." *Id.* at 588, 669 S.E.2d at 303 (citing *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985)).

The *Smith* victim "twice denied that a first-degree sexual offense ever occurred." *Id.* at 593, 669 S.E.2d at 306. In reviewing the defendant's extrajudicial confession, the defendant provided that the victim "unzipped his pants, removed his penis, and *attempted* fellatio, but that he could not achieve an erection because of his alcohol consumption." *Id.* (emphasis in original). The *Smith* Court stated that taking into consideration the defendant's extrajudicial confession alone, "a jury could not determine beyond a reasonable doubt that [the victim's] mouth ever made contact with [the] defendant's penis, which is a required element in a sexual offense prosecution." *Id.* at 593-94, 669 S.E.2d at 306.

The State argued that several pieces of corroborative evidence, along with the defendant's extrajudicial confession, were sufficient under the *corpus delicti* rule to sustain a conviction for first-degree sexual offense, but the *Smith* Court disagreed. The State first argued that the defendant's trial testimony that he felt "something" touch his penis was strongly corroborative, but the Court held that, "[l]ike the extrajudicial confession, this statement is also vague; it is not clear from the record what this 'something' was." *Id.* at 594, 669 S.E.2d at 307. Next, the State argued that defendant's statement to the victim's brother that "he had let [the victim] give him oral sex" was strongly corroborative. The *Smith* Court held that the corroborating evidence supporting the defendant's extrajudicial confession must be substantial and *independent*, and that this statement was not independent because it was derived immediately following defendant's extrajudicial confession elicited by a detective. *Id.* Lastly, the State argued that several pieces of "opportunity evidence" – testimony from both the defendant and the victim that they were alone together in a bedroom as well as testimony from the victim's brother that he left the victim with the defendant – were sufficient to sustain the defendant's conviction. The *Smith* Court held that because "no independent proof, such as physical evidence or witness testimony, of any crime [could] be shown[,]" the opportunity evidence was not strong enough to establish the *corpus delicti* of first-degree sexual offense. *Id.*

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3. "The term *corpus delicti* literally means 'body of the crime.' " *State v. Smith*, 362 N.C. 583, 589, 669 S.E.2d 299, 304 (2008) (citations omitted).

at 595-96, 669 S.E.2d at 307-308. Based on the foregoing, the *Smith* Court held that the State "ha[d] not met its burden [of providing] strong corroboration evidence relevant to the essential facts and circumstances of [the] defendant's extrajudicial confession" and reversed the defendant's conviction. *Id.* at 596, 669 S.E.2d at 308.

Similar to the facts found in *Smith*, in the case *sub judice*, although A.J. and D.T. gave several differing accounts of the events that took place on the evening of 15 June 2012, both A.J. and D.T. testified at trial that defendant did not solicit sex from them in exchange for money or marijuana. Furthermore, we find defendant's extrajudicial statement regarding an alleged exchange of sex for money or marijuana with A.J. and D.T. to be vague. Defendant's extrajudicial statement provided the following, in pertinent part:

> [A.J.] asked if I had any money. I said, 'Yeah, I got some money.' She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, "You are supposed to have something waiting on me." I said, "Why, did you bring something?" We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn't have much money for them.

The State argues that "an agreement to exchange sex for marijuana might be inferred even without Defendant's statements" and that other independent evidence corroborated defendant's extrajudicial confession. However, after careful review, we are not persuaded. The record is insufficient to strongly corroborate the essential element that defendant patronized a minor prostitute in order to convict defendant of participating in the prostitution of a minor. Because the State did not meet its burden in violation of the *corpus delicti* rule, we hold that the trial court erred by failing to grant defendant's motion to dismiss. Accordingly, we reverse defendant's conviction of two counts of participating in the prostitution of a minor.

Based on the disposition of defendant's first argument, it is unnecessary for us to address his remaining arguments on appeal.

Reversed.

Judges HUNTER, Robert C., and GEER concur.

STATE OF NORTH CAROLINA
v.
GREGVON SATTERTHWAITE

No. COA13-1323

Filed 17 June 2014

1. Drugs—possession of drug paraphernalia—motion to dismiss—sufficiency of evidence—plastic baggies

The trial court erred by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. The indictment alleged possession of plastic baggies as drug paraphernalia, and the State did not present evidence of plastic baggies.

2. Constitutional Law—effective assistance of counsel—claim dismissed without prejudice

Defendant's contentions in a drugs case concerning ineffective assistance of counsel were dismissed without prejudice since the record did not conclusively demonstrate whether defendant received ineffective assistance of counsel.

Appeal by defendant from judgment entered 25 June 2013 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 22 April 2014.

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

Leslie C. Rawls for defendant-appellant.

STEELMAN, Judge.

Where the indictment alleged possession of plastic baggies as drug paraphernalia, and the State did not present evidence of plastic baggies, the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Where the cold record does not demonstrate whether defendant received ineffective assistance of counsel, this argument is dismissed without prejudice.

I. Factual and Procedural Background

In 2011, Brandi Lynn Cooke (Cooke) was charged with trafficking in controlled substances. In order to seek more favorable treatment

for her charges, Cooke began working with Beaufort County Sheriff's Lieutenant Josh Shiflett (Shiflett) to investigate local drug dealers. Cooke informed Shiflett that one of her suppliers was Gregvon Satterthwaite (defendant), also known as "Popcorn."

On 25 May 2011, Cooke called defendant to set up a drug buy. Afterwards, Cooke contacted Shiflett and set up the deal as an undercover hydrocodone purchase. In advance of the deal, police searched Cooke and her car, and provided her with audio and video recording equipment, as well as $220 from the department's special funds for controlled substance purchases.

While Cooke was under police surveillance, defendant approached Cooke's vehicle and got into the front seat. Cooke gave defendant $200, and defendant gave Cooke a bottle of pills. Defendant then left. Cooke gave the pills to police. There were sixty pills of one variety, and ten of another; Shiflett tentatively identified the pills as hydrocodone. The pills were then sent to the SBI for testing to confirm their chemical composition.

Lauren Wiley (Wiley), a forensic chemist for the SBI, testified as to the analyses performed on the pills. The sixty white pills weighed 38.2 grams, and each contained 500 milligrams of acetaminophen and 5 milligrams of hydrocodone. The ten yellow pills weighed 4.2 grams, and each contained 325 milligrams of acetaminophen and 10 milligrams of hydrocodone.

Defendant was indicted for trafficking in opium by possession, trafficking in opium by transportation, trafficking in opium by sale, trafficking in opium by delivery, and possession of drug paraphernalia. On 25 June 2013, the jury found defendant guilty of all charges. The trial court arrested judgment on the conviction for trafficking in opium by delivery. The remaining charges were consolidated, and defendant was sentenced to an active term of imprisonment of 225-279 months. The trial court also imposed a $500,000.00 fine.

Defendant appeals.

II. Denial of Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of possession of drug paraphernalia. We agree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Analysis

The indictment that charged defendant with possession of drug paraphernalia stated that he possessed plastic baggies used to package and repackage pills. At trial, however, the State did not present any evidence of baggies. Instead, the evidence showed that defendant delivered the pills to Cooke in a bottle. Defendant contends that the absence of evidence of plastic baggies required the trial court to dismiss the charge of possession of drug paraphernalia, and that it was error to fail to do so.

N.C. Gen. Stat. § 90-113.22 makes it "unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . package, repackage, store, contain, or conceal a controlled substance . . ." N.C. Gen. Stat. § 90-113.22(a) (2013). "Drug paraphernalia" is defined as "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]" N.C. Gen. Stat. § 90-113.21(a) (2013). According to this definition:

> "Drug paraphernalia" includes, but is not limited to, the following:
>
> . . .
>
> (9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;
>
> (10) Containers and other objects for storing or concealing controlled substances;

N.C. Gen. Stat. § 90-113.21(a). Defendant contends that because the indictment was specifically based upon "baggies," the State was required to present substantial evidence that defendant possessed plastic baggies as drug paraphernalia.

This Court faced a similar issue in the case of *State v. Moore*. In that case:

> According to Defendant's indictment, Defendant allegedly possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence elicited at trial related to a can; rather, the evidence described

> crack cocaine in a folded brown paper bag with a rubber band around it.

State v. Moore, 162 N.C. App. 268, 273, 592 S.E.2d 562, 565 (2004). Defendant's motion to dismiss the charge was denied, and the trial court granted the State's motion to amend the indictment, replacing the reference to the can with reference to the folded brown paper bag. We held that:

> As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to [m]ount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia. Accordingly, we conclude the amendment to the indictment constituted a substantial alteration of the charge set forth in the indictment. Moreover, as no evidence of "a can designed as a smoking device" was presented, we conclude the trial court erroneously denied Defendant's motion to dismiss.

Moore, 162 N.C. App. at 274, 592 S.E.2d at 566.

In the instant case, as in *Moore*, defendant was charged with possession of drug paraphernalia, specifically plastic baggies. The only evidence of paraphernalia at trial was of bottles. We hold that the specific items alleged to be drug paraphernalia must be enumerated in the indictment, and that evidence of such items must be presented at trial. Because the State failed to present such evidence, the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia.

