234 N.C. App.—No. 4 Pages 481-667

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 19, 2016

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS

OF

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 1 JULY 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

SANCTIONS

Discovery violation—no abuse of discretion—The trial court did not abuse its discretion in determining the sanction to impose upon the attorney involved in an attorney fees and costs dispute for his actions during discovery. Finding of fact 46 contained an entirely sufficient explanation of the court's decision to sanction the attorney. **Robertson v. Steris Corp., 525.**

SEARCH AND SEIZURE

Reasonable suspicion—driving while impaired—tip from gas station attendant—The trial court in a prosecution for impaired driving and other offenses properly denied defendant's motion to suppress all evidence stemming from the initial stop where an attendant at a gas station called in a tip, an officer was dispatched, and defendant was arrested after failing field sobriety tests. This tip was more reliable than one from a true anonymous caller because the caller was identified as an employee of the gas station, defendant was not "seized" by the officer's approach and initial questioning, and the officer's personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter were a sufficient basis for reasonable suspicion to support a stop. **State v. Veal, 570.**

SENTENCING

Partial retrial—increased sentence—prior record—convictions from first trial—The trial court erred on a partial retrial by increasing defendant's sentence for the charges that were joined at the first trial which resulted in convictions. None of the first trial's convictions could have been used in calculating defendant's prior record level had the jury in the first trial reached guilty verdicts on all of the charges. It would be unjust to punish a defendant more harshly simply because the jury in his first trial could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges. **State v. Watlington, 601.**

Special probation—presumptive range—no abuse of discretion—The trial court did not abuse its discretion in a felonious breaking or entering and assault inflicting serious bodily injury case by imposing a term of special probation of 135 days in the Division of Adult Correction instead of regular probation. The sentence imposed was within the presumptive range and the record did not show that the sentence was discriminatory based on poverty. **State v. Massenburg, 609.**

STATUTE OF LIMITATIONS AND REPOSE

Fraud—unfair trade practices—statute not expired—The trial court did not err in a fraud and unfair trade practices case by holding that the statute of limitations had not expired. Defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

UNFAIR TRADE PRACTICES

Acts occurring within partnership—no in or affecting commerce—The trial court erred in part in a fraud and unfair and deceptive trade practices case by concluding that defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership

or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in trebling damages as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by trebling damages with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same trebling of damages and attorney's fees to which the independent contractor was subject. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

UNJUST ENRICHMENT

Damages—stipulated payments received—The trial court did not err by awarding restitution of $101,544.50 based on quantum meruit in an action involving a residential tower, a commercial building, an office building, and a parking garage where the court found that $101,544.50 was stipulated by the parties to be the total amount of payments that the commercial building owners (ACH) received from the office building owners (SRS) from 4 June 2008 to 31 December 2011. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass'n, Inc., 541.**

WORKERS' COMPENSATION

Compensable injury—aggravation of pre-existing injury—separate injury—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff had sustained an aggravation of a pre-existing condition without also concluding that she had suffered a disc herniation. There was no evidence that defendant attempted to "void" the Form 60 and plaintiff was not prejudiced by the Commission's characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation. **Miller v. Mission Hosp., Inc., 514.**

Further medical compensation—Parsons presumption—burden shifted back to plaintiff—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff did not need further medical compensation. Defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, the burden shifted back to plaintiff to establish her continuing need for medical treatment. Plaintiff failed to meet this burden and failed to present evidence of disability. **Miller v. Mission Hosp., Inc., 514.**

No interruption of work routine—findings—The evidence in a worker's compensation case supported the Industrial Commission's findings, which supported its conclusion that a Federal Express driver who suffered a carotid dissection while delivering packages on December 23 did not experience an interruption of his work routine. The challenged portions of the Commission's findings were supported by competent evidence, plaintiff failed to articulate the legal or medical significance of the circumstances he posited as unusual, and the full Commission reviews appeals from the deputy commissioner de novo. **Hill v. Fed. Express Corp., 488.**

No injury by accident—findings—standard of decision—Commission's discretion—The findings of the Industrial Commission in a worker's compensation case were supported by competent evidence and supported the Commission's conclusion that plaintiff did not sustain an injury by accident where a Federal Express driver

suffered a stroke while delivering packages on December 23. Plaintiff appeared to argue, without citation to authority, that when the Industrial Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it failed to take plaintiff's affidavit in the light most favorable to plaintiff. However, the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted. **Hill v. Fed. Express Corp., 488.**

Plaintiff no longer disabled—supported by findings—The Industrial Commission did not err in a workers' compensation case by allowing defendant to stop paying indemnity compensation to plaintiff. The Commission's conclusion that plaintiff was no longer disabled and was able to return to work was supported by the findings. **Miller v. Mission Hosp., Inc., 514.**

ZONING

Common law vested rights—statement of claim—sufficient—Plaintiffs' claim of common law vests rights in developing property was sufficiently pled to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Taking plaintiff's allegations as true, their clearing of lots, canal digging, dune building, and road grading were substantial expenditures, their property was not zoned at the time they made their expenditures, and their expenditures were made in good faith. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

State constitution—tax classification—claim dismissed—The trial court did not err in a zoning case by dismissing plaintiffs' allegations under Article V, Section 2 of the North Carolina Constitution that the County had refused to allow business development on property that it had classified as business property for tax purposes. Plaintiffs did not challenge the tax classification or the uniformity of the tax rules. The tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim, but their allegations were insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

Vested rights claim—exhaustion of administrative remedies—not required—Plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring this civil action and the trial court erred by dismissing their common law vested rights claim under N.C.G.S. § 1A-1, Rule 12(b)(1) A plaintiff is not required to request that a board of adjustment issue a variance that it does not have the authority to issue. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

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.

CINOMAN v. UNIV. OF N.C.

[234 N.C. App. 481 (2014)]

MICHAEL I. CINOMAN, M.D., AND MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFFS

v.

THE UNIVERSITY OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA HEALTHCARE SYSTEM, D/B/A THE UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL; THE UNIVERSITY OF NORTH CAROLINA, D/B/A THE SCHOOL OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; THE UNIVERSITY OF NORTH CAROLINA, D/B/A THE UNIVERSITY OF NORTH CAROLINA LIABILITY INSURANCE TRUST FUND; WILLIAM L. ROPER, IN HIS CAPACITY AS DEAN OF THE SCHOOL OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; BRIAN GOLDSTEIN IN HIS CAPACITY AS CHAIRMAN OF THE UNIVERSITY OF NORTH CAROLINA LIABILITY INSURANCE TRUST FUND COUNCIL; THOMAS M. STERN, AS GUARDIAN AD LITEM FOR ARMANI WAKEFALL; AND WAKEMED, DEFENDANTS

No. COA13-902-2

Filed 1 July 2014

1. Appeal and Error—interlocutory orders and appeals—stay of declaratory judgment action—immediately appealable

A trial court's interlocutory order granting a stay of a declaratory judgment action concerning an insurer's duty to defend was immediately appealable. Whether an insurer has a duty to defend an underlying action affects a substantial right that might be lost absent immediate appeal. This opinion supersedes the previous opinion filed 4 March 2014.

2. Declaratory Judgments—determination of insurance coverage—actual case or controversy

The trial court erred by staying a declaratory judgment action based on its determination that no actual controversy existed as to the duty of the University of North Carolina Liability Insurance Trust Fund (UNC LITF) to indemnify until the underlying malpractice action was finally resolved. While the UNC-LITF policy by its terms is primary, the policy is also pro rata, so that UNC-LITF and the doctor's private insurance provider (MMIC) would provide concurrent coverage if the MMIC policy is pro rata, and UNC-LIFT would be primary if the MMIC policy contains an excess clause. Therefore, an actual controversy exists as to the UNC LITF's duty to indemnify. This opinion supersedes the previous opinion filed 4 March 2014.

Appeal by plaintiffs from order entered 19 April 2013 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 6 January 2014 and opinion filed 4 March 2014. Petition for Rehearing allowed 17 April 2014.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and J. Whitfield Gibson, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by David N. Allen, J. Douglas Grimes, and M. Duane Jones, for the University of North Carolina defendants-appellees.

Tin, Fulton, Walker & Owen, by William Simpson, and Ferguson, Chambers & Sumter, P.A., by James E. Ferguson II, for defendant-appellee Thomas M. Stern, as Guardian ad Litem for Armani Wakefall.

MARTIN, Chief Judge.

Plaintiffs Michael I. Cinoman, M.D. and Medical Mutual Insurance Company of North Carolina ("MMIC") appeal from an order granting UNC defendants'[1] motion to stay this declaratory action pending a final resolution of the underlying malpractice action. On 4 March 2014, this Court filed an opinion reversing the stay order. UNC defendants filed a Petition for Rehearing on 8 April 2014, which we allowed on 17 April 2014. Upon reconsideration, we reach the same disposition but modify the originally filed opinion. This opinion supersedes the previous opinion filed 4 March 2014.

In February 1999, Dr. Cinoman served as a temporary attending physician for full-time rotations in the University of North Carolina Hospitals at Chapel Hill Pediatric Intensive Care Unit ("UNC-PICU") as part of an agreement to assist UNC defendants with a staffing shortage in the UNC-PICU. On 21 June 2007, Thomas M. Stern, as guardian ad litem for Armani Wakefall, initiated a medical malpractice action against Dr. Cinoman and others for damages allegedly incurred by Wakefall as a result of negligent treatment she received at the UNC-PICU in February 1999 ("underlying malpractice action").

Dr. Cinoman is insured under a professional liability insurance policy issued by MMIC, which has treated its coverage as broad enough to cover the claims asserted against Dr. Cinoman in the underlying malpractice action. UNC defendants maintained that Dr. Cinoman is not entitled to coverage under the University of North Carolina Liability Insurance

1. UNC defendants are all defendants except for Thomas M. Stern, who is a nominal defendant due to his interest in the insurance coverage, and WakeMed, which is not a party to this appeal.

Trust Fund ("UNC LITF"), which provides coverage for claims against employees and agents of UNC defendants, because he was not a full-time employee of UNC defendants at the time of the events giving rise to the underlying malpractice action. In the absence of coverage by the UNC LITF, the damages demanded in the underlying malpractice action allegedly exceed Dr. Cinoman's professional liability insurance coverage.

On 17 February 2009, plaintiffs filed this declaratory judgment action to determine whether Dr. Cinoman is entitled to coverage under the UNC LITF, in addition to his coverage under the MMIC policy, and the relative liabilities of MMIC and the UNC LITF. Plaintiffs and UNC defendants moved for summary judgment, and the trial court granted summary judgment in favor of UNC defendants on 15 April 2010. On appeal, this Court reversed the summary judgment order, concluding that there were questions of material fact that rendered summary judgment for either party inappropriate, and remanded the case for trial. *Cinoman v. Univ. of N.C.*, 216 N.C. App. 585, 718 S.E.2d 424 (2011) (unpublished), *disc. review denied*, 365 N.C. 573, 724 S.E.2d 527 (2012).

On 28 February 2013, UNC defendants moved to stay further proceedings in this action pending the final resolution of the underlying malpractice action. In an order entered 19 April 2013, the trial court granted the motion to stay, finding that while an actual controversy exists as to the UNC LITF's duty to defend, no such controversy exists as to the UNC LITF's duty to indemnify until the underlying malpractice action is finally resolved. Plaintiffs appeal from the order pursuant to N.C.G.S. §§ 1 277 and 7A 27. UNC defendants moved to dismiss the appeal as interlocutory.

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[1] We must first determine whether the trial court's interlocutory order granting the stay is immediately appealable. Although interlocutory orders are not generally appealable, immediate appeal is available under N.C.G.S. §§ 1 277 and 7A 27 from an interlocutory order which affects a substantial right. *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 578–79 (1999), *on remand*, 137 N.C. App. 82, 527 S.E.2d 75 (2000). Where there is a pending suit or claim, an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action "affects a substantial right that might be lost absent immediate appeal." *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000). We therefore conclude that the appeal is properly before us.

A survey of the relevant case law indicates that our review on appeal of an order granting a stay is an abuse of discretion standard. *See Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960) ("Whether one lawsuit will be held in abeyance to abide the outcome of another rests in the sound discretion of the trial judge, and his action will not be disturbed on appeal, unless the discretion has been abused . . . ."); *see also Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (concluding that order staying declaratory judgment action to permit trial of parallel action in another state is reviewed for abuse of discretion and declining to adopt a *de novo* standard of review); *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (holding that order staying litigation pending final disposition of similar action in federal court "is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion"), *appeal dismissed and disc. review denied*, 327 N.C. 428, 396 S.E.2d 611 (1990). " 'A [trial] court by definition abuses its discretion when it makes an error of law.' " *In re A.F.*, __ N.C. App. __, __, 752 S.E.2d 245, 248 (2013) (alteration in original) (quoting *Koon v. United States*, 518 U.S. 81, 100, 135 L. Ed. 2d 392, 414 (1996)).

[2] On appeal, plaintiffs contend the trial court erred by granting the stay based on its determination that no actual controversy exists as to the UNC LITF's duty to indemnify until the underlying malpractice action is finally resolved. We agree.

"An actual controversy between adverse parties is a jurisdictional prerequisite for a declaratory judgment." *Newton v. Ohio Cas. Ins. Co.*, 91 N.C. App. 421, 422, 371 S.E.2d 782, 783 (1988). An actual controversy exists where an insurer seeks a determination that primary coverage is not provided under its policy and is instead provided under policies issued by other insurers. *See Gov't Emps. Ins. Co. v. New S. Ins. Co.*, 119 N.C. App. 700, 704, 459 S.E.2d 817, 819, *disc. review denied*, 341 N.C. 648, 462 S.E.2d 510 (1995). No such controversy exists, however, in a declaratory judgment action to determine whether coverage is provided under an excess insurance policy where the underlying liability action has not yet been resolved. *See N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 89 N.C. App. 148, 150, 365 S.E.2d 216, 217–18, *disc. review denied*, 322 N.C. 481, 370 S.E.2d 226 (1988), *appeal after remand*, 94 N.C. App. 591, 380 S.E.2d 790 (1989).

When more than one insurance policy affords coverage for a loss, the "other insurance" clauses in the competing policies must be examined to determine which policy provides primary coverage and which

policy provides excess coverage. *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 328, 524 S.E.2d 386, 391, *aff'd in part and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000). An excess clause is a type of "other insurance" clause which "generally provides that if other valid and collectible insurance covers the occurrence in question, the 'excess' policy will provide coverage only for liability above the maximum coverage of the primary policy or policies." *Horace Mann Ins. Co. v. Cont'l Cas. Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 213 (1981) (internal quotation marks omitted). An excess clause is distinguishable from a pro rata "other insurance" clause. *See Fid. & Cas. Co. of N.Y. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 203–04, 192 S.E.2d 113, 120–21 ("The terms 'prorate' and 'excess' do not have, and were not meant by the insurers to have identical meanings."), *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972). In *Fidelity & Casualty Co.*, this Court differentiated a pro rata clause in one policy from an excess clause in another policy:

> The Farm Bureau policy provides that if the injury or damage is covered by other applicable and collectible insurance, then Farm Bureau shall not be liable for a greater proportion of the loss than its limit of liability bears to the total applicable limits of liability of all valid and collectible insurance. The F and C policy, however, provides that its insurance coverage shall be excess to any other valid and collectible insurance with respect to loss arising out of the use of any non-owned automobile. The Farm Bureau provision is known as a "pro rata" clause; the F and C provision, an "excess" clause.

Id. at 203, 192 S.E.2d at 120–21.

Where a pro rata clause in one policy competes with an excess clause in another policy, the policy with the pro rata clause provides primary coverage, and the policy with the excess clause provides secondary coverage which will only be triggered if the limits of the policy containing the pro rata clause are first exhausted. *See id.* at 204, 192 S.E.2d at 121. Furthermore, where a pro rata clause in one policy competes with a pro rata clause in another policy, each insurer has primary concurrent liability for a proportionate amount of the loss. *See* 44A Am. Jur. 2d *Insurance* § 1752 (2013). Accordingly, an actual controversy exists in a declaratory judgment action to determine the liability of an insurer under its policy where the policy contains a pro rata clause and the other applicable policy contains either an excess clause or a pro rata clause.

In general, there is no primary versus excess insurance policy relationship where a self-insurance program is at issue because self-insurance does not constitute other collectible insurance within the meaning of an insurance policy's "other insurance" clause. *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 688–89, 443 S.E.2d 357, 360–61 (1994), *disc. review improvidently allowed per curiam*, 340 N.C. 353, 457 S.E.2d 300 (1995). Self-insurance is equivalent to a primary insurance policy, however, "when the self-insurance expressly provides that it is primary to other insurance." *Id.* at 689, 443 S.E.2d at 361. That is, while self-insurance generally is not a primary insurance policy, an exception exists where the self-insurance states that it affords primary coverage. *Cf. id.* (concluding that insured's self-insurance was not the primary insurance policy where there was no evidence that the self-insurance stated it would be primary to the insured's other insurance).

In their Petition, UNC defendants rely on *Cone Mills Corp.* for the contention that the UNC LITF is self-insurance and thus cannot be deemed a primary insurance policy. We note that this is the first time that UNC defendants have claimed that the UNC LITF is self-insurance. On appeal, UNC defendants made no assertion that the UNC LITF is self-insurance and failed to cite to a single case in which self-insurance was at issue; rather, UNC defendants likened the UNC LITF to an excess insurance policy and relied on cases finding no actual controversy exists in a declaratory judgment action to determine coverage provided by an excess insurance policy.

The UNC LITF is a self-insurance program for professional liability, authorized by N.C.G.S. § 116-219. However, the UNC LITF, by its terms set forth in the UNC LITF Memorandum of Coverage, falls under the exception carved out in *Cone Mills Corp.* and affords primary coverage. We find the plain language of the following "other insurance" clause in the UNC LITF Memorandum of Coverage to be controlling:

> ARTICLE VII. OTHER INSURANCE
>
> When this agreement and other collectible insurance both apply to a loss on the same basis, whether primary, excess or contingent, the Trust Fund shall not be liable under this agreement for a greater proportion of the loss than that stated in the applicable contribution provision below:
>
> A. Contribution by Equal Shares. If all such other valid and collectible insurance provides for contribution by equal shares, the Trust Fund shall not be liable for a

> greater proportion of such loss than would be payable if each insurance company contributes an equal share until the share of each company equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid. With respect to any amount of loss not so paid, the remaining companies shall continue to contribute equal shares of the remaining amount of the loss until each such company has paid its limit in full or the full amount of the loss is paid.
>
> B. Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the Trust Fund shall not be liable for a greater proportion of such loss than the applicable limit of liability under this agreement for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

Nothing in this provision indicates that the UNC LITF's liability arises only after the limits of other collectible insurance policies have been exhausted. Rather, the provision provides that the UNC LITF shares liability with other collectible insurance according to their respective limits. Thus, the UNC LITF "other insurance" clause is a pro rata clause. *See Fid. & Cas. Co.*, 16 N.C. App. at 203–04, 192 S.E.2d at 120–21.

While the UNC LITF "other insurance" clause does not expressly provide that the UNC LITF is primary to other insurance, the pro rata clause nonetheless means that the UNC LITF provides primary coverage regardless of the terms of the MMIC policy.[2] Assuming, *arguendo*, that the MMIC policy contains an excess clause, then the UNC LITF provides primary coverage. *See id.* at 204, 192 S.E.2d at 121. If, on the other hand, the MMIC policy contains a pro rata clause, then the UNC LITF and MMIC share liability on a pro rata basis according to their respective limits and, for that reason, both the UNC LITF and MMIC provide primary concurrent coverage. *See* 44A Am. Jur. 2d *Insurance* § 1752. Therefore, because the UNC LITF affords primary coverage, an actual controversy exists as to the UNC LITF's duty to indemnify, and the trial court erred by granting the stay based on its determination that no such controversy exists pending a final resolution in the underlying malpractice action.

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2. Although the MMIC policy is not included in the record on appeal, a review of the policy is not necessary because the UNC LITF "other insurance" clause is a pro rata clause. That is, regardless of whether the MMIC policy contains an excess clause or a pro rata clause, the UNC LITF provides primary coverage.

The remaining arguments in UNC defendants' Petition are without merit and we decline to consider them further.

Reversed.

Judges ERVIN and McCULLOUGH concur.

JIMMY HILL, EMPLOYEE, PLAINTIFF
v.
FEDERAL EXPRESS CORPORATION, EMPLOYER, SELF-INSURED
(SEDWICK CMS, THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA 14-60

Filed 1 July 2014

1. Worker's Compensation—no interruption of work routine—findings

The evidence in a worker's compensation case supported the Industrial Commission's findings, which supported its conclusion that a Federal Express driver who suffered a carotid dissection while delivering packages on December 23 did not experience an interruption of his work routine. The challenged portions of the Commission's findings were supported by competent evidence, plaintiff failed to articulate the legal or medical significance of the circumstances he posited as unusual, and the full Commission reviews appeals from the deputy commissioner de novo.

2. Worker's Compensation—no injury by accident—findings—standard of decision—Commission's discretion

The findings of the Industrial Commission in a worker's compensation case were supported by competent evidence and supported the Commission's conclusion that plaintiff did not sustain an injury by accident where a Federal Express driver suffered a stroke while delivering packages on December 23. Plaintiff appeared to argue, without citation to authority, that when the Industrial Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it failed to take plaintiff's affidavit in the light most favorable to plaintiff. However, the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted.

Appeal by plaintiff from the Opinion and Award entered 30 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 May 2014.

Oxner Thomas & Permar, by Justin B. Wraight, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Brooke M. Lewis, and M. Duane Jones, for defendant-appellee.

STEELMAN, Judge.

The Commission's findings of fact were supported by competent evidence and its findings supported its conclusions of law. The Commission did not abuse its discretion in its determinations of the weight and credibility of the evidence, and did not employ an overly narrow interpretation of the Workers Compensation Act in weighing the evidence.

I. Factual and Procedural History

Jimmy Hill (plaintiff) was born in 1953 and was 59 at the time of the hearing in this case. In December 2011 plaintiff had been employed as a courier for Federal Express Corporation (defendant) for over 13 years. His duties included loading and delivering packages. As a courier, plaintiff was required to lift 75 pound packages and delivered 80 to 90 packages a day. On 23 December 2011 plaintiff arrived at work shortly before 8:00 a.m. Upon arrival at work, plaintiff checked the lights and brakes in his truck, performed stretching exercises, and began sorting and arranging the packages in his truck.

On a normal day, couriers were required to deliver packages in order of priority, based on factors such as the need to deliver refrigerated medications in a timely manner or the fact that a customer had paid for express delivery. To accomplish this, plaintiff might drive past some delivery locations, and return to them after he completed the priority deliveries. On 23 December 2011, two factors led defendant to abandon its usual prioritizing. First, because it was the last business day before Christmas, plaintiff had so many deliveries that he had to place packages on the floor of his truck. Secondly, a plane bringing packages for delivery was delayed, so that instead of leaving the warehouse at 8:15, plaintiff did not leave until about 9:00 a.m. Plaintiff's supervisor agreed that plaintiff should deliver packages on the floor as soon as possible, and that he could use a "straight line" delivery route, stopping at

each delivery location as he came to it, even if this resulted in delayed delivery of packages to customers who had contracted for early morning delivery.

Between 9:00 and 11:00 a.m., plaintiff delivered about 20 packages. Shortly after 11:00 a.m., plaintiff began experiencing impaired vision and significant difficulties with motor control. He was able to park at a nearby fire station, and was taken by ambulance to Moses Cone Hospital. Plaintiff was diagnosed with a stroke cause by a carotid dissection, which is a tear in a blood vessel. Plaintiff was treated in the hospital for about five days, followed by a period of rehabilitative therapy. Plaintiff made a good recovery, but as of the time of the hearing he was still experiencing cognitive and physical effects of the stroke, and had not been able to return to work.

Plaintiff filed a claim for workers compensation benefits, which defendant denied on the grounds that plaintiff had experienced "no work related accident resulting in injury." The Full Commission issued its Opinion and Award on 30 August 2013, denying plaintiff's claim for workers compensation benefits. The Commission concluded that "plaintiff's job duties as a courier for FedEx on December 23, 2011 were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke."

Plaintiff appeals.

II. Standard of Review

Appellate review of an Industrial Commission order is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission has sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Id.* (citation omitted). Findings that are not challenged on appeal are "presumed to be supported by competent evidence" and are "conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). The "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

The "claimant in a workers' compensation case bears the burden of initially proving 'each and every element of compensability' . . . by a 'greater weight' of the evidence or a 'preponderance' of the evidence." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005)

(quoting *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003), and *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995)). "To establish 'compensability' . . . a 'claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.' " *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). In this case the parties disagree about whether plaintiff presented evidence that (1) his employment bore a causal relationship to his carotid dissection, and (2) whether on 23 December 2011 there was an interruption of plaintiff's normal work routine and the introduction of unexpected or unusual circumstances such that the Commission might find that he suffered an injury by "accident."

"Our Supreme Court has defined the term 'accident' as used in the Workers' Compensation Act as 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.' The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Of course, if the employee is performing his regular duties in the 'usual and customary manner,' and is injured, there is no 'accident' and the injury is not compensable." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980) (quoting *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E. 2d 289, 292 (1957), and citing *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963), and *O'Mary v. Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964)).

In *Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986), our Supreme Court upheld a workers' compensation award where the claimant injured his arm while performing "twisting movements" shortly after starting a new job requiring these unaccustomed movements. Similarly, in *Salomon v. Oaks of Carolina*, 217 N.C. App. 146, 718 S.E.2d 204 (2011), we upheld the Commission's determination that a nursing assistant suffered an injury by accident where her injury was caused by a patient's unusual and unexpected resistance to the plaintiff's care. However, an injury is not the result of an "accident" simply because it occurs during a challenging workday in which the claimant performs his or her usual duties under more difficult conditions. *See, e.g.*, *Southards v. Motor Lines*, 11 N.C. App. 583, 585, 181 S.E.2d 811, 813 (1971) (holding the Commission's findings insufficient to support award, given that the "fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, are not enough to satisfy the

requirement of an 'interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences[.]' . . . Nor is the mere fact that plaintiff was in a hurry[.]") (citing *Gray v. Storage, Inc.*, 10 N.C. App. 668, 179 S.E.2d 883 (1971)).

III. Commission's Findings of Fact

[1] Plaintiff's first argument challenges the evidentiary support for the Commission's findings concerning whether the circumstances of plaintiff's employment on 23 December 2011 constituted "an unlooked for and untoward event" or "interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (2010) (citation omitted). Plaintiff argues that the Commission erred in making findings on this issue that were not supported by competent evidence. We disagree.

The Commission's findings about the circumstances of plaintiff's job on 23 December 2011 included the following:

> 1. As of the date of the hearing before the Deputy Commissioner, plaintiff was 59 years old and had been employed by defendant for 14 years as a courier[.] . . .
>
> 2. As a courier, plaintiff was required to load his truck, deliver packages, and pick up packages. Plaintiff typically handled small and large packages of varying weights. He testified that he lifted packages weighing between 75 and 150 pounds, and it was not unusual for plaintiff to deliver 85 to 90 packages a day.
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> . . .
>
> 4, In December 2011, plaintiff was driving a sprinter truck. . . . [He] was familiar with the operation of the truck[.] . . .
>
> 5. Plaintiff had worked as a courier for defendant during the Christmas season for many years, and he testified that the Christmas season is always a busy time for FedEx couriers. Plaintiff had not driven the particular route he was driving on December 23, 2011 during prior Christmas seasons; however, he had been driving this particular route since his old route had been switched over to the new FedEx hub. The only difference between the two routes that plaintiff was able to identify at the hearing before the Deputy Commissioner was that the route he was assigned

sometime after Christmas 2010 was more residential than his prior route.

6. On a 'regular' day, defendant operates on a priority schedule, such that priority overnight packages have to be delivered by 10:30 a.m. . . . Because of the priority package delivery times, couriers would load their trucks and drive their route so that the priority packages could be delivered first and on time. This meant that a courier might drive past a stop that the courier would come back to later in the day. . . . [During the winter] the couriers typically rush to complete their deliveries . . . before it gets dark and becomes difficult to see the house numbers.