Since the remaining charges in the consolidated judgments require the imposition of a mandatory sentence, it is unnecessary to resentence defendant. *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (adopting dissent from Court of Appeals, 189 N.C. App. 640, 654-55, 659 S.E.2d 79, 88 (2008)).

III. Ineffective Assistance of Counsel

[2] In his second argument, defendant contends that his trial counsel was ineffective. We dismiss this argument without prejudice.

A. Standard of Review

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on

> the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

B. Analysis

Defendant contends that his trial counsel proceeded under an inaccurate understanding of the law as to how mixtures of controlled substances are considered for purposes of weight under our drug trafficking statutes. Defendant contends that, as a result, his counsel incorrectly advised him concerning a plea offer. Defendant contends that he relied upon counsel's advice in pleading not guilty. However, the cold record of the case does not conclusively demonstrate whether defendant received ineffective assistance of counsel. We hold that addressing such a matter would be premature, and dismiss this argument without prejudice to defendant filing a motion for appropriate relief in the trial court.

IV. Conclusion

The charge of possession of drug paraphernalia is vacated, and that issue is remanded to the trial court with instructions to dismiss that charge. The balance of the charges are not challenged upon appeal. Defendant's contentions concerning ineffective assistance of counsel are dismissed without prejudice.

VACATED AND REMANDED IN PART, DISMISSED IN PART.

Judges HUNTER, Robert C., and BRYANT concur.

STATE v. WILLIAMS

[234 N.C. App. 445 (2014)]

STATE OF NORTH CAROLINA
v.
SAMUEL EUGENE WILLIAMS, JR., DEFENDANT

No. COA13-1221

Filed 17 June 2014

1. Appeal and Error—appealability—motions to dismiss—failure to file notice of appeal or writ of certiorari

Defendant's arguments in a driving while impaired case challenging the trial court's denial of his motions to suppress the results of the alco-sensor and evidence obtained as a result of his arrest based on lack of probable cause were dismissed based on his failure to file a notice of appeal from the trial court's order as required by N.C. R. App. P. 3 or a writ of certiorari.

2. Appeal and Error—certificate—appeal not taken for purposes of delay and evidence necessary

Defendant's motion to dismiss the State's appeal in a driving while impaired case based on the State's alleged failure to meet the certification requirements of N.C.G.S. § 15A-979(c) was denied. Where the State intends to appeal from a trial court's ruling on a motion, the State must file a certificate with the trial court indicating that the State's appeal is not taken for purposes of delay and the evidence sought is necessary to the State's case.

3. Motor Vehicles—driving while impaired—multiple chemical analysis tests—implied consent rights

The trial court did not err in a driving while impaired case by granting defendant's motion to suppress the results of a chemical blood test. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C.G.S. § 20-16.2(a).

Appeal by the State from order entered 23 July 2013 by Judge Wayland J. Sermons, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

BRYANT, Judge.

Pursuant to N.C. Gen. Stat. § 15A-979(c), where the State intends to appeal from a trial court's ruling on a motion, the State must file a certificate with the trial court indicating that the State's appeal is not taken for purposes of delay and the evidence sought is necessary to the State's case. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C. Gen. Stat. § 20-16.2(a). Where defendant fails to file a notice of appeal pursuant to N.C. R. App. P. 3, defendant's appeal must be dismissed.

On 21 June 2011 at approximately 8:41 p.m., Hyde County Sheriff's Deputy Scott Wilkerson was dispatched to an accident scene on Ocracoke Island involving a fatality and a golf cart. Upon arriving at the scene, Deputy Wilkerson observed a body lying in front of a golf cart and a man, later identified as defendant Samuel Eugene Williams, Jr., standing next to the golf cart. Defendant admitted to driving the golf cart. Deputy Wilkerson testified that defendant had red, glassy eyes, was very talkative, and smelled strongly of alcohol. Defendant told Deputy Wilkerson that he had consumed six beers that afternoon. Deputy Wilkerson administered a portable breath test (alco-sensor) to defendant which yielded a positive result. Defendant was arrested and charged with driving while impaired.

Defendant was transported to the Ocracoke Island Sheriff's Office intoxilyzer room. Deputy Wilkerson read and gave defendant a copy of his implied consent rights; defendant signed the implied consent rights form acknowledging that he understood his rights. After waiting thirty minutes, Deputy Wilkerson, a certified chemical analyst, asked defendant to submit to a chemical analysis of his breath, but defendant refused.

Deputy Wilkerson then requested that a blood testing kit be brought to the office for defendant. Although Deputy Wilkerson did not re-advise defendant of his implied consent rights for the blood test, he gave defendant a consent form for the testing which defendant signed. Defendant's blood was then drawn using the blood testing kit by a paramedic on site.

On 23 May 2012, defendant filed motions to suppress the following: the results of the alco-sensor; evidence obtained as a result of the arrest

of defendant based on lack of probable cause; defendant's statement that he consumed "3 Jaeger bombs"; and statements made by defendant prior to being advised of his Miranda rights. On 13 June 2012, defendant filed an additional motion to suppress evidence obtained as a result of the chemical analysis of his blood.

On 23 July 2013, the trial court entered a written order denying the following: defendant's motion to suppress the results of the alco-sensor; the motion to suppress evidence obtained as a result of defendant's arrest based on lack of probable cause; and the motion to suppress defendant's statement that he had consumed "3 Jaeger bombs." The trial court granted defendant's motions to suppress the results of the chemical blood test and defendant's statements made prior to being advised of his Miranda rights. The State appeals from the portion of the order granting defendant's motion to suppress the results of the chemical blood test.

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[1] Defendant attempts to bring forth issues in his brief on appeal challenging the trial court's order denying his motions to suppress the results of the alco-sensor and evidence obtained as a result of his arrest based on lack of probable cause. However, defendant has not filed a notice of appeal from the trial court's order as required by Rule 3 of our Rules of Appellate Procedure, N.C. R. App. P. 3 (2013), nor has defendant filed a writ of certiorari for review of the issues he attempts to raise. As such, we dismiss defendant's arguments challenging the trial court's denial of his motions. *See State v. May*, 207 N.C. App. 260, 262, 700 S.E.2d 42, 44 (2010) (dismissing appeal where "defendant failed to give timely written notice of appeal").

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[2] On 10 January 2014, defendant filed a motion to dismiss the State's appeal, arguing that the State failed to meet the certification requirements of N.C.G.S. § 15A-979(c) because the State addressed its certificate to "the court" rather than to the trial court judge. We disagree.

North Carolina General Statutes, section 15A-979(c) states that:

> An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division . . . upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

N.C.G.S. § 15A-979(c) (2013).

The State noted the following in its certificate, "Certification Under N.C.G.S. § 15A-979(c)":

> THE STATE OF NORTH CAROLINA, by the undersigned assistant district attorney and pursuant to N.C.G.S. §§ [sic] 15A-979(c), having given notice of appeal to the Court of Appeals from the pretrial order of the trial court granting defendant=s [sic] motion to suppress evidence in this case, certifies to the court that the appeal is not taken for the purpose of delay and that the evidence suppressed is essential to the prosecution of the case.

Defendant contends that because N.C.G.S. § 15A-979(c) requires that the certificate be presented to the *judge* who granted the motion, any deviation from this statutory language as presented in the certificate renders the State's certificate void. Defendant's argument lacks merit, as the word "judge" can be, and is, synonymous with "the court."

> When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Wiggs v. Edgecombe Cnty., 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citations and quotation omitted). We agree with the State that the term "judge" is ambiguous, as "judge" can also mean "court." *See* Black's Law Dictionary 405 (9th ed. 2009) (defining "court" as "[a] governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice[,]" or as "[t]he judge or judges who sit on such a governmental body"). Moreover, in looking at the purpose of N.C.G.S. § 15A-979(c), it is clear that this statute is intended to be a procedural safeguard for defendants against the State, rather than an insurmountable burden for the State. Our Courts have held that the certification requirement under N.C.G.S. § 15A-979(c) is paramount in that by failing to file a certificate pursuant to N.C.G.S. § 15A-979(c), the State may not pursue its appeal. *See State v. Judd*, 128 N.C. App. 328, 329-30, 494 S.E.2d 605, 606 (1998) (holding this Court lacked jurisdiction where the State failed to file a certificate as required by N.C.G.S. § 15A-979(c)); *State v. Blandin*, 60 N.C. App. 271, 272-73, 298 S.E.2d 759, 759-60 (1983) (dismissing the State's appeal for failure to timely file a certificate pursuant

to N.C.G.S. § 15A-979(c), as "[t]o give the State the right to file the certificate after the case has already been docketed in the appellate court would be to reduce the requirement of the certificate to a nullity. If G.S. § 15A-979(c) means anything at all, it means that the Court is bound to dismiss this appeal.").

The language of such a certification, however, is not similarly critical. Rather, the certificate must merely acknowledge that the State's "appeal is not taken for the purpose of delay and that the evidence is essential to the case." Provided the certificate contains this required statement and is timely filed with the trial court, the actual wording of the certificate in its addressing of the trial court is flexible. *See State v. Turner*, 305 N.C. 356, 359, 289 S.E.2d 368, 370 (1982) (holding that the "two obvious purposes of the certificate [pursuant to N.C.G.S. § 15A-979(c)] are to require the prosecutor to certify that the appeal is not taken for purpose of delay, and that the suppressed evidence is essential to the case"). As it should be clear from the context of N.C.G.S. § 15A-979(c) that in filing a certificate the State is addressing the judge who granted the motion upon which the State wishes to appeal, we find it permissible for the State to use terms such as "judge," "the court," "this court," etc. Accordingly, we deny defendant's motion to dismiss the State's appeal.