7. As a courier, plaintiff would generally . . . start his route at approximately 8:00 or 8:10 am. However, if the plane bringing incoming freight was delayed, plaintiff would be delayed in starting his route.

8. It was not unusual for planes to be delayed. To address this contingency, defendant had implemented protocols to address the delivery of packages, such as foregoing priority delivery and going to a 'straight line' delivery method, which involves the couriers making each stop on their route, rather than bypassing some stops in the route in order to go on to the next priority delivery. . . .

9. On December 23, 2011, the plane bringing in the freight that had to be delivered that day was late to arrive. Plaintiff testified that this allowed him to spend some time lining up the freight that was already in his truck, and to swap off routes with other drivers. . . . When asked by his attorney whether a late plane put any pressure on him, plaintiff testified that it just means you will be in a different traffic pattern when you eventually start your route. Plaintiff testified that he left the hub at "9:00 something" on [that] morning[.] . . .

10. Plaintiff testified that on December 23, 2011, he had large packages on his truck; however, he did not testify as to whether those packages were any larger than the packages he regularly had to deliver. Plaintiff also testified that he did not know how many packages he had on his truck when he left the hub on December 23, 2011, but that this day was different because of "the amount of packages that

> was there and the size and awkwardness of it[.]" . . . [That day] was the first time that he ever had to deliver a flat screen TV, but there was no testimony that the flat screen TV weighed any more than other packages he had delivered over the past 13 years. Finally, he testified that the floor of his truck was filled with packages and that he had to step over packages when he made his deliveries.

Based on its findings concerning the circumstances of plaintiff's work on 23 December 2011, the Commission stated in Finding No. 21 that:

> 21. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that plaintiff did not suffer an interruption of his regular work routine on December 23, 2011. Plaintiff's job by its very nature requires that he rush to make timely deliveries. Plaintiff was very busy every Christmas season. The evidence of record does not support a finding that plaintiff was busier on December 23, 2011 than he had been at other times during the 2011 Christmas season or during past Christmas seasons. The evidence does not support a finding that the late arrival of the plane caused him to rush any more than usual. In fact, plaintiff had more time to organize his truck, and he did not have to complete the priority deliveries by 10:30. While his truck may have been very full, there is no evidence that having to step over packages on the floor or move awkwardly in the truck was not something he had had to do during past Christmas seasons.

We hold that the Commission's findings are supported by competent evidence. In arguing for a contrary result, plaintiff challenges only a few excerpts from Findings of Fact 5,8, 9, and 21 which he contends were not supported by competent evidence. The remaining findings, which as discussed above are conclusively established given that they are not challenged, are sufficient to support the Commission's conclusion that plaintiff was not subjected to any significant interruption of his work routine. Furthermore, our review reveals that the challenged excerpts are supported by competent evidence.

Plaintiff first contends that the Commission erred in Finding No. 8 by finding that it was not unusual for planes to be late, and argues that the "record is devoid of any evidence that supports this finding." Plaintiff testified that defendant identified the situation of a delayed plane as a "code 43" and that specific procedures were in place for the couriers to

follow in response to delays. The Commission could reasonably find that the existence of a specific identification code and an alternative plan for use when planes were delayed was evidence that this occurrence was not unusual. This argument lacks merit.

Plaintiff also argues that the Commission erred in Finding of Fact 5 by finding that the only difference plaintiff identified between his former delivery route and the route he was assigned in 2011 was that the newer route was more residential. Plaintiff asserts that this finding "is quite contrary to the testimony in this matter and is not supported by competent evidence." However, plaintiff does not dispute that he testified that the newer route was more residential, and does not identify any other differences between the two delivery routes. Instead, he argues that other aspects of plaintiff's work day on 23 December 2011 were unusual. The Commission did not err by finding that the only difference plaintiff noted between his 2011 route and his route prior to Christmas 2010 was that the new route was more residential.[1]

In addition, plaintiff argues that the Commission erred in Finding of Fact 9, by finding that the plane's delay allowed plaintiff additional time to arrange the freight in his truck, or to trade routes or deliveries with other drivers. Plaintiff asserts that this finding "is completely contradicted by the testimony." However, when plaintiff was asked to discuss the effect of a late plane on his work day, he testified that:

> We had a 43 at 8:05 I'm thinking. It's on my timecard. A 43 is a delay for planes and really it - I mean, you don't want a late plane but really that gave us time to line up what we had already there [in the truck.] And then the couriers will swap off on the routes that's close to you, you know. "Can you hit this on your way down to so-and-so because this the only one I've got in that area?" And we swapped off, you know during that time and all, [and] finished loading our trucks[.]"

(emphasis added). This finding was clearly supported, rather than "completely contradicted" by the above-quoted testimony.

Plaintiff also asserts that Finding No. 21 "demonstrates multiple examples of conclusions which are not supported by competent evidence." Plaintiff challenges the finding that "the evidence does not

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1. We also note that plaintiff failed to offer evidence concerning the significance, if any, of the residential character of the new route. For example, he did not testify that it was harder to service a residential delivery route, or that it took longer.

support a finding that the late arrival of the plane caused [plaintiff] to rush any more than usual," and asserts that plaintiff "unequivocally testified that late planes wreak havoc on [his] normal job[.]" Plaintiff testified that the delay gave him additional time to organize his route and trade deliveries with other couriers. Also, in response to the delay, defendant adjusted some of its normal policies; for example, couriers were permitted to deliver packages in a straight line, even if that meant that overnight deliveries were delayed. On the other hand, the late start gave plaintiff less time to complete the route before dark. Plaintiff was never asked whether overall his job was easier or harder when a plane was delayed, and he certainly never testified "unequivocally" that the situation "wreaked havoc" on his delivery schedule. In addition, plaintiff testified that he delivered 80 or 90 packages a day. He experienced stroke symptoms after working only two hours and delivering about 20 packages, a rate of delivery that was no faster than usual. We hold that the challenged portions of the Commission's findings were supported by competent evidence.

Plaintiff also cites findings of fact made by the Deputy Commissioner and asserts that they illustrate "the abnormalities and unusual circumstances which Plaintiff faced on the day of his injury." However, "[w]hether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission - not the hearing officer." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). "[T]he Full Commission reviews appeals from the Deputy Commissioner *de novo*. Therefore, the Deputy Commissioner's findings are irrelevant and have no bearing on the instant case." *Newnam v. New Hanover Regional Med. Ctr.*, __ N.C. App. __, __, 711 S.E.2d 194, 200 (2011) (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)).

Plaintiff has also failed to articulate the legal or medical significance of the circumstances he posits as unusual. He offers no reasons why a delayed plane, busy time of year, or packages on the truck's floor might have resulted in his injury. We hold that the Commission's findings of fact were supported by competent evidence, and that they supported its conclusion that on 23 December 2011 plaintiff did not experience an interruption of his work routine. Plaintiff's arguments to the contrary lack merit.

IV. Commission's Determinations on Weight and Credibility

[2] Plaintiff's next argument challenges the Commission's findings concerning whether the medical evidence showed a causal relationship between his employment and his injury. This argument lacks merit.

The Commission concluded that the greater weight of the evidence showed that his job duties on 23 December 2011 "were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke." This conclusion was supported by its findings, including the following:

. . .

> 11. At approximately 11:00 a.m. on December 23, 2011, after plaintiff had made 20 deliveries, he began to experience blurred and distorted vision[, and] . . . difficulty with his fine motor skills[.] . . . [He] drove to a nearby fire station[, where a fireman] . . . called an ambulance to transport him to the hospital.
>
> 12. Plaintiff was then transported to the Moses Cone Hospital Emergency Department where he was examined by Dr. Pramod P. Sethi[.] . . . [P]laintiff had a major occlusion of the internal carotid artery of the neck. . . . [Dr. Deveshwar] performed an emergency catheter angiogram [which] . . . revealed a carotid dissection[,] . . . [and] used a balloon and a stent to open the dissected area and administered clot-busting medicine[.] . . .
>
> 13. . . . [Plaintiff] sustained a . . . stroke, secondary to . . . a left internal carotic artery occlusion from a left internal artery dissection. Plaintiff remained in the hospital until December 28, 2011. As of the date of his discharge, plaintiff continued to experience problems with his speech and motor movement on his right side. He was prescribed medication and referred to rehabilitation therapy[.]. . .
>
> 14. A carotid dissection occurs when a rupture or tear develops in the inner layer of the carotid artery, causing blood to seep between the layers of the artery to cause an occlusion, which if left undetected causes a clot to develop, which in turn causes a stroke. No one knows how long it takes between the time the artery dissects and the time the patient begins to show symptoms of a stroke, but it is a multi-stage process which Dr. Coin believes could possibly take a few days to a week. Dr. Coin, a neurologist who reviewed plaintiff's medical records and testified as an expert at defendant's request, testified that it would be difficult for him to understand how it could all happen within three hours[.] . . . Dr. Daniel Gentry, plaintiff's

family doctor, testified that a dissection "comes from a defect plus time."

15. Dr. Sethi testified that several things can cause a carotid dissection, including "minimal postural trauma" . . . or a hereditary condition[.] . . . People who suffer from cardiovascular disease . . . are predisposed to suffer a carotid dissection. Advanced age (i.e., over 50) . . . [is another] risk factor[] for developing a carotid dissection.

16. With regard to trauma specifically, Dr. Sethi testified that any minor trauma can cause a dissection, but minor trauma will not cause a dissection in everyone. . . . Dr. Sethi went on to explain that most acute traumatic events have a sudden and unexpected character, such as a quick blow to the neck or an abrupt turning of the head with lateral flexion of the neck. Dr. Coin testified that a dissection could be caused by obvious external trauma, such as a motor vehicle accident, or some trivial "trauma" such as coughing, wrenching your neck or even simply turning the head from one side to the other. Dr. Gentry was of the opinion that no one can really "put their finger on" what causes a dissection in any given case, and that it would be impossible to say that an abrupt turning of the head caused a dissection. According to Dr. Gentry, there is no scientific or medical evidence that activity such as . . . lifting packages in a truck could cause a dissection. He also disagreed with . . . [the] suggestion that you would expect a dissection to come from some sort of unusual exertion.

. . .

18. Prior to the hearing before the Deputy Commissioner, plaintiff's counsel sent Dr. Sethi a letter setting forth questions regarding the cause of plaintiff's carotid dissection. The letter to Dr. Sethi included an affidavit signed by plaintiff which set forth several ways in which Plaintiff contends that his workday on December 23, 2011 was unusual. After reviewing the affidavit in which plaintiff stated that December 23, 2011 was an usually busy day during which he was rushing to make deliveries of unusually heavy packages of unusual shape in the time allotted, during which he had to contort his body into awkward positions, Dr. Sethi stated on the questionnaire that (1) plaintiff's job duties and responsibilities as a courier

more likely than not [were] a significant factor in his suffering a left internal carotid artery occlusion resulting from dissection on December 23, 2011; and (2) plaintiff's left internal carotid artery dissection on December 23, 2011 was more likely than not caused by a traumatic event, such as an abrupt turning of the head with lateral flexion of the neck, when he was maneuvering himself in a crowded delivery truck and lifting heavy packages. However, when asked on cross-examination about his answers on the questionnaire, Dr. Sethi testified: "I didn't say it caused. I said it could have contributed. It's possible that it played a role." With regard to his response to the question about an abrupt turning of the head, Dr. Sethi stated on cross-examination that "there's no possible answer here. I think it's possible it could have been caused by that."

19. While plaintiff did testify at the hearing that he had to move awkwardly in the back of the truck on December 23, 2011 due to the number of packages on the floor and the location of the shelves, there is no evidence of record that, at any point, plaintiff had to abruptly turn his head.

20. Dr. Coin testified that he considered Plaintiff's job duties to be a "trivial trauma in the same category of probably . . . numerous things that could have happened in the week prior to his stroke and that you could not with a degree of certainty identify that as a significant factor for his dissection." Dr. Coin also testified that plaintiff's job duties did not place him at an increased risk of suffering a dissection. In this regard, Dr. Sethi testified that all FedEx drivers are not at an increased risk of having a dissection.

21. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that plaintiff did not suffer an interruption of his regular work routine on December 23, 2011. . . . Moreover, there is no evidence that anything happened at any point to cause plaintiff to have to abruptly turn his head. At the time plaintiff experienced the onset of his stroke symptoms, he had only delivered 20 packages, when he was accustomed to delivering 85 to 90 packages a day.

22. The Full Commission places greater weight on the testimony of Dr. Coin and Dr. Gentry with regard to the

> issue of whether anything Plaintiff did on December 23, 2011 caused his carotid dissection and subsequent stroke. Based upon a preponderance of the competent, credible evidence of record, the Full Commission finds that plaintiff's job duties as a courier for FedEx on December 23, 2011 were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke.

These findings are supported by competent evidence and support the Commission's conclusion that plaintiff did not sustain an injury by accident.

In arguing for a different result, plaintiff contends that the Commission "erred in affording greater weight to Dr. Coin's testimony, as Dr. Coin was not competent to testify and his testimony was based upon mere conjecture and speculation." Plaintiff does not challenge Dr. Coin's qualification as an expert witness. Instead, he directs our attention to aspects of Dr. Coin's testimony that, in plaintiff's opinion, render it less compelling than other evidence. For example, plaintiff asserts that Dr. Coin's review of his medical history was incomplete and that some of Dr. Coin's opinions were contradicted by those of Dr. Gentry. Plaintiff also asserts as a "fact" that "Plaintiff suffered minor trauma - a twist, a turn, a jolt - which dissected the carotid artery and led to the stroke," although plaintiff did not testify to any sudden movement and the expert witnesses did not agree that such an incident caused his injury. In essence, plaintiff is asking us to reweigh the evidence, which we will not do:

> Because it is the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.

Shaw v. US Airways, Inc., __ N.C. App. __, __, 720 S.E.2d 688, 690 (2011) (quoting *Johnson v. Lowe's Cos.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 617-18 (2001) (internal citations and quotations omitted)). Plaintiff's argument that Dr. Coin's testimony was "incompetent" and based solely on "speculation" is without merit.