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[3] On appeal, the State argues that the trial court erred in granting defendant's motion to suppress the results of the chemical blood test. We disagree.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation and quotation omitted). Where a trial court's conclusions of law are supported by findings of fact we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 137-38, 557 S.E.2d 191, 193-94 (2001).

Specifically, the State argues that evidence of the results of the chemical blood test was admissible because although Deputy Wilkerson did not re-advise defendant of his implied consent rights, defendant signed a consent form for the testing.

North Carolina General Statutes, section 20-16.2, Basis for Officer to Require Chemical Analysis; Notification of Rights, holds that:

> Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> *Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst* authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, *who shall inform the person orally and also give the person a notice in writing* that:
>
> > (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
> >
> > . . .
> >
> > (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.

N.C. Gen. Stat. § 20-16.2(a)(1, 3) (2013) (emphasis added).

Deputy Wilkerson read and gave to defendant a copy of his implied consent rights, and defendant signed the form acknowledging he understood these rights. Defendant then refused to take a breath test. Where a defendant refuses to take a breath test, such as here, the State may then seek to administer a different type of chemical analysis such as a blood test pursuant to North Caroline General Statutes, Section 20-139.1(b5), Subsequent Tests Allowed:

> A person may be requested, pursuant to G.S. 20-16.2, to submit to a chemical analysis of the person's blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer . . . . *If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).* A person's willful refusal to

> submit to a chemical analysis of the blood or other bodily fluid or substance is a willful refusal under G.S. 20-16.2. If a person willfully refuses to provide a blood sample under this subsection, . . . then a law enforcement officer with probable cause to believe that the offense involved impaired driving or was an alcohol-related offense made subject to the procedures of G.S. 20-16.2 shall seek a warrant to obtain a blood sample.

N.C. Gen. Stat. §20-139.1(b5) (2013) (emphasis added). N.C.G.S. §§ 20-16.2 and 20-139.1 must be read *in pari materia* "to determine the procedures governing the administering of chemical analyses." *Nicholson v. Killens*, 116 N.C. App. 473, 478, 448 S.E.2d 542, 544 (1994). "However, we conclude that G.S. 20-16.2, and that statute alone, sets forth the procedures governing notification of rights pursuant to a chemical analysis." *Id.* at 478, 448 S.E.2d at 544-45. As such, although the State is correct in asserting that it could seek to administer a blood test to defendant after defendant refused to take a breath test[1], the State was required, pursuant to the mandates of N.C.G.S. § 20-16.2(a) and as reiterated by N.C.G.S. § 20-139.1(b5), to re-advise defendant of his implied consent rights before requesting he take a blood test. This is particularly important when, as here, defendant had refused a breath test after being advised of his rights and acknowledging them. "Statutes imposing a penalty are to be strictly construed[.]" *Id.* at 477, 448 S.E.2d at 544 (citation omitted); *see also State v. Gray*, 28 N.C. App. 506, 506-07, 221 S.E.2d 765, 765-66 (1976) (holding that failure of the State to show a breathalzyer test was properly administered required the suppression of all evidence stemming from that test); *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (1973) ("The failure [of the State] to establish that defendant was accorded his statutory rights rendered the results of the breathalyzer test inadmissible in evidence, and its admission over objection constituted prejudicial error."); *State v. Warf*, 16 N.C. App. 431, 431-32, 192 S.E.2d 37, 38 (1972) (holding that where the State fails to carry its burden of showing that a breathalyzer test was properly administered, evidence of that test must be suppressed). Accordingly, the trial court did not err in granting defendant's motion to suppress as to the chemical blood test.

The State further argues that even if N.C.G.S. § 20-139.1(b)(5) is applicable, the trial court erred in granting defendant's motion to suppress because any statutory violation was "technical and not substantial

1. The statute clearly provides that upon a defendant's refusal to provide a blood sample as requested, law enforcement may seek a warrant to obtain the blood sample for testing. N.C.G.S. § 20-139.1(b5).

and the defendant has shown no prejudice" because defendant had been advised of his implied consent rights as to the breath test "less than an hour before the blood test." The State cites *State v. Green*, 27 N.C. App. 491, 219 S.E.2d 529 (1975), and *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977), in support of its argument.

In *Green*, the defendant alleged that the arresting officer's "garbled" reading of the defendant's implied consent rights violated N.C.G.S. § 20-16.2. This Court disagreed, finding that the arresting officer's reading of the defendant's implied consent rights, coupled with the defendant receiving a printed copy of those rights and signing a consent form prior to taking a breath test, was sufficient. *Green*, 27 N.C. App. at 494-95, 219 S.E.2d at 531-32.

In *Buckner*, the defendant was properly read and given a copy of his implied consent rights but did not sign a form acknowledging his understanding of these rights before he took a breath test. This Court found that the breath test was admissible into evidence as it was clear from the record that the defendant was properly instructed as to his rights and failed to exercise those rights. *Buckner*, 34 N.C. App. at 451, 238 S.E.2d at 638.

Both *Green* and *Buckner* are distinguishable from the instant case. In *Green* and *Buckner*, each defendant was advised of his implied consent rights before being asked to take a single chemical analysis – a breath test. In each case, the technical deficiencies raised by the defendants did not override the facts showing each defendant was advised of and given copies of his implied consent rights prior to testing. Here, defendant was advised of his implied consent rights and thereafter refused to take the initial chemical breath test. When the State then sought to administer a second chemical analysis, a blood test, defendant was not advised of his implied consent rights as to that test. A failure to advise cannot be deemed a mere technical and insubstantial violation. The State was *required* to re-advise defendant of his implied consent rights prior to the second chemical analysis test – a blood test. Since "[s]tatutes imposing a penalty are to be strictly construed[,]" the State's failure to adhere to the requirements of N.C.G.S. §§ 20-16.2 and 20-139.1 must result in suppression of the results of the blood test. Accordingly, the State's argument is overruled.

Affirmed.

Judges STEPHENS and DILLON concur.

TIFFANY N. TOBE-WILLIAMS, PETITIONER
v.
NEW HANOVER COUNTY BOARD OF EDUCATION; A/K/A NEW HANOVER COUNTY SCHOOLS, RESPONDENT

No. COA13-679

Filed 17 June 2014

1. Appeal and Error—preservation of issues—jurisdiction—waiver

The trial court properly asserted jurisdiction over a board of education, and the appeal was reviewed on the merits, where the board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense by failing to raise jurisdiction at the hearing and by arguing the merits of the case.

2. Schools and Education—assistant principal—reinstatement—notice and opportunity to be heard

A trial court order requiring that an assistant principal be reinstated was remanded where the superintendent had recommended renewal but the Board of Education (Board) decided otherwise after conducting its own investigation and effectively conducting a hearing without notice or participation by petitioner. On remand, the Board is to reach a decision after properly allowing petitioner an opportunity to be heard regarding the information that the Board intends to consider that was not included in her personnel file at the time the superintendent recommended renewal of her contract.

Appeal by respondent from order entered 4 January 2013 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 7 November 2013.

The Leon Law Firm, P.C., by Mary-Ann Leon; and The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for respondent-appellant.

N.C. School Boards Association, by Allison B. Schafer and Christine T. Scheef, for Amicus Curiae North Carolina School Boards Association.

N.C. Association of Educators, by Ann McColl and Carrie Bumgardner, for Amicus Curiae North Carolina Association of Educators.

GEER, Judge.

Respondent New Hanover County Board of Education ("the Board") appeals from an order reversing the Board's decision not to renew the contract of petitioner Tiffany N. Tobe-Williams. We conclude that the process employed by the Board in reaching its decision violated Ms. Tobe-Williams' procedural rights under N.C. Gen. Stat. § 115C-287.1(d) (2013) and under N.C. Gen. Stat. § 115C-325(b) (2013) when it based its decision not to renew Ms. Tobe-Williams' contract on evidence not contained in her personnel file and without giving her notice of that evidence and an opportunity to respond to it. Accordingly, we affirm the trial court's conclusion that the Board's decision was made upon unlawful procedure.

However, the grounds for nonrenewal asserted by the Board are not arbitrary, capricious, personal, or political, and the record contains evidence that would support the Board's decision even though some of the Board's specific findings of fact are unsupported. We, therefore, reverse the trial court's order of reinstatement and remand to the Board for reconsideration of its decision after giving Ms. Tobe-Williams notice of the information that the Board intends to consider in making its decision and an opportunity to respond to that evidence.

Facts

Ms. Tobe-Williams was employed by the Board as an assistant principal in the New Hanover County School District under a four-year contract from July 2008 to 30 June 2012. During the 2008-2009 academic year, Ms. Tobe-Williams worked at Myrtle Grove Middle School. During the course of that academic year, Ms. Tobe-Williams' relationship with her immediate supervisor, principal Robin Meiers, deteriorated due, in large part, to Ms. Tobe-Williams' concerns about the financial practices of the school treasurer, which Ms. Tobe-Williams believed were not in compliance with Board policies. Although Ms. Tobe-Williams expressed her concerns to Ms. Meiers on several occasions, she did not feel that Ms. Meiers adequately addressed the problem. The Human Resources Department encouraged Ms. Tobe-Williams to work with Ms. Meiers to resolve the issues.