V. Commission's Conclusions of Law

Plaintiff argues next that the Commission's conclusions of law are not supported by its findings of fact. Plaintiff does not assert that the Commission's conclusions do not logically rest upon its findings. Instead, he argues that the Commission should have made different findings, repeating earlier arguments, which we have rejected, concerning the evidentiary support for the Commission's findings. This argument is without merit.

VI. Commission's Interpretation of Statutory Law

Finally, plaintiff argues that "contrary to the well-settled law of the State of North Carolina, the Industrial Commission narrowly construed the North Carolina Workers' Compensation Act in detriment to the plaintiff." This argument lacks merit.

Plaintiff notes that the Workers' Compensation Act " 'should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.' " *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007) (quoting *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (internal quotation omitted). Plaintiff also points out that on appeal, in determining whether competent evidence supports the Commission's findings of fact, the "evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams* at 681, 509 S.E.2d at 414 (citing *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937)).

Plaintiff contends that the Commission failed to follow these principles when it stated in Finding of Fact 10 that plaintiff had testified that he had large packages in his truck on 23 December 2011, but that he "did not testify as to whether those packages were any larger than the packages he regularly had to deliver." Plaintiff does not dispute the accuracy of this characterization of his testimony at the hearing. Rather, he directs our attention to an affidavit signed by plaintiff stating that his truck held packages that were unusually heavy. Plaintiff appears to argue, without citation to authority, that when the Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it "failed to take Plaintiff's affidavit in the light most favorable to Plaintiff[.]" However, "it is well-established that the Commission may

accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted." *Nobles v. Coastal Power & Elec., Inc.*, 207 N.C. App. 683, 693, 701 S.E.2d 316, 323 (2010) (citing *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 306-07, 661 S.E.2d 709, 715 (2008)). This argument is without merit.

For the reasons discussed above, we conclude that the Industrial Commission did not err and that its Opinion and Award should be

AFFIRMED.

Chief Judge MARTIN and Judge DILLON concur.

ELIZABETH HINSHAW, PLAINTIFF/MOTHER
v.
JOHN KUNTZ, DEFENDANT/FATHER

No. COA13-1184

Filed 1 July 2014

1. Child Custody and Support—actual income—bonus income—calculated as part of base income

The trial court erred in excluding the parties' bonus income when calculating the parties' actual income and the overall child support award. The North Carolina Child Support Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or non-recurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award.

2. Child Custody and Support—retroactive child support—valid, unincorporated separation agreement—no evidence of actual amounts expended

The trial court did not err in a child support case by failing to award retroactive child support from 1 September 2010 through the time plaintiff filed her complaint in district court. The trial court lacked authority to award retroactive child support because defendant, at all requisite times, abided by the terms of the parties' valid, unincorporated separation agreement. Even if the trial court had had the authority, plaintiff failed to present evidence regarding the specific amounts she actually expended to support the minor

children during the requisite period for which she sought retroactive child support.

3. Attorney Fees—child support—sufficient means to defray cost of litigation

The trial court did not err by denying plaintiff attorneys fees in a child support case. The trial court's finding of fact that plaintiff had sufficient means to defray the cost of litigation was supported by the record. Furthermore, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances.

Appeal by plaintiff from judgment entered 8 May 2013 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 9 April 2014.

HORACK TALLEY PHARR & LOWNDES, P.A., by Christopher T. Hood and Elizabeth J. James, for plaintiff.

Krusch & Sellers, P.A., by Rebecca K. Watts, for defendant.

ELMORE, Judge.

Elizabeth Hinshaw (plaintiff) appeals the trial court's 8 May 2013 child support award on the basis that the trial court erred in (1) failing to include bonus income in calculating the parties' base income, (2) denying her claim for retroactive child support, and (3) denying her motion for reasonable attorney's fees. After careful review, we find no error in the latter two issues, but hold that the trial court erred in the first. Accordingly, we affirm, in part, and reverse and remand, in part, for further action consistent with this opinion.

I. Background

Plaintiff and John Kuntz (defendant) were married in September 2001, separated in December 2006, and divorced in July 2010. The parties are the parents of three minor children, namely, A. Kuntz, born 15 September 2002; S. Kuntz, born 6 February 2004; and E. Hinshaw, born 27 January 2007 (the minor children). Plaintiff was awarded primary physical custody of the minor children pursuant to a Consent Order for Child Custody entered 16 April 2009. On 12 February 2009, the parties entered into a Settlement Agreement/Separation Agreement (the Agreement) whereby defendant agreed to pay plaintiff child support in the amount of $1,750.00 per month and alimony in the amount of

$5,000.00 per month until 31 August 2010, the date on which his alimony obligation was to terminate. The Agreement further provided that, after alimony ended, the parties were to renegotiate the amount of child support defendant would pay plaintiff pursuant to the North Carolina Child Support Guidelines (the Guidelines). At the time the parties negotiated the Agreement, their combined adjusted gross income was less than $25,000.00 per month.

When alimony ended, defendant voluntarily increased his child support payment from $1,750.00 per month to $2,750.00 per month. Plaintiff did not find this new sum to be an adequate support payment. The parties were subsequently unable to agree on an appropriate child support award; therefore, plaintiff filed a Motion in the Cause for Child Support on 29 March 2011. In her motion, plaintiff alleged that the amount of child support currently paid by defendant was not adequate to meet the needs of the minor children.

In its 8 May 2013 Child Support Order, the trial court made the following findings of fact: After spending a number of years as a stay-at-home parent, plaintiff was hired by Wells Fargo in April 2010. Plaintiff's gross base income from Wells Fargo totaled $121,000.00 per year; she also earned approximately $94.00 per month on a crossword puzzle business and $48.00 in interest and dividend income. Therefore, plaintiff's gross yearly income totaled $122,904.00. Plaintiff has received and can continue to expect an annual bonus from her employer. Defendant is employed by Bank of America earning an annual salary of $211,000.00. Defendant has received and can continue to expect an annual bonus from his employer.

Based on these figures, the trial court found that the supporting parent's basic child support obligation could not be determined by using the child support schedule outlined in the Guidelines because the parents' combined adjusted gross income exceeded $25,000.00 per month. Accordingly, the trial court determined that the minor children's reasonable needs and expenses totaled $6,630.89 per month, with $5,768.70 attributable to plaintiff's household and $862.19 attributable to defendant's household. Based solely on the parties' monthly gross incomes—without accounting for bonus income—the trial court ordered defendant to pay sixty percent (60%) of the minor children's reasonable needs and expenses, which totaled $3,978.53 per month. After crediting defendant $862.19, the trial court set defendant's child support obligation at $3,116.34 per month. Further, the trial court ordered defendant to pay $8,425.82 in arrears (prospective child support). Both parties' motions for attorney's fees were denied in the 8 May 2013 order. Plaintiff now appeals.

II. Analysis

A. Bonus Income

[1] Plaintiff first argues that the trial court erred in excluding the parties' bonus income when calculating the parties actual income and the overall child support award. We agree.

"In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted). "Child support calculations under the guidelines are based on the parents' current [or actual] incomes at the time the order is entered." *Caskey v. Caskey*, 206 N.C. App. 710, 713, 698 S.E.2d 712, 714 (2010) (citations omitted). Under the Guidelines, "income" is defined as:

> [A] parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, **bonuses**, dividends, severance pay, etc.) . . . . When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support. When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 51. "Gross annual income in its plain, ordinary and popular sense means total income without deductions." *Saunders v. Saunders*, 52 N.C. App. 623, 624, 279 S.E.2d 90, 91 (1981) (internal quotations omitted). This definition "include[s] longevity pay [and] bonuses." *Id.*

In the case *sub judice*, the trial court found that both parties had received and remained eligible for an annual bonus. Specifically, the trial court found that defendant's 2011 bonus totaled $114,002.20

($28,500.00 of cash and $85,502.20 of restricted stock); his 2010 bonus totaled $114,000.00; and his 2009 bonus totaled $37,500.00. Plaintiff's 2011 bonus totaled $30,800.00, and her 2010 bonus totaled $17,931.00, representing nine months of employment. However, in Finding #118 the trial court declined to incorporate the parties' bonus income in its calculation of the parties' base income for the following reason:

> Given that the reasonable needs and expenses of the children are covered by the parties each month prior to the addition of bonus income deferred compensation, tuition reimbursement or other increases to base income, and given that both parties are eligible for a bonus each year, the Court declines to calculate bonus income, deferred compensation, tuition reimbursement or other increases to base income as part of child support.

On appeal, plaintiff contends that the trial court was required to include bonus income in calculating the parties' gross base income. Alternatively, defendant argues that because his bonus income is irregular or non-recurring, "the trial court is to address that income separately from the parties' gross monthly income when determining child support." Defendant avers: "The approach of separating out irregular or non-recurring income from regular, ongoing income . . . makes sense" given that there is no "guarantee" of receiving a bonus. We disagree with defendant and point out that he cites no authority to support his position.

First, we note that the plain language of the Guidelines clearly includes bonus income in the definition of "income." Should certain bonus or other income be deemed irregular or non-recurring, the Guidelines further instruct the trial court to average or pro-rate the income or order the obligor to pay a percentage of his or her non-recurring income equivalent to the percentage of his or her recurring income for child support. There is no provision in the Guidelines that instructs the trial court to completely separate irregular or non-recurring bonus income from its calculations. Second, we can infer that the trial court found that the bonus income was not irregular or non-recurring given that the order specifically stated each party had received and could expect an annual bonus. After reviewing the record, we agree that the bonus income did not constitute irregular or non-recurring income as contemplated by the Guidelines. Finally, there is no provision in the Guidelines which instructs the trial court that it may elect to opt out of including bonus income in its calculations based solely on the premise that the reasonable needs and expenses of the children are

otherwise satisfied without its inclusion. Because the Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or non-recurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award. Its failure to do so constituted an abuse of discretion. *See e.g.*, *Waller v. Waller*, 20 N.C. App. 710, 713, 202 S.E.2d 791, 793 (1974) (holding that before ruling on a motion to modify child support, the trial court must give consideration to the fact that part of the defendant's income was a bonus which fluctuated from year to year).

B. Retroactive Child Support

[2] Plaintiff next argues that the trial court erred in failing to award retroactive child support from 1 September 2010 through the time she filed her complaint in district court. We disagree.

"Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support." *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (quotation and internal citations omitted). "[R]etroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period. Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary." *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (quotations and citations omitted). "[W]here the parties have complied with the payment obligations specified in a valid, unincorporated separation agreement," the trial court is prohibited from awarding retroactive child support, absent an emergency situation. *Carson* at 106-107, 680 S.E.2d at 889.

On appeal, plaintiff's argument is premised on the notion that the child support provision in the Agreement expired when defendant's obligation to pay alimony likewise expired. As such, plaintiff contends that the parties were not subject to a valid, unincorporated separation agreement as of 1 September 2010. Plaintiff avers, "the parties were, for purposes of child support, in a position procedurally analogous to that where parties separate without executing a separation agreement providing for child support." Plaintiff's argument is similar to the argument advanced by the plaintiff-mother in *Carson*. In *Carson*, the parties entered into an unincorporated separation agreement in March 2008, which provided that the defendant-father would pay a child support obligation of $500.00 per month until the parties were able to negotiate the terms of a consent order for child support. *Id.* at 103, 680 S.E.2d at

887. In the event the parties were unable to negotiate a consent order within one year, the separation agreement stated that either party could file a complaint in district court. *Id.* The parties never negotiated the terms of a consent order; the defendant-father continued to pay $500.00 per month in child support. *Id.*

Eight years passed before the plaintiff-mother filed a complaint in district court seeking retroactive child support, claiming that she was "entitled to reimbursement from defendant for a portion of the actual expenses incurred for the benefit of the minor child from August 2003 through the present." *Id.* at 104, 680 S.E.2d at 887 (internal quotation omitted). The trial court ordered the defendant-father to pay $31,036.85 in retroactive and prospective child support from September 2003 through January 2008. *Id.* at 104, 680 S.E.2d at 888. On appeal, the defendant-father argued that the trial court erred in awarding the plaintiff-mother retroactive child support because he had consistently paid $500.00 per month in accord with the terms of the parties' separation agreement. *Id.* at 105, 680 S.E.2d at 888. This Court held that, because the defendant-father fully complied with the terms of the valid, unincorporated separation agreement, the trial court was prohibited from awarding retroactive child support in excess of the stated terms of the separation agreement. *Id.* at 108, 680 S.E.2d at 890 (holding "where there is a valid, unincorporated separation agreement, which dictates the obligations of the parent providing support, and the parent complies fully with this obligation, the trial court is not permitted to award retroactive child support absent an emergency situation").

In the instant case, plaintiff's argument that the child support provision "expired" is without merit. Here, the parties were operating under a valid, unincorporated separation agreement which clearly intended for defendant to continue making child support payments after the expiration of the alimony term. It is undisputed that defendant made monthly payments pursuant to the terms of the Agreement from the time it became effective until the time plaintiff filed a complaint in district court. Defendant even voluntarily increased his support payment from the mandated $1,750.00 per month to $2,750.00 per month. Should plaintiff have found $2,750.00 to be an acceptable support payment, the parties could have operated under the terms of the Agreement indefinitely. On these facts, the trial court lacked authority to award retroactive child support because defendant, at all requisite times, abided by the terms of the valid, unincorporated separation agreement. Accordingly, the trial court did not err in denying plaintiff's claim for retroactive child support.

Assuming *arguendo* that the trial court had authority to award retroactive child support, plaintiff's argument remains unconvincing. Again, retroactive child support is based on the non-custodial parent's share of the reasonable actual expenditures made by the custodial parent on behalf of the child. *Robinson*, *supra.* The record discloses that plaintiff failed to present evidence to the trial court regarding the specific amounts she actually expended to support the minor children during the requisite period for which she sought retroactive child support. As such, plaintiff failed to meet her burden of proof. The trial court did not err in declining to award plaintiff retroactive child support on these facts. Having found that the original terms of the Agreement were not reasonable to meet the children's needs, the trial court was justified in awarding prospective child support in the amount of $8,425.82.

C. Attorney's Fees

[3] Lastly, plaintiff argues that the trial court erred in denying her motion for an award of attorney's fees. We disagree.

In a child support action, the trial court has discretion to award attorney's fees to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2013). Whether a party has satisfied these requirements is a question of law fully reviewable on appeal. *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citation omitted). Generally, the dependent spouse has insufficient means to defray the costs of litigation if he or she is unable "as litigant to meet the supporting spouse as litigant on substantially even terms." *Theokas v. Theokas*, 97 N.C. App. 626, 630-31, 389 S.E.2d 278, 281 (1990) (citation omitted). In addition, "[b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has **refused** to **provide support which is adequate** under the circumstances existing at the time of the institution of the action or proceeding[.]" N.C. Gen. Stat. § 50-13.6 (emphasis added).

In the instant action, both parties requested an award of attorney's fees. Specifically, plaintiff sought to recover "at least" $25,265.50 in attorney's fees from defendant. In its order, the trial court found that neither party was entitled to recover attorney's fees because each had sufficient means to defray the cost of litigation. On appeal, our focus hinges on whether plaintiff had sufficient funds to defray the costs of litigation. "With regard to this determination, a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate."

Barrett at 374, 536 S.E.2d at 646 (citation omitted). Having reviewed the trial court's findings, we find them to be sufficient to form a basis to deny plaintiff attorney's fees. Excluding bonus income, plaintiff's monthly gross income is $10,242.00, and her reasonable needs total $3,183.87. After paying $2,652.35 per month towards the minor children's reasonable needs, plaintiff is left with a surplus of $4,405.78 per month. This alone supports the trial court's determination that plaintiff had sufficient means to defray the cost of litigation.

Further, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances. *See* N.C. Gen. Stat. § 50-13.6. The record indicates that defendant complied with the terms of the Agreement directing him to make child support payments; in fact, he voluntarily made support payments in excess of what he was required to pay. This evidence further supports the trial court's decision to deny plaintiff's motion for attorney's fees. *See Prescott v. Prescott*, 83 N.C. App. 254, 262, 350 S.E.2d 116, 121 (1986) (holding that the trial court did not abuse its discretion in denying wife's motion for reasonable attorney's fees in connection with her child support action when the husband paid adequate child support and voluntarily made additional support payment which he was not obligated to make under the parties' consent order). We hold that the trial court's findings of fact are supported by competent evidence and conclude that it was not an abuse of discretion for the trial court to deny plaintiff's motion for an award of attorney's fees.

III. Conclusion

The trial court did not err in denying plaintiff's motions for retroactive child support and for attorney's fees. However, by excluding the parties' bonus income in its calculation of the parties' gross base income, the trial court did err in calculating its child support award. We reverse the requisite portions of the trial court's order and remand so that the trial court can include the bonus income in its calculations. We further instruct the trial court to recalculate the supporting parent's child support obligation accordingly.

Affirmed, in part; reversed and remanded, in part.

Judges McCULLOUGH and DAVIS concur.

MAGAZIAN v. CREAGH

[234 N.C. App. 511 (2014)]

VICTOR E. MAGAZIAN, PLAINTIFF
v.
JAMES J. CREAGH, DEFENDANT

No. COA14-230

Filed 1 July 2014

Appeal and Error—notice of appeal—not timely

An appeal was dismissed as untimely where the order from which plaintiff attempted to appeal was entered on 20 September 2013, a Friday, and plaintiff acknowledged in his notice of appeal that he received actual notice of the order by email on 25 September 2013, the following Wednesday. Plaintiff received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday, and had to file his notice of appeal within 30 days of entry of the order, or by 21 October. However, he did not file his notice of appeal until 25 October 2013.

Appeal by Plaintiff from Order entered 20 September 2013 by Judge Paul Gessner in Wake County Superior Court. Heard in the Court of Appeals 4 June 2014.

Kerner Law Firm, PLLC, by Thomas W. Kerner, for Plaintiff.

Smith, Debnam, Narron, Drake, Saintsing & Myers, L.L.P., by Bettie Kelley Sousa, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This appeal arises from an action to "renew" a judgment. A Connecticut State court purportedly entered a judgment against Defendant James J. Creagh for a deficiency balance in favor of New Milford Savings Bank in the State of Connecticut on 11 March 2001[1].

1. We note that, although both parties refer to the previous judgment in their briefs, no copy of the foreign judgment was included in the record on appeal. Thus, we are unable to confirm any details of the judgment. Counsel are reminded that N.C. R. App. P. 9(a)(1)(j) requires the inclusion "of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal. . . ." N.C.R. App. P. 9(a)(1)(j) (2013). Thus, even had this appeal been timely, failure to include the foreign judgment would have prevented resolution of the issue of timeliness of the action to renew the judgment.

Plaintiff Victor E. Magazian claims to be a successor in interest to New Milford Savings Bank. Plaintiff previously filed a Notice of Filing of Foreign Judgment against Defendant in Wake County Superior Court on 6 December 2002.

On 3 December 2012, Plaintiff filed a "Complaint to Renew Judgment" in Wake County Superior Court.[2] Defendant answered on 6 February 2013 and filed a motion for summary judgment on 30 August 2013. Plaintiff also filed a motion for summary judgment on 6 September 2013. Both summary judgment motions came on for hearing on 16 September 2013. The court granted Defendant's motion, denied Plaintiff's motion, and dismissed the action with prejudice by order entered on 20 September 2013. Plaintiff received actual notice of the dismissal order by email on 25 September 2013[3] and filed a notice of appeal on 25 October 2013.

Discussion

On appeal, Plaintiff argues that the trial court erred by (1) granting Defendant's motion for summary judgment and (2) denying Plaintiff's motion for summary judgment. Plaintiff contends that the Notice of Filing of Foreign Judgment filed on 6 December 2002 acted as a new North Carolina judgment, and therefore Plaintiff was within the ten-year statute of limitations when he instituted the new action in December 2012. Thus, Plaintiff argues that he was entitled to judgment as a matter of law. Similarly, Plaintiff argues that Defendant's motion for summary judgment failed to show that there was no genuine issue of material fact as to whether Plaintiff was entitled to maintain his 2012 action. Because Plaintiff's appeal is untimely, we dismiss.

In civil actions, the notice of appeal must be filed "within thirty days after entry of the judgment if the party has been served with a copy of the judgment within the three day period" following entry of the judgment. N.C.R. App. P. 3(c)(1) (2013); N.C. Gen. Stat. § 1A-1, Rule 58 (2013).

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2. There is a ten-year statute of limitations on an action upon a judgment. N.C. Gen. Stat. § 1-47(1) (2013). Despite the language used in the caption of Plaintiff's complaint, the original judgment may not be "renewed" for an additional ten-year period. However, a creditor may obtain a new judgment by instituting a separate action based on the original judgment within the ten-year statute of limitations period. *See, e.g.*, *Duplin County DSS v. Frazier*, __ N.C. App. __ , __ , 751 S.E.2d 621, 625 (2013). The creditor will then have the applicable ten-year statute of limitations to enforce the new judgment. N.C. Gen. Stat. § 1-47(1).

3. The record does not contain a copy of the email and does not reflect who sent the email to Plaintiff. Plaintiff states in his notice of appeal that the order was "served on counsel for the Plaintiff via email" on 25 September 2013.

The three day period excludes weekends and court holidays. N.C. Gen. Stat. § 1A-1, Rule 6(a) (2013). Email is not a valid method of service under the North Carolina Rules of Civil Procedure. N.C. Gen Stat. § 1A-1, Rule 4 (2013). However, when a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service. *Manone v. Coffee*, N.C. App. ___, ___, 720 S.E.2d 781, 784 (2011). Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal. *Id.* at ___, 720 S.E.2d at 782.

The order from which Plaintiff attempts to appeal was entered on 20 September 2013, a Friday. Plaintiff acknowledges in his notice of appeal that he received actual notice of the order by email on 25 September 2013, the following Wednesday. Plaintiff received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday. Therefore, to be timely, the Rules of Appellate Procedure required Plaintiff to file his notice of appeal within 30 days of entry of the order. In other words, Plaintiff needed to file his notice of appeal on or before 21 October 2013. Because Plaintiff did not file his notice of appeal until 25 October 2013, the appeal is not timely and this court lacks jurisdiction. Accordingly, we dismiss.

DISMISSED.

Judges STROUD and McCULLOUGH concur.

DEBORAH MILLER, EMPLOYEE, PLAINTIFF
v.
MISSION HOSPITAL, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-1310

Filed 1 July 2014

1. Workers' Compensation—compensable injury—aggravation of pre-existing injury—separate injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff had sustained an aggravation of a pre-existing condition without also concluding that she had suffered a disc herniation. There was no evidence that defendant attempted to "void" the Form 60 and plaintiff was not prejudiced by the Commission's characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation.

2. Workers' Compensation—further medical compensation—Parsons presumption—burden shifted back to plaintiff

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff did not need further medical compensation. Defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, the burden shifted back to plaintiff to establish her continuing need for medical treatment. Plaintiff failed to meet this burden and failed to present evidence of disability.

3. Workers' Compensation—plaintiff no longer disabled—supported by findings

The Industrial Commission did not err in a workers' compensation case by allowing defendant to stop paying indemnity compensation to plaintiff. The Commission's conclusion that plaintiff was no longer disabled and was able to return to work was supported by the findings.

Appeal by Plaintiff from Opinion and Award entered 6 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 April 2014.

Root & Root, PLLC, by Louise Critz Root, for plaintiff-appellant.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, for defendant-appellee.

STEELMAN, Judge.

Where the Industrial Commission held that defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), the burden shifted back to plaintiff to establish her continuing need for medical treatment. Where plaintiff failed to meet this burden and failed to present evidence of disability, the Commission properly ordered indemnity and medical compensation to plaintiff terminated.

I. Factual and Procedural Background

Deborah Miller (plaintiff) was born in 1952 and began working for Mission Hospital (defendant) around 1988. In 2003 plaintiff was diagnosed with non-work related cervical spondylosis, a degenerative spinal condition. She underwent cervical fusion surgery at C3-C4 and returned to work in early 2004. On 10 June 2009 plaintiff suffered a compensable injury by accident that aggravated her pre-existing back condition. She was referred to Dr. Stephen David, who treated her from 12 June 2009 until early 2012. Plaintiff had an MRI scan on 14 June 2009. Dr. David reviewed the results and observed a "disc protrusion at C2-C3" that had not been present in an MRI performed in January 2003. Dr. David believed that the C2-3 disc herniation was a contributing cause of her symptoms, in addition to the exacerbation of her chronic spinal condition.

On 2 July 2009 defendant filed an Industrial Commission Form 60 admitting the compensability of plaintiff's claim for workers' compensation benefits and describing her injury as a C2-3 disc herniation. Tests performed at the direction of Dr. David revealed that the C2-3 disc herniation was not impinging upon plaintiff's spinal nerves. However, plaintiff reported significant pain and difficulty in performing daily activities to Dr. David, who treated her with cervical epidural injections, physical therapy, heat and ice on the affected areas, and various medications.

On 2 February 2010 plaintiff had a functional capacity evaluation, and on 12 February 2010 Dr. David examined plaintiff and reviewed the results of the evaluation. He concluded that plaintiff had reached maximum medical improvement and could return to work full time, with restrictions. However, a few weeks later, plaintiff reported to Dr. David that her symptoms had gotten worse. Dr. David found plaintiff "difficult to treat" because, despite the variety of treatments she did not have "any significant break-throughs," and his notes from 16 June 2010 state that he found it necessary to "write her out of work permanently."

Defendant hired a private investigator, who made videos in March 2010 depicting plaintiff engaging in daily activities over a number of days. On 19 April 2011 plaintiff was examined by Dr. Dennis White, a specialist in pain medicine. He initially diagnosed plaintiff with 'peripheralized' pain in "a global, nonspecific pain pattern." However, when Dr. White viewed the video surveillance of plaintiff, he found her movements as shown on the surveillance video to be inconsistent with her behavior and with the symptoms she reported during his examination.

Dr. Craig Brigham, an orthopedic surgeon who specializes in spine surgery, examined plaintiff on 27 January 2011 and found her to have a "near full range of motion of her cervical spine" as well as a "normal range of motion of the shoulders." Dr. Brigham saw no objective reason that plaintiff could not return to full duty work without restriction, and opined that the consequences of her work injury had resolved and that no further treatment was needed. Dr. Dahari Brooks, an orthopedic specialist, reviewed plaintiff's medical records, Dr. Brigham's notes and the surveillance videos. Based upon his review of these records, Dr. Brooks agreed with Dr. Brigham's assessment. He observed that the videos showed plaintiff engaging in activities that were inconsistent with the subjective complaints noted in her medical records, and that her physical motions in the surveillance vidoes did not correlate with the restricted motion she described during her office visits. He testified that Plaintiff was capable of returning to full duty work without restriction and did not need further medical treatment.

On 23 August 2011 plaintiff filed an Industrial Commission Form 33 requesting that her claim be assigned for hearing. The Full Commission issued its Opinion and Award on 6 August 2013. The Commission concluded that plaintiff had "regained the capacity to earn the same wages she was earning at the time of the injury in the same employment, and therefore, she is not disabled" and that "there is no need for ongoing medical treatment in this case related to Plaintiff's injury by accident on June 10, 2009." The Commission ordered defendant to "stop payment of indemnity and medical compensation to Plaintiff."

Plaintiff appeals.

II. Standard of Review

> The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. . . . Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight

> to be given their testimony.' Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.' " The "Commission's conclusions of law are reviewed *de novo*."

Spivey v. Wright's Roofing, __ N.C. App. __, __, 737 S.E.2d 745, 748-49 (2013) (quotations and citations omitted).

III. Commission's Description of Plaintiff's Injury

[1] In her first argument, plaintiff contends that the Commission erred in Conclusion of Law No. 1 by holding "that plaintiff had sustained an aggravation of a pre-existing condition" without holding that she had also suffered a disc herniation. Plaintiff does not dispute that she had a pre-existing spinal condition or challenge the evidentiary support for the Commission's finding that her compensable injury included an exacerbation of this pre-existing condition. Instead, she contends that it was error for the Commission not to specify that she also suffered a disc herniation. Plaintiff appears to argue that (1) defendant attempted "to void the agreement" represented by the execution of an Industrial Commission Form 60 by denying that she had a disc herniation as stated on the Form 60, and that (2) whether or not she suffered a disc herniation was a disputed issue of legal significance which the Commission was required to resolve. We disagree with both assertions.