On 19 June 2009, Ms. Tobe-Williams attempted to file a grievance by emailing Dr. John A. Welmers, Jr., the assistant superintendent for Human Resources, and expressing her dissatisfaction with the lack of response or guidance from Human Resources regarding her allegations of unethical financial practices. In the email, Ms. Tobe-Williams stated that if the matter was not resolved by the following Tuesday, she would contact the Department of Public Instruction to request a full investigation. She indicated that "resolved MINIMALLY mean[t]," among other things, that she be transferred to another school.

Dr. Welmers responded that Ms. Tobe-Williams' allegations concerning the treasurer were being investigated and that an internal auditor and Ms. Meiers had taken "personnel action concerning the improvement of the treasurer's performance and put in place steps to ensure that the treasurer meets all of the school system's guidelines and regulations . . . ." Dr. Welmers notified Ms. Tobe-Williams that her email did not constitute a formal grievance and explained to Ms. Tobe-Williams the guidelines of the Board's formal grievance policy, concluding that "[i]f you believe one of these conditions [for which a grievance may be filed] exists that has not already been addressed by the school system, you certainly have every right to begin the formal grievance procedure."

On 10 July 2009, Ms. Tobe-Williams filed a formal grievance against Ms. Meiers, Dr. Welmers, and Dr. Susan Hahn, the Director of Human Resources. On 19 August 2009, then-superintendent Dr. Alfred H. Lerch, Jr. granted Ms. Tobe-Williams a transfer to Wrightsville Beach Elementary School ("WBES"), and Ms. Tobe-Williams agreed to drop her grievance. Superintendent Lerch requested that Ms. Meiers not complete an evaluation for Ms. Tobe-Williams for the 2008-2009 academic year.

During the 2009-2010 academic year, Ms. Tobe-Williams had a successful year as an assistant principal at WBES, working under Principal Pansy R. Rumley. During her second year at WBES, on 21 and 25 January 2011, Ms. Tobe-Williams suffered allergic reactions while participating in a school clean up. Ms. Tobe-Williams came to believe that these allergic reactions and her subsequent health issues were related to the uncleanliness of the school and the possibility of black mold growing in the building. On 1 February 2011, Ms. Tobe-Williams' doctor wrote her a note stating she "needs time off from school until dust and black (mold?) [sic] cleaned up."

In response to an incident report relating to Ms. Tobe-Williams, the New Hanover County Schools Maintenance Operations Department completed an indoor air quality ("IAQ") observation report on 28 January

2011. The N.C. Department of Environmental and Natural Resources Division of Environmental Health also inspected the school on 16 February 2011, while the New Hanover County Health Department conducted an inspection and tested for mold, allergens, and other health issues on 22 February 2011. None of the reports from these inspections indicated that mold was present in the school.

On 23 February 2011, Ms. Tobe-Williams met with Dr. Welmers; Mr. Bill Hance, the assistant superintendent of maintenance; and Dr. Jim Markley, the new superintendent of New Hanover County Schools. At the meeting, Ms. Tobe-Williams expressed her concerns regarding the presence of mold, the lack of cleanliness of WBES, and her dissatisfaction with the administration's response to her concerns. She believed the administration had deceived her by failing to timely provide her with information concerning the mold investigation, by failing to return her emails, and by not sharing with her pictures of the school that Mr. Hance had taken. Ms. Tobe-Williams requested that an IAQ examination be done at the school.

Mr. Hance explained to Ms. Tobe-Williams that no mold or other significant health issues had been found at the school by the Health Department. Regarding the cleanliness of WBES, Dr. Markley acknowledged that WBES's previous inspection reports showed that WBES had received the lowest overall score in the school system, but he explained that WBES nevertheless met the school system's general guidelines for cleanliness.

On 25 February 2011, Dr. Markley temporarily transferred Ms. Tobe-Williams to Alderman Elementary School ("AES"), effective 28 February 2011, to fill the position of an assistant principal who was on maternity leave. His letter to Ms. Tobe-Williams indicated the transfer was "as a precaution for your health and safety due to the fact that you have alleged that you have become sick at work and that you believe it is due to poor indoor air quality . . . at [WBES] . . . ." He told Ms. Tobe-Williams that they were having the IAQ at WBES tested and that he would reassess her assignment once he received the results.

Ms. Tobe-Williams did not report to work at AES. Instead, she filed a grievance against Dr. Markley and sent an email to the Board's attorney maintaining that the transfer was "in violation of federal OSHA regulations which prohibit employers from transferring employees due to workplace hazard complaints." She informed Dr. Markley that she would be out the first week of her temporary transfer due to multiple doctor appointments.

Additional IAQ testing of WBES was completed by Phoenix EnviroCorp on 25 February 2011, 7 March 2011, and 11 March 2011. Mr. Hance notified Ms. Tobe-Williams when he received the testing reports from Phoenix EnviroCorp and made copies of the reports available to Ms. Tobe-Williams. The results revealed that there were elevated levels of mold in one classroom, mobile classroom seven ("MC-7"). Phoenix EnviroCorp also conducted carbon dioxide monitoring in all the classrooms on 11 March 2011. The report concluded that the readings indicated "possible ventilation issues," but noted that all the measurements were "well below" the OSHA Permissible Exposure Limit and the NIOSH Recommended Exposure limit for carbon dioxide. On Saturday, 12 March 2011, custodians throughout the New Hanover County School District conducted a "thorough cleaning" of WBES from 7:00 a.m. until 4:00 p.m.

On 22 March 2011, Ms. Rumley sent a letter to the parents of the students assigned to MC-7 explaining why the students had been moved from MC-7 to the library. The letter explained that the school was replacing the HVAC unit and that "[o]nce everything is operational and a final air quality inspection is approved, the students will return to MC-7." Chris Peterson, the director of maintenance operations, reviewed the letter prior to its being sent to the parents and concluded that the information in the letter was accurate.

On 24 March 2011, Dr. Markley informed Ms. Tobe-Williams that the maintenance department had completed a thorough cleaning of the school, and the air quality in the building was "good" with respect to levels of carbon dioxide and mold. He noted that the most recent tests had indicated that elevated mold spore levels were only found in one location, MC-7, and were "not elevated to a significant degree." As a "precautionary measure," Dr. Markley requested that Ms. Tobe-Williams not work in that area until further testing had been completed. Dr. Markley requested that Ms. Tobe-Williams return to WBES on 28 March 2011 unless her doctor advised her not to. Additionally, he noted that "[i]f your doctor states that you should not return to that specific building or upon your return you experience any difficulties with breathing, anaphylaxis, or other health conditions, we will take that information into consideration for accommodating your condition which may involve making other arrangements for your work site."

Ms. Tobe-Williams returned to work, and continued to pursue her grievances against WBES regarding cleanliness and IAQ. On 10 May 2011, Ms. Tobe-Williams testified and presented evidence at a hearing before the Board. After considering all the evidence presented at the

hearing, the Board adopted and sent Ms. Tobe-Williams a written resolution, which concluded that Ms. Tobe-Williams' concerns did not rise to the level of a valid grievance.

After the hearing, Ms. Tobe-Williams continued to raise complaints about the conditions at WBES, including a complaint on 25 May 2011 that a window in the media center had been screwed shut and posed a fire hazard. Ms. Tobe-Williams believed that the window was purposefully screwed shut as retaliation against her. The screws were removed promptly upon Ms. Tobe-Williams' request.

The following day, 26 May 2011, Ms. Tobe-Williams, appearing "visibly angry," confronted Ms. Rumley in her office and told Ms. Rumley that "she was the angriest that she had ever been, and it was up to [Ms. Rumley] whether the next ten days would be pleasant and amicable or not" and that Ms. Tobe-Williams "could make life miserable by going to the news media regarding the issues with Mobile Classroom 7." Specifically, Ms. Tobe-Williams was upset about the window being screwed shut and about the letter that Ms. Rumley had sent to parents regarding MC-7. Ms. Tobe-Williams called Ms. Rumley a "liar" for stating in the letter that MC-7 had received "A" ratings on health department inspections.

Regarding the window, Ms. Rumley informed Ms. Tobe-Williams that maintenance had screwed the window shut in an attempt to follow the energy policy of not opening windows when the air-conditioning was on. Ms. Rumley also produced for Ms. Tobe-Williams the inspection reports that she believed showed the "A" ratings for MC-7. Ms. Tobe-Williams explained that the "A" did not refer to the rating, but rather the "status code." Following the meeting, Ms. Rumley notified Dr. Markley that she had misinterpreted the information on the inspection reports.

Due to a reduction in funding, Ms. Tobe-Williams was transferred to Ogden Elementary School ("OES") as an assistant principal for the 2011-2012 school year. Ms. Tobe-Williams completed the year under Principal Tammy Bruestle and received "Proficient" and "Accomplished" ratings on her final evaluation. The evaluation noted, however, that Ms. Tobe-Williams could "be intimidating to staff members especially if they are under performing [sic]."

At a Board meeting on 5 June 2012, Dr. Markley submitted to the Board a list of principals and assistant principals, including Ms. Tobe-Williams, with a recommendation that the Board renew their contracts. Prior to the Board's vote on the contracts, however, the Board requested additional time to review Ms. Tobe-Williams' personnel file and other records concerning Ms. Tobe-Williams' performance over the course of

her four-year contract "because [the Board] was aware of serious concerns about" Ms. Tobe-Williams. As a result, the superintendent removed Ms. Tobe-Williams' name from consideration, and the Board did not vote on her contract at the 5 June 2012 meeting.

After the 5 June 2012 meeting, the Board reviewed Ms. Tobe-Williams' personnel file, other information maintained by the New Hanover County Schools' Human Resources Department, and a memorandum submitted by Ms. Meiers regarding Ms. Tobe-Williams' performance during the 2008-2009 school year. Ms. Tobe-Williams was not contacted by the Board during this time. At the 10 July 2012 meeting, the superintendent again recommended that Ms. Tobe-Williams' contract be renewed. Nonetheless, the Board unanimously voted not to renew Ms. Tobe-Williams' contract and adopted a written resolution reflecting its decision.

Ms. Tobe-Williams appealed the nonrenewal decision to New Hanover County Superior Court on the grounds that the decision was arbitrary and capricious, not supported by substantial evidence, in excess of statutory authority, and affected by errors of law. The matter was heard on 17 December 2012 by the trial court. On 4 January 2013, the court entered an order reversing the Board's decision on the grounds that it was not supported by substantial evidence in the record, was arbitrary and capricious, and was based upon unlawful procedure in violation of N.C. Gen. Stat. § 115C-287.1. The Board timely appealed to this Court.

Discussion

"On appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board." *Davis v. Macon Cnty. Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594 (2006). The Board's decision not to renew an assistant principal's employment contract is subject to judicial review in accordance with Article 4 of the North Carolina Administrative Procedure Act ("APA"). N.C. Gen. Stat. § 115C-287.1(d).

Under Article 4, N.C. Gen. Stat. § 150B-51(b) (2013), a trial court may reverse or modify the agency decision if it is:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency or 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.

Errors alleged under subsections (1) through (4) are reviewed de novo. N.C. Gen. Stat. § 150B-51(c). "When conducting de novo review, the court considers the matter anew and may freely substitute its own judgment for the board's." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 572, 649 S.E.2d 410, 415 (2007).

The whole record test applies to claims that the Board's decision was unsupported by substantial evidence or was arbitrary, capricious, or an abuse of discretion. *Davis*, 178 N.C. App. at 652, 632 S.E.2d at 594. "Pursuant to the whole record test, the reviewing court examines all competent evidence to determine whether a school board's decision was based upon substantial evidence." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

"A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). "Only when there is no substantial evidence supporting administrative action should the court reverse an agency's ruling." *Mendenhall v. N.C. Dep't of Human Res.*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995).

This Court reviews the trial court's order for error of law. *Moore*, 185 N.C. App. at 572-73, 649 S.E.2d at 415. "Our task is essentially twofold: '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* at 573, 649 S.E.2d at 415 (quoting *Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 655, 615 S.E.2d 408, 413 (2005)).

I

[1] The Board first argues that the trial court erred in failing to dismiss the petition for lack of personal jurisdiction. The APA provides that "the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat.

§ 150B-45(a) (2013). Additionally, "[w]ithin 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." N.C. Gen. Stat. § 150B-46 (2013).

Here, Ms. Tobe-Williams filed her petition on 9 August 2012, but the Board was not served by personal service or by certified mail until 5 September 2012, more than 10 days later. Service was, therefore, defective. In the Board's response to the petition, the Board asserted the defenses of insufficiency of process, insufficiency of service, and lack of personal jurisdiction pursuant to Rules 12(b)(4), (5), and (6) of the Rules of Civil Procedure, and moved to dismiss the petition.

However, the issue of service and personal jurisdiction over the Board was not raised by either party at the 17 December 2012 hearing, and both parties presented arguments concerning the merits of the case. The Board did not request a ruling on its motion to dismiss, and the trial court proceeded to enter a decision on the merits.

"Jurisdiction over the person of a defendant can be acquired only in two ways: (1) By service of process upon him, whereby he is brought into court against his will; and (2) by his voluntary appearance and submission." *In re Blalock*, 233 N.C. 493, 503, 64 S.E.2d 848, 855 (1951).

> An appearance merely for the purpose of objecting to the lack of any service of process or to a defect in the process or in the service of it, is a special appearance. In such case the defendant does not submit his person to the jurisdiction of the court.
>
> On the other hand, a general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person.
>
> A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof.

Id. at 503-04, 64 S.E.2d at 855-56 (internal citations omitted).

In this case, by failing to raise the issue of jurisdiction at the hearing and by arguing the merits of the case, the Board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense.

Accordingly, we hold that the trial court properly asserted jurisdiction over the Board, and we review the merits of this appeal.

II

[2] The Board next contends that the trial court erred in concluding that the Board's decision was made upon unlawful procedure. Because this question raises issues of law, we review it de novo.

The procedure for hiring school administrators, including assistant principals, is set out in N.C. Gen. Stat. § 115C-287.1. A school administrator is employed by the local board of education "upon the recommendation of the superintendent" for an initial contract term of up to four years "ending on June 30 of the final 12 months of the contract." N.C. Gen. Stat. § 115C-287.1(b). During the term of the contract, a school administrator may not be dismissed or demoted "except for the grounds and by the procedure by which a career teacher may be dismissed or demoted as set forth in G.S. 115C-325." N.C. Gen. Stat. § 115C-287.1(c). This procedure includes the "right to receive notice of an adverse recommendation by the superintendent, to be heard before a case manager and/or the board of education, to present evidence, and generally to defend against whatever the charges or allegations might be." *Moore*, 185 N.C. App. at 570, 649 S.E.2d at 413-14 (citing N.C. Gen. Stat. § 115C-325(h)-(j3) (2005)).

However, the General Assembly has provided a different procedure for the decision whether to renew a school administrator's contract. If the superintendent intends to recommend that the school administrator's contract be renewed, the superintendent must "submit the recommendation to the local board for action," and the Board "may approve the superintendent's recommendation or decide not to offer the school administrator a new, renewed, or extended school administrator's contract." N.C. Gen. Stat. § 115C-287.1(d).

On the other hand,

> [i]f a superintendent decides not to recommend that the local board of education offer a new, renewed, or extended school administrator's contract to the school administrator, the superintendent shall give the school administrator written notice of his or her decision and the reasons for his or her decision no later than May 1 of the final year of the contract. The superintendent's reasons may not be arbitrary, capricious, discriminatory, personal, or political. No action by the local board or further notice

> to the school administrator shall be necessary unless the school administrator files with the superintendent a written request, within 10 days of receipt of the superintendent's decision, for a hearing before the local board. Failure to file a timely request for a hearing shall result in a waiver of the right to appeal the superintendent's decision. If a school administrator files a timely request for a hearing, the local board shall conduct a hearing pursuant to the provisions of G.S. 115C-45(c) and make a final decision on whether to offer the school administrator a new, renewed, or extended school administrator's contract.
>
> If the local board decides not to offer the school administrator a new, renewed, or extended school administrator's contract, the local board shall notify the school administrator of its decision by June 1 of the final year of the contract. *A decision not to offer the school administrator a new, renewed, or extended contract may be for any cause that is not arbitrary, capricious, discriminatory, personal, or political.*

Id. (emphasis added).

Thus, when the superintendent recommends nonrenewal, the school administrator is entitled to notice of the grounds for the nonrenewal recommendation and, upon timely request, to a hearing before the Board. However, when the superintendent recommends renewal, the statute is silent as to the procedure by which the Board may accept or reject the recommendation and, more specifically, as to the school administrator's right to notice and a hearing.

We are not required to decide, in this case, whether a Board must conduct a full-blown hearing whenever a superintendent recommends renewal but the Board decides otherwise. It is apparent that the procedure that the Board used in this case is not one authorized by the statute and is not consistent with Chapter 115C when read as a whole.

In construing other provisions of Chapter 115C of the North Carolina General Statutes, our Supreme Court has emphasized:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity

> of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

Taborn v. Hammonds, 324 N.C. 546, 553, 380 S.E.2d 513, 517 (1989) (quoting *Faulkner v. New Bern–Craven Cnty. Bd. of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 290–91 (1984)).

The Supreme Court further emphasized that when construing provisions in Chapter 115C, the following well-established principle of statutory construction applies: " '[A]ll statutes relating to the same subject matter shall be construed *in pari materia* and harmonized if this end can be attained by any reasonable interpretation.' " *Id.* (quoting *Faulkner*, 311 N.C. at 58, 316 S.E.2d at 291)). Accordingly, in deriving the meaning of a particular provision of Chapter 115C, "we must examine it in the general context of North Carolina's public school laws . . . ." *Id.*, 380 S.E.2d at 517-18.

In *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975), the Supreme Court held that "[t]he manifest purpose" of the statute then governing employment of teachers "was to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons." It follows that the manifest purpose of N.C. Gen. Stat. § 115C-287.1(d) in prohibiting the nonrenewal of administrators' employment contracts for "arbitrary, capricious, discriminatory, personal, or political" reasons is to ensure that North Carolina's schools are staffed with administrators of proven ability.