Plaintiff does not identify any evidentiary basis for her assertion that defendant attempted to have the Form 60 set aside. For example, she does not contend that defendant filed a motion to have the Form 60 set aside, or that defendant ever denied that plaintiff suffered a compensable injury as admitted by the Form 60. The forms filed by the parties make it clear that they agreed that plaintiff had suffered a compensable injury in 2009, but disagreed about whether or not she remained disabled or needed further medical treatment several years later. In the Industrial Commission Form 33 that plaintiff filed to request a hearing, she asserted that "Plaintiff maintains and defendants deny that plaintiff is permanently and totally disabled." In the Form 33R that defendant

filed in response, defendant asserted that "Plaintiff has failed to present sufficient evidence to establish that she remains disabled as a result of her compensable injury or that she is permanently and totally disabled." Thus, both parties characterized their dispute as a disagreement about the duration of plaintiff's disability, and not as a conflict about the nature of her original injury or the validity of the Form 60.

Plaintiff also fails to articulate why the Commission was required to make more detailed findings about her original injury in its determination of whether she was entitled to continued disability or medical compensation at the time of the hearing. Moreover, in its Conclusion of Law No. 3 the Commission specifically addressed the legal implications of the fact that the Form 60 characterizes plaintiff's injury as a disc herniation. Plaintiff fails to explain how she was prejudiced by the Commission's failure to specify that she had a C2-3 disc herniation in its Conclusion No. 1, given that this issue is expressly addressed in another conclusion of law.

We hold that there is no evidence that defendant attempted to "void" the Form 60, and that plaintiff was not prejudiced by the Commission's characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation.

This argument is without merit.

IV. Cessation of Medical Compensation

[2] In her next argument, plaintiff asserts that the Commission's conclusion that she did not need further medical compensation was "not supported by the evidence of record or applicable law." We disagree.

Medical compensation is defined as "medical, surgical, hospital, nursing, and rehabilitative services" that "may reasonably be required to effect a cure or give relief" or "tend to lessen the period of disability[.]" N.C. Gen. Stat. § 97-2(19). "In a workers' compensation claim, the employee 'has the [initial] burden of proving that his claim is compensable.' " *Holley v. Acts, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950)). "The degree of proof required of a party plaintiff under the Act is the 'greater weight' of the evidence or 'preponderance' of the evidence." *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995). "The employer's filing of a Form 60 is an admission of compensability." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 293 (2005) (citing *Sims v. Charmes/Arby's Roast Beef*,

142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (2001)). "Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292 (citing *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999), and *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff. *See McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664 (1996) ("[T]he signing of the Form 21 agreement established a presumption of the plaintiff's disability. The defendant then presented evidence . . . successfully rebutting plaintiff's presumption of disability, and the burden shifted back to the plaintiff.").

As discussed above, defendant admitted the compensability of plaintiff's injury by filing a Form 60 on 22 June 2009. Therefore, the issue before the Commission was not whether plaintiff had suffered a compensable workplace accident in 2009, or whether she experienced a C2-3 disc herniation, but whether at the time of the hearing she required any further medical treatment for her injury. In this regard, the Commission found in relevant part that:

. . .

> 3. On June 10, 2009, Plaintiff sustained an injury by accident arising out of and in the course of her employment with Defendant[.]
>
> . . .
>
> 6. Plaintiff was referred to Dr. Stephen Michael David . . . and began treating with him on June 12, 2009. Plaintiff received conservative treatment from Dr. David from mid-2009 through early 2012[.] . . .
>
> 7. Dr. David recommended a cervical MRI, which was done on June 14, 2009. . . . In the opinion of Dr. David, the June 2009 cervical MRI revealed the prior surgical fusion at C3-C4, cervical spondylosis with broad-based disc osteophyte formation at C5-C6, as well as a new central disk protrusion at C2-3. . . .
>
> . . .

9. Nerve conduction studies were done on January 12, 2010, . . . [which showed] no evidence of cervical entrapment. . . .

. . .

11. . . . [O]n February 12, 2010 . . . Dr. David assessed Plaintiff at maximum medical improvement . . . [and] released her to return to work with restrictions[.] . . .

12. Shortly after being released to return to work with restrictions, Plaintiff returned to Dr. David on March 2, 2010, reporting an aggravation of her neck pain. . . .

. . .

14. Defendant engaged a private investigator to conduct surveillance on Plaintiff. . . .

15. . . . [The video surveillance] shows Plaintiff engaging in many of the activities of daily living. Her movements have been noted to be inconsistent with what was expected by the physicians, based upon her presentations in their offices. The video shows more fluid and natural movement than Plaintiff demonstrated in the offices of the physicians or at the hearing before Deputy Commissioner Ledford.

. . .

21. . . . Plaintiff was examined on April 19, 2011 by Dr. Dennis White, a specialist in pain medicine. Upon examination, Dr. White noted that Plaintiff appeared to be in distress, guarding her neck movements and avoiding any flexion of the neck or gestural range of motion while communicating. According to Dr. White, Plaintiff was deliberately avoiding any movement because of pain. . . .

. . .

23. . . . Dr. White viewed the video of the surveillance of Plaintiff. He found her movements on the surveillance [video] to be inconsistent with what she demonstrated at the time of the examination[, and testified that] . . . . Plaintiff's movement on the surveillance video was natural, spontaneous, gestural, and rhythmic, and that he "didn't see any sign of distress whatsoever." . . .

24. Dr. Craig Brigham, an orthopedic surgeon who specializes in spine surgery, examined Plaintiff on January 27, 2011[.] . . . Dr. Brigham found no neurological abnormalities and no motor deficits. Dr. Brigham found "near full range of motion of her cervical spine considering she has had a 1-level fusion as well as normal range of motion of the shoulders." . . .

25. Dr. Brigham testified that he saw no acute distress when he examined Plaintiff and . . . no objective basis as to why Plaintiff could not return to full duty work without restriction[,] . . . based upon his review of the medical records and what he found to be a lack of objective evidence of ongoing problems, as well as the inconsistencies noted in his physical examination of Plaintiff. He opined that any consequences of the work injury had resolved and no further treatment was needed.

26. Dr. Dahari Brooks, an orthopaedic specialist, conducted a medical records review . . . [and] agreed with the assessment of Dr. Brigham. In his opinion, the surveillance footage he reviewed showed Plaintiff engaging in activities which were inconsistent with her subjective pain complaints[.] . . . Plaintiff's physical motions as seen in the surveillance footage failed to correlate with the restricted motion she described during the course of her office visits. . . . Dr. Brooks opined that Plaintiff was capable of returning to full duty work without restriction and that she would not need further medical treatment.

. . .

33. Based upon a preponderance of the evidence in view of the entire record, the Full Commission does not find Plaintiff's testimony regarding the nature and severity of her complaints to be credible.

34. In assessing the expert medical testimony, the Full Commission places greater weight on the testimony of Dr. Brooks, Dr. White, and Dr. Brigham, as opposed to that of Dr. David[.] . . . There is no objective basis for Plaintiff's complaints of ongoing, disabling . . . pain, and these complaints are belied by the video surveillance evidence. . . . Dr. David's opinions are based in large part on Plaintiff's

> subjective complaints, which the Full Commission does not find credible.

Plaintiff has not challenged the evidentiary support for these findings of fact, which are therefore binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). We hold that these findings support the Commission's conclusion that "any consequences of Plaintiff's work-related injury have resolved and that there is no need for ongoing medical treatment in this case related to Plaintiff's injury by accident on June 10, 2009."

In arguing for a different result, plaintiff appears to argue that the Form 60 automatically entitles her to additional medical compensation. However, in Conclusion No. 3 the Commission addressed the implications of defendant's execution of the Form 60 and stated that:

> 3. Since Defendant filed a Form 60 admitting the compensability of Plaintiff's injury to her spine, specifically her "C2-3 Disk Herniation," there is a rebuttable presumption that the additional medical treatment for her spine is directly related to the compensable injury. . . . *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). . . . Defendant has successfully rebutted the *Parsons* presumption with competent, credible medical evidence that any consequences of Plaintiff's work-related injury have resolved and that there is no need for ongoing medical treatment in this case related to Plaintiff's injury by accident on June 10, 2009. Therefore, the burden shifted back to Plaintiff to prove that her medical conditions are related to her accident at work on June 10, 2009. The Full Commission concludes that Plaintiff has failed to meet this burden, and therefore, Defendant is not responsible for ongoing medical compensation.

This conclusion acknowledges the presumption arising under *Parsons* from the Form 60, but concludes that defendant successfully rebutted the presumption and that plaintiff failed to meet her burden to produce competent medical evidence that her claim for ongoing medical benefits was "related to her accident at work on June 10, 2009." Plaintiff has not challenged the factual or evidentiary support for this conclusion of law, or disputed its legal validity. We hold that the Commission did not err by concluding that plaintiff was not entitled to further medical benefits arising from this claim.

V. Cessation of Indemnity Compensation

[3] Finally, plaintiff asserts that the Commission "erred by allowing [defendant] to stop paying indemnity compensation to plaintiff." We disagree.

N.C. Gen. Stat. § 97-2(9) defines "disability" as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." In is well-established that:

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowe's Product Distribution, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982), *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798, 809 (1986), and *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550 (1991)). In this case, the Commission concluded in relevant part that:

> 2. Plaintiff bears the burden of proving disability. . . . In the case at bar, Plaintiff has failed to prove disability under any prong of *Russell*. Moreover, the competent, credible evidence of record establishes that as of January 27, 2011, Plaintiff had regained the capacity to earn the same wages she was earning at the time of the injury in the same employment, and therefore, she is not disabled within the meaning of N.C. Gen. Stat. § 97-2(9). . . .

This conclusion is supported by the findings quoted above in relation to the issue of plaintiff's entitlement to further medical benefits, by the Commission's findings detailing plaintiff's physical abilities as depicted on the surveillance videos, and by its findings that:

. . .

> 25. Dr. Brigham testified that he saw no acute distress when he examined Plaintiff and that he saw no objective basis as to why Plaintiff could not return to full duty work without restriction. . . .
>
> 26. . . . Based upon his review of the medical records, as well as the surveillance, Dr. Brooks opined that Plaintiff was capable of returning to full duty work without restriction and that she would not need further medical treatment.

Plaintiff acknowledges that these findings support the Commission's conclusion that she was no longer disabled. However, she appears to argue that, because the Form 60 specified that she had suffered a C2-3 disc herniation, the Commission could not properly rely upon an expert's opinion regarding disability unless the expert "formed this diagnosis [of a disc herniation] as a basis of their opinion." However, the Form 60, although establishing the compensability of her 9 June 2009 injury, did not give rise to any legal presumption regarding whether she remained disabled in 2012. The "use of the Form 60 did not entitle plaintiff to a presumption of continuing temporary disability[.]" *Sims*, 142 N.C. App. at 160, 542 S.E.2d at 282. The Commission's ruling on plaintiff's claim for disability required it to determine whether or not plaintiff was capable of returning to work. Plaintiff cites no authority in support of her contention that an expert's opinion on her ability to return to work in 2012 requires the expert to agree that in 2009 plaintiff suffered the specific injury set out in the Form 60. In other words, plaintiff fails to articulate how the fact that the Form 60 described her injury as a C2-3 disc herniation is relevant to the question of whether or not the symptoms arising from plaintiff's June 2009 compensable injury had resolved several years later. We hold that the expert opinions of Dr. Brooks and Dr. Brigham that plaintiff was capable of returning to work were not invalidated by the fact that their assessment of plaintiff's condition was not based on their agreement that plaintiff suffered a disc herniation as a result of her compensable injury, and that the Commission did not err by ruling that plaintiff was no longer disabled.

For the reasons discussed above, we hold that the Commission did not err and that its Opinion and Award should be

AFFIRMED.

Judges HUNTER, Robert C., and BRYANT concur.

TERRI LYNN ROBERTSON AND MARY DIANNE DANIEL, PLAINTIFFS
v.
STERIS CORPORATION, A DELAWARE CORPORATION, ET AL., DEFENDANTS

No. COA13-1301

Filed 1 July 2014

1. Attorney Fees—claim for fees in quantum meruit—subject matter jurisdiction—personal jurisdiction—jurisdiction over settlement

The trial court did not err in an attorney fees and costs dispute by conducting a hearing on the attorney's claims. The trial court had subject matter jurisdiction, personal jurisdiction over plaintiffs, and jurisdiction over plaintiffs' settlement funds. Moreover, the attorney was not required to bring his claims for fees and costs against plaintiffs in a separate action because an attorney may properly bring a claim for fees in quantum meruit against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial.

2. Attorney Fees—motion to intervene—not required—motion in the cause sufficient

The trial court did not err in an attorney fees and costs dispute in its handling of the attorney's motion to intervene in the underlying case. A dismissed attorney seeking legal representation fees and costs can pursue his claims against his former clients by the filing of a motion in the cause. Accordingly, both the motion to intervene and the allowance of that motion in this case were wholly unnecessary to permit the judge to reach and resolve the merits of the attorney's motion in the cause.

3. Attorney Fees—award—not against public policy

The trial court's award of fees and costs to an attorney in an attorney fees and costs dispute did not violate the public policy

requiring that contingency fees be in writing as stated in Rule 1.5(c) of the Revised Rules of Professional Conduct of the North Carolina State Bar. The Rules, precedent from our Supreme Court, and decisions by previous panels of the Court of Appeals all reject the argument.

4. Sanctions—discovery violation—no abuse of discretion

The trial court did not abuse its discretion in determining the sanction to impose upon the attorney involved in an attorney fees and costs dispute for his actions during discovery. Finding of fact 46 contained an entirely sufficient explanation of the court's decision to sanction the attorney.

Appeal by Plaintiffs from order entered 7 February 2013 by Judge D. Jack Hooks, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 9 April 2014.

The Lorant Law Firm, by D. Bree Lorant, and Womble, Carlyle, Sandridge & Rice, LLP, by Burley B. Mitchell, Jr., and Robert T. Numbers, II, for Plaintiffs.