The procedural protections explicitly provided in N.C. Gen. Stat. § 115C-287.1(d) further this purpose. Specifically, the notice of an adverse recommendation by the superintendent alerts the school administrator that her future employment status is at risk and, more importantly, of the potential grounds for nonrenewal. The school administrator may then request a hearing before the school board in order to have an opportunity to contest the validity of the asserted grounds for nonrenewal and to specifically address the concerns of the superintendent and the school board.

In this case, however, the superintendent recommended the renewal of Ms. Tobe-Williams' contract and, therefore, the statute did not expressly require that she be given an opportunity to request a hearing. The Board urges that it was, under the plain language of N.C. Gen. Stat. § 115C-287.1, free, without conducting a hearing, to "decide[] not to offer the school administrator a new, renewed, or extended school

administrator's contract." However, in this case, the Board did not simply reject the superintendent's recommendation.

Instead, the Board determined that it needed more information. As its resolution regarding the nonrenewal of Ms. Tobe-Williams' contract stated, the Board, upon receipt of the superintendent's 5 June 2012 recommendation, "chose not to renew Ms. Tobe-Williams' contract at that time because it was aware of serious concerns about Ms. Tobe-Williams. The Board asked for an opportunity to review documentation of Ms. Tobe-Williams' performance and conduct." The resolution indicated that the Board members "then reviewed extensive documentation concerning Ms. Tobe-Williams which was maintained by the Human Resources Department, including rebuttals and explanations provided by Ms. Tobe-Williams." At the 12 July 2012 Board meeting, "Board Members discussed Ms. Tobe-Williams' performance and conduct with the Superintendent *and others* and discussed the documentation they had reviewed." (Emphasis added.)

Nothing in the Board's resolution indicates that it limited its review to materials in Ms. Tobe-Williams' personnel file -- materials of which Ms. Tobe-Williams would have had notice. See N.C. Gen. Stat. § 115C-325(b) (2013) (providing "[t]he personnel file shall be open for the teacher's inspection at all reasonable times" and requiring five days' notice to teachers before material is placed in personnel file). Indeed, even though, after a dispute arose between principal Robin Meiers and Ms. Tobe-Williams, a prior superintendent had expressly determined that Ms. Meiers should not prepare an evaluation for academic year 2008-2009, Ms. Meiers was asked to provide the Board with a memo describing, three years after the fact, what Ms. Tobe-Williams' ratings would have been had Ms. Meiers evaluated her formally.[1] Moreover, our review of the administrative record suggests that additional documentation reviewed by the Board was likely not included in Ms. Tobe-Williams' personnel file prior to the superintendent's having recommended her renewal.

Review of the Board's resolution also reveals that the Board in fact relied on documentation, including Ms. Meiers' memo, in makings its nonrenewal decision. The Board even found that "[f]urther investigation *by the Board* has revealed that at least two teachers at Ogden

1. Significantly, as the formal evaluations in Ms. Tobe-Williams' personnel file indicate, if Ms. Meiers had prepared a formal evaluation, Ms. Tobe-Williams would have seen the evaluation and had an opportunity to comment in writing.

Elementary School asked the Principal not to let Ms. Tobe-Williams evaluate them because Ms. Tobe-Williams had intimidated them and they did not believe they could be evaluated fairly by Ms. Tobe-Williams." (Emphasis added.) In short, the Board conducted, unbeknownst to Ms. Tobe-Williams, its own investigation and then, at a Board meeting, interviewed unspecified witnesses about her performance and discussed documentation related to that performance. In other words, the Board effectively conducted a hearing without notice to or participation by Ms. Tobe-Williams.

The procedure followed by the Board in this case -- in which the Board conducted its own investigation, solicited the creation of documentation, reviewed documentation not contained in the personnel file, and interviewed witnesses -- is not specifically authorized by the statute and is not consistent with Chapter 115C when read as a whole. Moreover, our research has failed to uncover any decision by our courts suggesting that such a procedure is permissible.

N.C. Gen. Stat. § 115C-325 "governs the hiring, firing, tenure and resignations of public schoolteachers; and its definition of 'teacher' includes those who directly supervise teaching," such as principals and assistant principals. *Warren v. Buncombe Cnty. Bd. of Educ.*, 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986). *Before setting out the procedures for the hiring and firing of employees*, the statute provides the following regarding personnel files:

> The superintendent shall maintain in his office a personnel file for each teacher that contains any complaint, commendation, or suggestion for correction or improvement about the teacher's professional conduct, except that the superintendent may elect not to place in a teacher's file (i) a letter of complaint that contains invalid, irrelevant, outdated, or false information or (ii) a letter of complaint when there is no documentation of an attempt to resolve the issue. The complaint, commendation, or suggestion shall be signed by the person who makes it *and shall be placed in the teacher's file only after five days' notice to the teacher. Any denial or explanation relating to such complaint, commendation, or suggestion that the teacher desires to make shall be placed in the file. Any teacher may petition the local board of education to remove any information from his personnel file that he deems invalid, irrelevant, or outdated. The board may order the*

> *superintendent to remove said information if it finds the information is invalid, irrelevant, or outdated.*

N.C. Gen. Stat. § 115C-325(b) (emphasis added).

Thus, employees, including administrators, are expressly provided notice of the inclusion of any materials in their personnel files and receive an opportunity to address those materials. It is evident by the inclusion of this provision at the beginning of N.C. Gen. Stat. § 115C-325 -- the section of Chapter 115C governing employment contracts -- that the General Assembly intended to protect employees from the inclusion of unfair, untrue, incomplete, or outdated information in their personnel files that might adversely affect their employment status. This provision is also inconsistent with a construction of N.C. Gen. Stat. § 115C-287.1(d) that would allow a school board unfettered discretion regarding what it may consider when making an employment decision without a hearing.

While we recognize that school boards have wide discretion to consider evidence introduced at a hearing, *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74-75 (1979) ("While a Board of Education conducting a hearing . . . must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law[]"), there was no hearing in this case. Therefore, the Board's decision was based, at least in part, upon information -- including documentation and interviews -- to which Ms. Tobe-Williams had never been given any opportunity to respond. We cannot conclude that the General Assembly intended such a result given the careful protections that the legislature has granted regarding the contents of an employee's personnel file.

Further, "[i]t is fully established that the language of a statute will be interpreted so as to avoid an absurd consequence. . . . Where a literal reading of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Taylor*, 286 N.C. at 496, 212 S.E.2d at 386 (internal quotation marks omitted).

In N.C. Gen. Stat. § 115C-287.1(d), the General Assembly has specifically provided for a hearing before the Board only if the superintendent has recommended nonrenewal, as the Board argues. Nevertheless, to allow the Board, when the superintendent has in fact *recommended renewal*, to conduct its own investigation, to consider documentation outside of the administrator's personnel file, and to question witnesses without notice to the administrator, would lead to an absurd

consequence that is inconsistent with "[t]he manifest purpose" of the statute to provide administrators "of proven ability for the children of this State by protecting such [administrators] from dismissal for political, personal, arbitrary or discriminatory reasons." *Taylor*, 286 N.C. at 496, 212 S.E.2d at 386.

The construction urged by the Board in this case would provide extensive procedural protections to an administrator whose performance was poor enough to merit a nonrenewal recommendation from the superintendent, but deny an administrator actually recommended for renewal by the superintendent of any opportunity to ensure simply that information considered by the Board was not "invalid, irrelevant, [or] outdated," N.C. Gen. Stat. § 115C-325(b), or "arbitrary, capricious, discriminatory, personal, or political," N.C. Gen. Stat. § 115C-287.1(d).

Furthermore, the Board's construction would grant more procedural protection when the concerns originated with the superintendent, whose recommendation is only advisory, than when the concerns originated with those who have the ultimate decision making authority – the Board itself. *See Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984) (holding that superintendent's recommendation for renewal of probationary teacher is only advisory and "ultimate responsibility rests with the board").

We recognize that in the context of a renewal of a probationary teacher's contract, this Court rejected the teacher's argument that she had a statutory right to a hearing where "N.C. Gen. Stat. § 115C-325(m)(2) [(2005)] – the provision specifically setting forth the rights of probationary teachers – fails to expressly provide any right to a hearing before the Board." *Moore*, 185 N.C. App. at 573, 649 S.E.2d at 415.

This Court explained that, in contrast to the provision providing the rights of probationary teachers, the General Assembly expressly requires prior notice to school administrators and career teachers from the superintendent "regarding a recommendation that may adversely affect the employee's future status." *Id.* at 574, 649 S.E.2d at 415. In reference to the provisions of N.C. Gen. Stat. § 287.1(d), the Court reasoned "[t]he existence of language granting administrators the right to a hearing 'pursuant to the provisions of G.S. 115C–45(c)' confirms that when the General Assembly intended to afford notice and hearing rights, it did so in unambiguous terms." 185 N.C. App. at 577-78, 649 S.E.2d at 418.