No brief for Defendants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., and Andrew P. Flynt, for Intervenors G. Henry Temple, Jr., and Temple Law Firm, PLLC.

STEPHENS, Judge.

Procedural History and Factual Background

In 2004, Plaintiffs Terri Lynn Robertson and Mary Dianne Daniel were allegedly injured by the release of toxic liquids and gases from a sterilization machine while they were at work at Brunswick County Hospital. On 19 January 2007, G. Henry Temple, Jr., of the Temple Law Firm, PLLC, filed a complaint in Brunswick County Superior Court on behalf of Plaintiffs seeking damages for personal injuries against various defendants ("the underlying lawsuit"). No written contract regarding legal representation was executed between Temple and Plaintiffs. Plaintiffs asserted that Temple never discussed his contingency fee rate with them and Temple himself could not recall doing so, but Travis Harper, an attorney working for the Temple Law Firm, testified that Temple did tell Plaintiffs that "their individual recoveries would be

after costs and attorney fees[.]" Temple did explain that, if he lost the case, he would pay all costs of the litigation. The underlying lawsuit was designated as exceptional by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and the Honorable D. Jack Hooks, Jr., was appointed as presiding judge.

When Plaintiffs first approached Temple in November 2006, Temple had concerns about the viability of their claims. He was particularly concerned that the statute of repose for product liability claims would operate to bar the lawsuit. Two other attorneys had already declined to take case, and Temple told Plaintiffs he would need to investigate before making a decision. As the case proceeded, it proved even more complex and problematic than Temple had anticipated. Early on, Judge Hooks ruled that all product liability claims were barred by the applicable statute of repose, and Temple shifted his theory of the case to an attempt to prove inadequate maintenance of the sterilization machine. By the time of the first round of mediation in May 2010, the costs that Temple had incurred in pursuit of the lawsuit were approximately $150,000, but Plaintiffs were offered only $270,000 total to settle. Plaintiffs did receive workers' compensation benefits and settlements of several hundred thousand dollars each for their workers' compensation claims. During pendency of the litigation, claims against all defendants except Steris Corporation and Seal Master Corporation[1] were dismissed. Trial was set for 14 March 2011, and a second round of mediation was ordered for 2 March 2011.

Temple's research with two mock juries indicated that Plaintiffs would likely lose the case based on problems with Plaintiffs' credibility and other issues. Consultants working with Temple urged him to settle, and Temple reached a confidential settlement with Seal Master before mediation. During mediation, Temple also reached a confidential settlement with Steris for an amount the consultants considered surprisingly high. However, a dispute arose between Plaintiffs and Temple regarding Temple's fees and costs. Temple sought 40% of Plaintiffs' recovery after costs, and Plaintiffs felt that percentage was too high. Plaintiffs signed releases of their claims as to Steris and Seal Master,

1. Seal Master produced the seals used by Steris in the manufacture of the sterilization machine which allegedly malfunctioned. The complaint in the underlying lawsuit refers to Seal Master as "Seal Master Corporation, aka Sealmaster, Inc." Some documents in the record on appeal, including the order appealed from, refer to this defendant as "Sealmaster." The company's website indicates that its proper name is "Seal Master Corporation," and we use that spelling here. *See* Seal Master Corporation, http://www.sealmaster.com/ (last visited 18 June 2014).

but due to the fee dispute, Plaintiffs refused to authorize Temple to deliver the signed releases or dismiss the underlying lawsuit. Plaintiffs terminated their relationship with Temple and retained attorney D. Bree Lorant in early September 2011.

The fee dispute and termination of his services led Temple to file motions in the underlying lawsuit to intervene and to recover attorneys' fees and costs on 5 October 2011. On 11 October 2011, Judge Hooks entered an "Order and Notice of Hearing" stating, *inter alia*, that claims by Plaintiffs against Steris and Seal Master had "been announced as settled, but ha[d] not been dismissed as a number of issues ha[d] arisen beyond the matters" in the underlying lawsuit.The order specifically referenced the dispute regarding Temple's fees. On 26 October 2011, Plaintiffs agreed to dismiss the underlying lawsuit with prejudice. On 1 November 2011, a consent order was entered to allow dismissal of all claims against the remaining defendants as "a full and final settlement of the causes of action" had been reached in the underlying lawsuit.[2] However, the order did not resolve the fee dispute between Temple and Plaintiffs, and Temple's motions in the cause and to intervene remained pending.

On 20 August 2012, Plaintiffs moved to dismiss the matter or, in the alternative, to stay Temple's motions.[3] On 9 and 10 October 2012, Judge Hooks, under a new commission, held a hearing on the pending motions. By order entered 7 February 2013, Judge Hooks granted Temple's motion to intervene, denied Plaintiffs' motion to dismiss or stay proceedings, and awarded Temple reimbursement of certain costs and an attorneys' fee of one-third of Plaintiffs' net recovery in the underlying lawsuit less the amount of workers' compensation lien and common costs payments previously made by Temple. From that order, Plaintiffs appeal.

Discussion

On appeal, Plaintiffs make eleven arguments: that Judge Hooks erred in (1) hearing Temple's claims without having subject matter

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2. The record on appeal includes notices of voluntary dismissal with prejudice as to claims against Steris signed by each plaintiff and dated 2 November 2011. Notices of voluntary dismissal with prejudice as to Seal Master signed by each plaintiff are also included in the record. However, although the notices as to Seal Master are signed by Temple, they do not bear a file stamp from the superior court.

3. On 17 August 2012, Plaintiffs filed a separate civil action in Orange County Superior Court against Temple, asserting claims for constructive fraud, breach of fiduciary duty, duress and undue influence, negligent infliction of emotional distress, and declaratory relief. That action was dismissed without prejudice on 4 November 2013.

jurisdiction, (2) asserting authority over Plaintiffs without having personal jurisdiction, (3) asserting authority over Plaintiffs' settlement funds without having jurisdiction, (4) hearing and ruling on Temple's claims which should have been asserted in a separate action, (5) conducting a bench trial that deprived Plaintiffs of their due process rights, right of immediate appellate review, and a fair hearing on the merits, (6) finding Temple to be a real party in interest in the underlying action, (7) granting Temple's motion to intervene, (8) awarding Temple fees and costs in violation of public policy, (9) awarding Temple fees and costs in violation of the North Carolina Rules of Professional Conduct, (10) awarding Temple fees and costs without legal authority, and (11) reaching conclusions of law that are not supported by the court's findings of fact. We affirm.

I. Jurisdiction

[1] In Plaintiffs' first four arguments, they contend that Judge Hooks erred in hearing Temple's claims without having subject matter jurisdiction, personal jurisdiction over Plaintiffs, or jurisdiction over Plaintiffs' settlement funds, and assert that Temple was required to bring his claims for costs and fees against Plaintiffs in a separate action. Because these arguments are related, we consider them together and reject each contention.

> 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. Thus the trial court's subject[]matter jurisdiction may be challenged at any stage of the proceedings.

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

Plaintiffs cite *In re Transportation of Juveniles* for the proposition that Judge Hooks had subject matter jurisdiction only over the issues raised in Plaintiffs' complaint which they contend did not include Temple's alleged entitlement to fees for his services. 102 N.C. App. 806,

808, 403 S.E.2d 557, 558 (1991) ("A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.") (citation omitted). We find that case easily distinguishable.

There, a district court judge "entered an order [regarding who would transport juveniles in secure custody to and from court], *ex mero motu* and without an action or proceeding having been filed." *Id.* at 807, 403 S.E.2d at 558. We vacated the order because, "without an action pending before it, the district court was without jurisdiction to enter an order." *Id.* at 808, 403 S.E.2d at 559. Here, in contrast, there *was* an action pending before Judge Hooks, to wit, the underlying lawsuit. As Judge Hooks noted in his order filed 7 February 2013, due to the dispute between Plaintiffs and Temple over Temple's costs and fees, the trial court was "unable to have final dismissals entered" after Plaintiffs and the remaining defendants reached a settlement. The November 2011 consent order providing for final dismissal of all pending claims between Plaintiffs and the remaining defendants pursuant to the mediated settlement placed the resulting settlement funds with the Clerk of Superior Court in Brunswick County pending resolution of the dispute over Temple's costs and fees.

For the same reason, we also reject Plaintiffs' assertions that, once they agreed to dismiss with prejudice their remaining claims in the underlying lawsuit, (1) Judge Hooks's "authority over this matter came to an end and he had no ability to keep the action alive beyond its natural life[,]" (2) Judge Hooks lacked jurisdiction over Plaintiffs or the settlement funds, and (3) Temple was required to bring any claims to recover his costs and fees in a separate action. As stated above, the consent order explicitly noted that the matter of Temple's costs and fees had been raised in the underlying lawsuit and remained pending after release of the settlement funds to the Clerk.

Further, the trial court here followed the procedures this Court approved in a remarkably similar case, *Guess v. Parrott*, 160 N.C. App. 325, 585 S.E.2d 464 (2003). That appeal arose

> out of a dispute between attorneys for the firms of appellant Lloyd T. Kelso & Associates and appellee Melrose, Seago & Lay, P.A., as to entitlement to attorneys' fees

> stemming from the underlying case. The underlying case involved an automobile accident . . . in which [the] plaintiff Johnny Robert Guess, Jr., was injured when his vehicle collided with a tractor-trailer driven by [the] defendant Terry Anthony Parrott.
>
> Shortly after the accident, [the] plaintiff's father and brother . . . contacted the appellee law firm of Melrose, Seago & Lay, P.A., and made arrangements with Randal Seago to represent [the] plaintiff. [The] plaintiff and Randal Seago entered into a contingency fee agreement in which [the] plaintiff promised to pay appellee one-third of any recovery. Further, [the] plaintiff would reimburse appellee for expenses and costs advanced by it.
>
> Mr. Seago went about the task of representing [the] plaintiff. He filed a complaint . . . . The parties negotiated at mediation, ... [but] a settlement could not be reached . . . . Therefore, this matter went to trial . . . [with] a mistrial [eventually] declared.
>
> Following the unsuccessful trial, Seago and other attorneys at appellee law firm were involved in negotiations with their client, [the] plaintiff, and [the] defendants. . . .
>
> [The p]laintiff became dissatisfied with the representation provided to him by appellee law firm and informed them of such. Acceding to [the] plaintiff's wishes, appellee filed a motion to withdraw [which was granted]. . . .
>
> Thereafter, [the] plaintiff secured the services of appellant Lloyd Kelso of Lloyd T. Kelso & Associates. [The p]laintiff entered into a contingency fee agreement with Kelso, promising to pay 35% of the amount recovered. . . .
>
> The parties were ordered into mediation and eventually settled [the] plaintiff's case . . . . The attorneys' fees issue was not resolved in mediation.

Id. at 326-27, 585 S.E.2d at 465-66. The "appellee filed a motion [in the underlying case] requesting a portion of the attorneys' fees . . . ." *Id.* at 327, 585 S.E.2d at 466. Following a bench trial, the trial court entered an order awarding (1) costs to each law firm, (2) "the reasonable value of its services in *quantum meruit* . . . from the contingency fee funds generated by the successful settlement" to appellee, and (3) "the remaining

funds from the generated fee" to appellant.[4] *Id.* at 329, 585 S.E.2d at 467 (italics added). On appeal, appellant argued, *inter alia*, that appellee's motion had failed to state a claim upon which relief could be granted and that the trial court erred in resolving the fee dispute via a bench trial rather than before a jury. *Id.*

This Court held that "a claim by an attorney who has provided legal service pursuant to a contingency fee agreement and then [been] fired has a viable claim in North Carolina in *quantum meruit* against the former client or its subsequent representative" and that the filing of a motion in the underlying action, as Temple did here, was a proper procedure for asserting such a claim. *Id.* at 331, 585 S.E.2d at 468 (italics added). We further concluded that

> [t]he apportionment of attorneys' fees among the various lawyers who have represented a party has not been regulated by statute and is therefore within the province of the trial court. Accordingly, appellant had no right to have the reasonable value of appellee's services determined by a jury, as this issue is committed to the sound discretion of the trial court.

Id. at 334, 585 S.E.2d at 470. Indeed, the Guess court observed that the trial judge in the underlying matter is "in the best position to make the determination of ability and skill of the parties, as well as to the difficulty of the case." *Id.* at 337, 585 S.E.2d at 472.

We see no meaningful distinction between the circumstances in *Guess* and those presented here.[5] As in *Guess*, the dismissed attorney filed a motion in the underlying action seeking to recover fees in *quantum meruit*, and the trial court conducted a bench trial to resolve the dispute. Accordingly, we overrule Plaintiffs' arguments regarding

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4. "[T]he theory of '*quantum meruit*,' an equitable remedy, . . . is defined by Black's Law Dictionary to mean 'as much as deserved.'" *Id.* at 332, 585 S.E.2d at 469 (italics added). "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998).

5. We are not persuaded by Plaintiffs' suggestion that the holding in *Guess* does not apply here because Plaintiffs had not entered into a *written* contract for Temple's legal services. It is well-established that "recovery in *quantum meruit* is appropriate only where an implied contract exists, and that, where an express contract concerning the same subject matter is found, no contract will be implied." *Carolantic Realty, Inc. v. Matco Group, Inc.*, 151 N.C. App. 464, 471, 566 S.E.2d 134, 139 (2002) (citation and internal quotation marks omitted). Here, it was the very lack of a written agreement which led to the dispute over Temple's fees, leaving Plaintiffs and Temple with nothing but an implied contract

Judge Hooks's jurisdiction over the issue of Temple's fees, over Plaintiffs, and over the settlement funds, and we reaffirm that an attorney may properly bring a claim for fees in *quantum meruit* against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial.

II. Intervention

[2] Plaintiffs also argue that the trial court erred in various ways in its handling of Temple's motion to intervene: that (1) the trial court was required to rule on the motion to intervene before reaching the merits of the fee dispute, (2) the motion to intervene was untimely because it was not heard until five and one-half years after the filing of the complaint, and (3) Temple was not entitled to intervene as a matter of right.