In *Moore*, however, the contract renewal procedures in N.C. Gen. Stat. § 115C-325(m)(2) (2005) did not provide notice and hearing rights

to probationary teachers under any circumstances, thus showing an intent on the part of the General Assembly to treat probationary teachers differently from school administrators and career teachers and provide them with less procedural protection. Here, in contrast to *Moore*, the question is not whether the General Assembly intended to afford school administrators, as a class of employee, with notice and hearing rights in the contract renewal process, but rather under what circumstances are such procedural protections triggered. To hold that when a superintendent recommends renewal, a Board may conduct its own investigation, and an administrator has no right to notice or an opportunity to be heard in any form regarding that investigation, would be an absurd result inconsistent with other provisions in Chapter 115C. We decline to adopt such a construction of N.C. Gen. Stat. § 115C-287.1(d).

Reading N.C. Gen. Stat. § 115C-287.1(d) *in pari materia* with other provisions in Chapter 115C and considering the overall purpose of N.C. Gen. Stat. § 115C-287.1(d), as directed by *Taylor* and *Taborn*, we hold that in deciding whether "to offer the school administrator a new, renewed, or extended school administrator's contract," N.C. Gen. Stat. § 115C-287.1(d), if the superintendent recommends that an administrator's contract be renewed, the Board is limited to reviewing the administrator's personnel file as it exists at that time and the superintendent's recommendation. In the event the Board has concerns regarding renewal that cannot be resolved by review of the administrator's personnel file, we hold that the Board may not consider documentation outside the administrator's personnel file or question witnesses -- effectively holding a hearing -- without providing (1) notice of the Board's concerns and of the information that the Board is considering and (2) an opportunity to the administrator to respond to that information.

Here, the superintendent recommended that Ms. Tobe-Williams' contract be renewed at the 5 June 2012 board meeting. The Board asked the superintendent to remove Ms. Tobe-Williams from the list of assistant principals he recommended for renewal because "it was aware of serious concerns" about Ms. Tobe-Williams and needed more time to "review documentation of Ms. Tobe-Williams' performance and conduct." The Board's removal of Ms. Tobe-Williams from the recommendation list had the same effect as a recommendation for nonrenewal: it placed Ms. Tobe-Williams' future employment status at risk based upon certain concerns about Ms. Tobe-Williams. Therefore, to carry out the intent of the General Assembly, the Board should have notified Ms. Tobe-Williams of her removal from the recommendation list and given

her an opportunity to respond to any information that the Board was considering that was not included in her personnel file.[2]

Accordingly, we hold that the procedure employed by the Board in this case violated Ms. Tobe-Williams' procedural rights under N.C. Gen. Stat. § 115C-287.1(d) and N.C. Gen. Stat. § 115C-325(b). Those violations resulted in a record that does not include any information that Ms. Tobe-Williams might have submitted had she been given the opportunity to do so, and, to that extent, is insufficient for a determination whether the Board's non-renewal decision was "arbitrary, capricious, discriminatory, personal, or political." N.C. Gen. Stat. § 115C-287.1(d).

The trial court, however, concluded that the Board's decision was not supported by substantial evidence in the record and was arbitrary and capricious. Accordingly, it reversed the Board's decision and ordered Ms. Tobe-Williams' reinstatement. After carefully reviewing the record, we hold that, although some of the Board's specific factual findings are not supported by evidence in the record, there is substantial evidence to support the Board's ultimate findings. Those findings articulate grounds for nonrenewal that are not arbitrary, capricious, discriminatory, personal, or political. Since the record reveals that there may be a non-prohibited basis for nonrenewal, we reverse the trial court's order of reinstatement.

Nevertheless, because Ms. Tobe-Williams has not yet had an opportunity to respond to the evidence gathered and considered by the Board, we reverse the Board's decision and remand for the Board to reach a new decision after properly allowing Ms. Tobe-Williams an opportunity to be heard regarding the information that the Board intends to consider that was not included in her personnel file at the time the superintendent recommended renewal of her contract. *See Taborn v. Hammonds*, 83 N.C. App. 461, 469, 350 S.E.2d 880, 885 (1986) (vacating Board's decision and remanding for new hearing where deficiencies in Board's findings and failure to resolve material conflicts in the evidence "prevent[ed] [the Court] from discerning a substantive reason for the decision to terminate plaintiff"). Because of our resolution of this appeal, we need not address the remainder of the Board's arguments.

Affirmed in part; reversed in part; and remanded.

Judges STEPHENS and ERVIN concur.

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2. We note that Ms. Tobe-Williams learned only on 12 July 2012 that material had been added to her personnel file -- two days after the Board had already decided not to renew her contract. She received a copy of her personnel file on 18 July 2012, more than a week after the decision.

WHITESELL v. BARNWELL

[234 N.C. App. 471 (2014)]

TOMMY M. WHITESELL, PETITIONER-APPELLEE
v.
CATHY B. BARNWELL, RESPONDENT-APPELLANT

No. COA13-1426

Filed 17 June 2014

1. Partition—jointly held leasehold—contract—no estoppel

In an action involving the partition or sale of a leasehold in lake property as well as personal property, petitioner was not estopped by the agreement between the parties. Unlike *Properties, Inc. v. Cox*, 268 N.C. 14, in this case the trial court based its finding on the language of the parties' agreement (which did not contain any express stipulation as to partition) rather than the passage of time.

2. Partition—lake property leasehold—injury to a party

In an action involving the partition or sale of a leasehold in lake property as well as personal property, respondent did not show error on the question of whether petitioner would suffer injury or substantial injury. Respondent's argument consisted of questioning the evidence of injury, but the evidence showed that petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer wishing to share a one-half interest with respondent.

3. Partition—relief sought under statute—defense of unclean hands

Respondent did not show error on the basis of unclean hands in an action for the partition or sale of a leasehold in lake property as well as personal property. She restated earlier equity arguments but presented no authority for an application of unclean hands in this case, where petitioner sought relief through statute rather than under the parties' agreement.

4. Appeal and Error—failure to cite supporting authority—failure to describe reversible error

Respondent's argument concerning essential parties in an appeal from an order that a joint leasehold in lake property and personal property be sold was dismissed where she cited no supporting authority. Furthermore, she did not describe how the alleged omission constituted reversible error.

5. Partition—sufficiency of order of sale—governing statute

Respondent did not show error with the contention that a trial court's order for the sale of a jointly owned leasehold in lake property as well as personal property was not sufficient under the requirements of N.C. Gen. Stat. § 46-22(c). The case was governed by N.C.G.S. § 46-44 rather than N.C.G.S. § 46-22(c).

Appeal by Respondent from order entered 19 August 2013 by Judge A. Robinson Hassell in Superior Court, Rockingham County. Heard in the Court of Appeals 20 May 2014.

Rossabi Black Slaughter, P.A., by T. Keith Black and Gavin J. Reardon, for Petitioner-Appellee.

Forrester Law Firm, by Richard W. Forrester, for Respondent-Appellant.

McGEE, Judge.

Tommy M. Whitesell ("Petitioner") and Cathy B. Barnwell ("Respondent") each own a one-half leasehold interest in Lot No. 47 Belews Lake, Rockingham County and a one-half interest in personal property consisting of the following: a Park Model Home ("the mobile home") on the lot and "all personal property and improvements contained" on the lot. At the time Petitioner and Respondent acquired the leasehold interest and the mobile home, they were in a dating relationship. They entered into a written agreement (the "Agreement") around April 2000, that provided for the disposition of "the property located at Belews Lake" should either party die or should either party "desire to sell their individual ownership[.]"

Petitioner, on 29 November 2012, filed a petition for sale of the "leasing interest" and the personal property. The matter came on for hearing on 29 July 2013. In an order entered 19 August 2013, the trial court found that "a dispute exists between the Parties as to whether the Agreement contemplates both the Leasehold Interest and the Personal Property." The trial court further found that the parties "have experienced substantial difficulty in attempting to share the Leasehold Interest and Personal Property, resulting in numerous disagreements relating to maintenance, storage of boats on off weekends and reimbursement of expenses."

The trial court was "not persuaded that the Agreement reflects or is sufficient evidence that the Parties intended to forever waive or abandon their respective rights to partition their Leasehold Interest in the Property or the Personal Property." The trial court ordered a public sale of the leasehold interest and the personal property. Respondent appeals.

I. Standard of Review

It is well settled that "when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* The " 'determination as to whether a partition order and sale should [be] issue[d] is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law.' " *Id.* at 236, 695 S.E.2d at 821 (citation omitted).

II. Analysis

Respondent argues that the trial court erred in ordering a sale. Respondent makes several sub-arguments in support of this contention.

A. Estoppel

[1] First, Respondent contends Petitioner "was estopped by contract from partitioning." For support, Respondent cites *Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966). In *Properties*, the agreement did not contain an express stipulation that a party shall not partition the property. *Id.* at 20, 149 S.E.2d at 558. However, our Supreme Court observed that it was apparent "from the instrument itself and from the circumstances surrounding its execution that neither party considered the possibility of partition during the life of Mrs. Cox." *Id.*

By contrast, in the present case, the trial court found that a dispute existed as to whether the agreement contemplated both the leasehold interest and the personal property. Furthermore, the trial court was "not persuaded that the Agreement reflects or is sufficient evidence that the Parties intended to forever waive or abandon their respective rights to partition their Leasehold Interest in the Property or the Personal Property." Respondent does not challenge the above findings of fact on appeal as unsupported by competent evidence.

Rather, Respondent contends that the trial court, "after finding that an agreement existed, surely erred in assigning its own temporal interpretation to the [A]greement." To the extent this statement challenges the trial court's finding of fact, Respondent nevertheless has failed to show the trial court erred. There is no indication in the trial court's order that it based its finding on the passage of time. Rather, the trial court based its finding on the language of the Agreement, which does not contain any express stipulation as to partition. Respondent has not shown error on this basis.

B. Injury

[2] Respondent next contends Petitioner will not suffer either injury or substantial injury. To the extent this statement constitutes an argument that the trial court erred in making finding of fact 9 ("It is impossible to divide the Leasehold Interest or the Personal Property without substantial injury to at least one of the Parties."), Respondent has failed to demonstrate that the trial court erred on this basis. "If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made[.]" N.C. Gen. Stat. § 46-44 (2013). Respondent's argument consists of questioning the evidence of injury.

However, Petitioner testified during the hearing before the trial court that the alternating weekly schedule that the parties had been using since 2002 "doesn't work." He testified that the parties argued about the time frame and which duties each should perform at the property. The parties disagreed about picking up broken tree limbs, mowing the grass, the use of the septic tank, the installation of a light near the lake, cable expenses, utility expenses, fertilizer, kitchen supplies, and cleaning the property. Petitioner further testified that Respondent's pontoon blocked his view of the lake and prevented Petitioner from keeping his boat in the slip. This evidence shows the obstacles Petitioner faces in selling his one-half interest in the leasehold, mobile home, and other personal property. Petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer who wishes to share a one-half interest with Respondent.

The evidence shows that a "division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested[.]" N.C.G.S. § 46-44. Respondent has not shown error on this basis.

C. Unclean Hands

[3] Respondent next contends that Petitioner has unclean hands. "The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). However, within this sub-section, Respondent cites no supporting authority and restates earlier arguments relating to equity. Respondent contends that the fact Petitioner "assigned away a significant portion of the personal property" by "titling it to himself and his new wife," is a material breach of the agreement.

Respondent does not challenge the trial court's finding that the agreement does not show that the parties intended to waive the right to partition. Respondent has presented no authority for such application of the doctrine of unclean hands in this case, where Petitioner does not seek relief under the agreement, but rather through statute. Relief "is not to be denied because of general iniquitous conduct on the part of the complainant[.]" *Id.* at 384, 337 S.E.2d at 141. Respondent has failed to show error on this basis.

D. Essential Party

[4] Respondent also contends that Petitioner "has not named an essential party, Carolina Marina, the leasing entity for Duke Power." However, Respondent again cites no supporting authority for this argument. *See* N.C.R. App. P. 28(b)(6) ("The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies."). Furthermore, Respondent does not describe how this constitutes reversible error by the trial court. This argument is therefore dismissed. *See Hackos v. Goodman*, ___ N.C. App. ___, ___, 745 S.E.2d 336, 341 (2013) ("Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff's argument.").

E. Findings and Conclusions

[5] Respondent next contends that the trial court's order "is wholly inadequate to support an order for the sale of property" under the requirements of N.C. Gen. Stat. § 46-22(c). However, N.C.G.S. § 46-22(c) does not govern this case. The applicable statute is N.C. Gen. Stat. § 46-44, which provides that if "a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is

deemed necessary, the court shall order a sale[.]" N.C.G.S. § 46-44. This Court has held that a "leasehold interest in real property is a chattel real and as such is subject to rules of law applicable to personal property." *First Southern Savings Bank v. Tuton*, 114 N.C. App. 805, 807-08, 443 S.E.2d 345, 346 (1994); *see also Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E.2d 595, 597 (1980) ("a lease is a species of personal property"); *Moche v. Leno*, 227 N.C. 159, 160, 41 S.E.2d 369, 370 (1947) ("estates less than freehold, called 'estate for years,' however long, created by lease, have been classified almost invariably as personal, and not real property"); *Fleet National Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 391, 451 S.E.2d 325, 328 (1994). Respondent has therefore failed to show error on this basis.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JUNE 2014)

BANK OF AM., N.A. v. CHARLOTTE PROP. INVS., LLC No. 14-42	Mecklenburg (13CVS2168)	Affirmed
CENTURY FIRE PROT., LLC v. HEIRS No. 14-146	Catawba (12CVS1788)	Dismissed
FLORENTZ v. GORE No. 13-1223	Moore (12CVS1359)	Affirmed
FRENCH v. FRENCH No. 13-1239	Buncombe (11CVD6035)	Dismissed
IN RE C.L. No. 13-1401	Wake (12JT71)	Affirmed
IN RE D.M.H. No. 14-44	Caldwell (11JA91)	Affirmed
IN RE J.C.P. No. 13-1253	Guilford (08JT691-692) (11JT25)	Affirmed
IN RE J.R. No. 13-1473	Mecklenburg (10JA739)	Affirmed
IN RE L.J.C. No. 14-97	Wake (12JT04)	Affirmed
IN RE M.S. No. 14-138	Beaufort (11JA91)	Vacated and Remanded
IN RE N.M. No. 14-33	New Hanover (12JA222)	Affirmed
IN RE S.L.B.B. No. 14-116	Catawba (11JT177)	Affirmed
IN RE S.T.F. No. 13-1408	Robeson (10JT217-220)	Affirmed
IN RE T.L.F. No. 14-23	Wilkes (12JT88-89)	Affirmed
IN RE Z.P-S. No. 13-1378	Durham (07JT34)	Affirmed

JAMES B. TAYLOR FAM. LTD. P'SHIP v. BANK OF GRANITE No. 13-550	Caldwell (12CVS1041)	Affirmed
LARRIMORE v. DILLARD, INC. No. 13-1317	N.C. Industrial Commission (458055)	Reversed
McVICKER v. McVICKER No. 14-47	Wake (07CVD14785)	Affirmed
NEWBRIDGE BANK v. R.C. KOONTS & SONS MASONRY, INC. No. 14-13	Davidson (09CVS184)	Dismissed
PROMENADE AT SURF CITY, LLC v. NIKKIS ON TOPSAIL ISLAND, INC. No. 13-1422	Pender (12CVS231)	Affirmed
SAMMY'S AUTO SALES, INC. v. COMM'R OF DIV. OF MOTOR VEHICLES No. 13-889	Robeson (12CVS134)	Reversed
SHACKLEY v. SHACKLEY No. 13-774	Pitt (13CVD537)	Affirmed
STATE v. BALLARD No. 13-1211	Wilkes (05CRS52751-62) (05CRS52764-76) (06CRS50104-08) (06CRS50116-27) (06CRS50479)	Affirmed; Remanded for Correction of Clerical Error in Judgments.
STATE v. BARR No. 13-1461	McDowell (12CRS1514)	Vacated
STATE v. DAVEY No. 13-1177	Cleveland (12CRS2486-96) (12CRS53213-14)	No Error
STATE v. EARLE No. 13-1237	Madison (12CRS50550)	No Error
STATE v. ERVIN No. 13-1078	Gaston (11CRS56874) (11CRS58352)	Reversed and Remanded

STATE v. GLADDEN No. 13-1262	Cabarrus (04CRS12008) (04CRS13160) (04CRS8966-67) (04CRS9284) (05CRS2084)	Affirmed
STATE v. GRAVES No. 13-1174	Wake (10CRS222323-24) (12CRS5928)	No Error
STATE v. HONEYCUTT No. 13-1103	Orange (11CRS53479) (13CRS20)	No Error
STATE v. HUGHES No. 13-1400	Gaston (11CRS12184) (12CRS11164)	No Prejudicial Error in Part; Dismissed in Part.
STATE v. LEWIS No. 13-905	Rowan (10CRS58246) (11CRS3083)	No Error
STATE v. LOCKHART No. 13-1460	Guilford (12CRS80377)	No Error
STATE v. MANNS No. 13-1324	Forsyth (12CRS61995)	No Error
STATE v. McKOY No. 13-1071	Pender (11CRS52835) (12CRS542)	Vacated in Part, No Error in Part, and Remanded for Resentencing
STATE v. PHILLIPS No. 14-54	Craven (09CRS51899)	No Error
STATE v. ROSS No. 13-1162	Cleveland (09CRS53903) (09CRS53906-07)	No Error
STATE v. SMART No. 13-1231	Burke (12CRS20)	No Error
STATE v. SMITH No. 13-1036	Columbus (11CRS50365-66) (11CRS50392) (11CRS50425)	No Error In Part, Dismissed in Part, Vacated in Part

STATE v. WEST No. 13-1399	Pasquotank (10CRS1724-25) (10CRS51007)	No Error
STATE v. WARREN No. 13-1268	Haywood (11CRS53915) (12CRS50517)	Reversed and Remanded
STATE v. WOOTEN No. 13-1255	Wayne (11CRS55895)	No Error
STATE v. ZINKAND No. 14-121	Macon (11CRS50083)	No Error
TRIMARK FOODCRAFT, INC. v. LEGER No. 13-923	Cabarrus (12CVD2558)	Affirmed in part; reversed and remanded in part
WISE RECYCLING, LLC v. TOWN OF CLAYTON No. 14-4	Johnston (13CVS528)	Dismissed

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