As discussed *supra*, nothing in *Guess* indicates that a motion to intervene was filed by the appellee in that case; rather, this Court made clear that a dismissed attorney seeking legal representation costs and fees, like Temple, could pursue his claims against his former clients, like Plaintiffs, by the filing of a motion in the cause. *See id.* at 331, 585 S.E.2d at 468. Accordingly, both the motion to intervene and the allowance of that motion in the 7 February 2013 order were wholly unnecessary to permit Judge Hooks to reach and resolve the merits of Temple's motion in the cause. Thus, even assuming *arguendo* that Judge Hooks did err in ruling on the motion to intervene, any such error would be of no consequence to his resolution of the fee dispute in his 7 February 2013 order. Accordingly, we need not consider Plaintiffs' arguments regarding the motion to intervene.

III. Public Policy

[3] Plaintiffs also argue that the award of fees and costs to Temple was contrary to public policy in that the award was in violation of Rule 1.5(c) of the North Carolina Rules of Professional Conduct ("the Rules"), which provides that "[a] contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be

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regarding his entitlement to a percentage of Plaintiffs' recovery. Temple's representation of Plaintiffs having been terminated prior to finalization of the settlement of the underlying lawsuit, even had there existed a valid written contingency fee contract between Temple and Plaintiffs, Temple could not have collected his contractual fee under it. Rather, he would have had to proceed in *quantum meruit*, exactly as he did here. *See Guess*, 160 N.C. App. at 332-33, 585 S.E.2d at 469 ("Under current North Carolina law, . . . an attorney, working pursuant to a contingency fee contract, who is discharged without cause by his or her client, is entitled to recover the reasonable value of his or her services [in *quantum meruit*].").

determined, including the percentage or percentages that shall accrue to the lawyer . . . .” Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 1.5(c) (2012). We are not persuaded.

The “breach of a provision of the [Rules] is not in and of itself . . . a basis for civil liability.” *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 421, 558 S.E.2d 871, 879 (2002) (citations and internal quotation marks omitted). However, Plaintiffs contend that, because the Rules are adopted by our Supreme Court, *Beard v. The North Carolina State Bar*, 320 N.C. 126, 129-30, 357 S.E.2d 694, 696-97 (1987), they constitute a statement of public policy. In turn, Plaintiffs contend that to award Temple costs and fees in *quantum meruit* violates the public policy requiring that contingency fees be in writing as stated in Rule 1.5(c). *See, e.g.*, *Cansler v. Penland*, 125 N.C. 578, 579-80, 34 S.E. 683, 683-84 (1899) (holding that a contract which violates public policy is void and unenforceable).

However, the plain language of the Rules makes clear that the

> [v]iolation of a Rule should not give rise itself to a cause of action against a lawyer *nor should it create any presumption in such a case that a legal duty has been breached.* In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy . . . . The [R]ules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *Furthermore, the purpose of the Rules can be subverted when they are invoked by [the] opposing parties as procedural weapons. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.*

Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 0.2[7] (emphasis added). Indeed, the comments to Rule 1.5 itself explicitly provide that a trial court’s “determination of the merit of the petition or the claim [for attorney costs and fees] is reached by an application of law to fact and *not by the application of this Rule.*” Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 1.5, Comment 12 (emphasis added).

Plaintiffs cite several cases from this State in support of the proposition that

> there can be no recovery here on *quantum meruit* or otherwise. *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) (if there can be no recovery on a contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*); *Richardson v. Bank of Am.*, N.A. 182 N.C. App. 531, 563, 643 S.E.2d 410, 430 (2007) (same); *In Re: Cooper*, 81 N.C. App. 27, 41, 344 S.E.2d 27, 36 (1986) (same); *Townsend v. Harris*, 102 N.C. App. 131, 132, 401 S.E.2d 132 (1991).

We do not find Plaintiffs' arguments to have merit.

We note that each of the cases cited by Plaintiffs concerns violations of public policy regarding the content of contracts rather than their form. *See Thompson*, 313 N.C. at 314, 328 S.E.2d at 290 (noting in *dicta* that a "contingent fee contract for legal services to be rendered in connection with matters arising out of the domestic difficulties between [a husband and wife] was void and unenforceable exclusively by virtue of the fact that it violated the public policy of this State"); *Townsend*, 102 N.C. App. at 132, 401 S.E.2d at 133 (same); *In Re: Cooper*, 81 N.C. App. at 29, 344 S.E.2d at 29 ("[A]lthough a contingent-fee contract in a divorce, alimony, or child support proceeding is void, . . . a separate contingent-fee contract in an equitable distribution proceeding may be fully enforceable.") (citation omitted); *Richardson*, 182 N.C. App. at 563, 643 S.E.2d at 430 (noting that "the sale of [single-premium credit insurance] with loans greater than fifteen years [i]s void as against public policy").

As for *Thompson*, the primary case cited and relied upon by Plaintiffs as "controlling" on the outcome of this appeal, the only issue actually decided by our Supreme Court in that opinion was whether an order allowing intervention can be upheld when the underlying contract in the case has been declared void and unenforceable:

> *The Court of Appeals held that the contingent fee contract for legal services to be rendered in connection with matters arising out of the domestic difficulties between Ms. Thompson and her husband was void and unenforceable exclusively by virtue of the fact that it violated the public policy of this State. Review of that decision has not been sought and therefore the validity of that decision is not before us.*
>
> The opinion of the Court of Appeals on that point is the law of this case as it now stands before us. The contract being void, intervenors had no interest in the property or

> the transaction that was the subject of Ms. Thompson's suit. There was, therefore, no basis for the order allowing intervention. The Court of Appeals should have, therefore, vacated the order allowing intervention and dismissed the intervenors from that suit. It erred in not doing so.
>
> *Although in view of our disposition of the case a decision on the point is not necessary, we note that it is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on quantum meruit.*
>
> The opinion of the Court of Appeals remanding the case for determination of the reasonable value of the services rendered prior to 16 February 1981, the date the attorneys were discharged, is reversed. The case is remanded to the Court of Appeals for remand to the District Court of Henderson County for an order vacating the order allowing intervention and for the entry of an order dismissing the action filed by the intervenors against Ms. Thompson.

313 N.C. at 314-15, 328 S.E.2d at 290 (citations omitted; emphasis added). Thus, as the Supreme Court explicitly acknowledged, its observations regarding *quantum meruit* were purely *dicta*. *Id.* Plainly, then, *Thompson* is not controlling on that point.

In the opinion of this Court which was reversed the Supreme Court, wherein we considered as a matter of first impression whether contingent fees in domestic cases violated public policy, several policy considerations were cited, including "(1) the recognition that these contracts tend to promote divorce and (2) the lack of need for such contracts under modern domestic relations law [which provide adequate mechanisms for recovery of attorneys' fees by dependent spouses]." *Thompson v. Thompson*, 70 N.C. App. 147, 155, 319 S.E.2d 315, 320 (1984).[6] Of course, neither of these policy considerations is implicated here, and as discussed *supra*, the Rules explicitly state they are not intended to resolve disputed attorneys' fees.

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6. In an unfortunate reflection of the paternalism of the times, this Court also noted a third public policy which domestic contingent fee contracts would violate:

> Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent. The public, the legal profession, and the bench would

On the other hand, case law from this Court and our Supreme Court makes clear that "an agent or attorney, [even] in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances." *Forester v. Betts*, 179 N.C. 681, 682, 103 S.E. 209, 209 (1920); *see also Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553 (1989) (holding that an attorney could recover a reasonable fee even though the attorney and client had no written or oral contingency fee agreement). Indeed, the fact that an agreement for legal representation was determined "to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence" where an attorney's right of recovery arises in *quantum meruit*, because the trial court's award of fees is based "upon the reasonable value of [the attorney's] services" and not upon the failed agreement. *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, __ N.C. App. __, __, 730 S.E.2d 763, 766 (2012). We can find no meaningful distinction between the circumstances presented in this appeal and those in *Crumley & Assocs., P.C.*, a case which Plaintiffs fail to cite, let alone distinguish.

In sum, the Rules, precedent from our Supreme Court, and decisions by previous panels of this Court all reject the argument made by Plaintiffs here. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, Plaintiffs' argument is overruled.

IV. Mathematical Errors

[4] In their final argument, Plaintiffs contend that conclusion of law 5 of the 7 February 2013 order, stating the total amount of Temple's petitioned-for costs which it was disallowing, is not supported by finding of fact 46, which describes certain costs charged to Temple as a sanction

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> all suffer. We believe all will benefit by maintaining the present public policy of not enforcing such contracts no matter how freely and fairly entered into and how reasonable may be the fee thereby produced. The wise discretion of capable and experienced trial judges (aided by the evidence placed before them by the parties prior to the time the court fixes the fee to be paid by the husband) can be relied upon to assure every attorney an adequate fee and thus assure every wife adequate representation.

Id. at 156, 319 S.E.2d at 321 (citation and internal quotation marks omitted). Needless to say, the stereotypes and assumptions which underlie this supposed justification can no longer be considered the public policy of our State.

for his actions during discovery. However, a careful reading of Plaintiffs' argument and the record before us reveals that Plaintiffs are actually contending that the court abused its discretion in determining the sanction to impose. We disagree.

> It is well-settled that Rule 37 [of the North Carolina Rules of Civil Procedure] allowing the trial court to impose sanctions is flexible, and a broad discretion must be given to the trial judge with regard to sanctions. Our Supreme Court has stated that 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.

Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995) (citations, internal quotation marks, and some brackets omitted), *affirmed*, 344 N.C. 153, 472 S.E.2d 774 (1996).

At the hearing on Temple's motion in the cause, the trial court asked Temple about an incident during discovery when Temple failed to timely disclose a change in certain experts he intended to call. As a result, the trial court had sanctioned Temple by requiring that he pay the costs of deposing the newly disclosed witnesses rather than shifting those costs to Plaintiffs. At the motion hearing, Temple acknowledged the sanction, and, when the court asked Temple what the amount of the sanction was, Temple responded, "[$]28,000."

Later during the hearing, the following exchange occurred between Temple and one of his attorneys:

> Q[.] Now, did you undertake to prepare separate schedules to identify those deposition expenses that were incurred for the deposition of the plaintiffs' experts that Judge Hooks ordered be borne by the Temple Law Firm?
>
> A[.] Yes.
>
> . . . .
>
> Q[.] I show you two separate exhibits, [38] and [39]. Look at those and tell us what those are, please.
>
> A[.] Exhibit Number [38] lists out the plaintiff expert deposition expenses of fees, transcripts, and videographer expenses. And [39] lists out their plaintiff expert deposition travel expenses.

> Q[.] Okay. So [38] includes both the deposition testimony time as well as the deposition transcript and video charges, is that correct, for each of those plaintiff experts that the Temple Law Firm was ordered to pay for; is that correct?
>
> A[.] Yes, that's my understanding.
>
> Q[.] Okay. And then Exhibit [39] represents the travel — well, tell us what [39] represents.
>
> A[.] It represents the expenses that the experts incurred to travel to the depositions listed on the chart.
>
> Q[.] Okay. And so what are the total expenses for the experts, their deposition testimony and their transcripts and videos, as reflected on Exhibit [38]?
>
> A[.] $21,686.05.
>
> Q[.] Okay. And what are the total travel expenses incurred by those experts to give those depositions, as reflected on Exhibit [39]?
>
> A[.] $6,630.75.

As Plaintiffs note, the total of the expenses listed in the two exhibits is $28,316.80, an amount quite close to the figure Temple himself provided in response to the court's question early in the hearing. However, in finding of fact 46 of the 7 February 2013 order, the trial court disallowed only a portion of that total amount:

> 46. As a result of the manner in which [P]laintiffs' counsel disclosed and then changed experts, the [trial c]ourt as a sanction required the costs of deposing newly disclosed experts (by Plaintiffs) be paid by [P]laintiffs[']] counsel. Those costs were as follows:
>
> $ 750.00: Cynthia Wilhelm Deposition fee
>
> $ 2,000.00: Ward Zimmerman Deposition fee
>
> $ 2,800.00: Fred Hetzel Deposition fee 8/26/10
>
> $ 2,800.00: Fred Hetzel Deposition fee 11/3[/]10
>
> $ 3,500.00: Fred Hetzel Deposition fee 11/9/10
>
> $ 755.33: Ward Zimmerman Deposition related charges[]
>
> $ 1,364.67: Fred Hetzel deposition expenses

> $ 986.41: Jim Dobbs Depo travel expenses
>
> $ 543.84: Jim Dobbs Depo travel expenses
>
> Total: $15,500.25
>
> As it was always the intent of the [trial c]ourt that counsel bear this expense, it should not be allowed to be shifted to [P]laintiffs.

As noted *supra*, "broad discretion must be given to the trial judge with regard to sanctions" and such a determination will not be upset absent "a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* While Temple's testimony and exhibits 38 and 39 reflected costs of approximately $28,000 connected with the newly disclosed experts, the trial court itself never stated the exact amount of the expenses it planned to shift to Temple as a sanction. After reviewing the exhibits, the court, in its discretion, apparently decided that only some of those costs would be borne by Temple. Given the specificity of finding of fact 46 in breaking down and listing the specific expenses to be included in the sanction, we see no abuse of the trial court's discretion. We explicitly reject Plaintiffs' assertion that the trial court was required to provide an "explanation as to why the additional $12,816.55 [was] not included." Finding of fact 46 contains an entirely sufficient explanation of the court's decision to sanction Temple. This argument is overruled.

The 7 February 2013 order is

AFFIRMED.

Judges ERVIN and McCULLOUGH concur.

SRS ARLINGTON OFFICES 1, LLC, SRS ARLINGTON OFFICES 2, LLC, SRS ARLINGTON OFFICES 3, LLC, SRS ARLINGTON OFFICES 4, LLC, SRS ARLINGTON OFFICES 5, LLC, SRS ARLINGTON OFFICES 6, LLC, SRS ARLINGTON OFFICES 7, LLC, SRS ARLINGTON OFFICES 8, LLC, SRS ARLINGTON OFFICES 9, LLC, SRS ARLINGTON OFFICES 10, LLC, SRS ARLINGTON OFFICES 11, LLC, SRS ARLINGTON OFFICES 12, LLC, AND SRS ARLINGTON OFFICES, LLC, PLAINTIFFS

v.

ARLINGTON CONDOMINIUM OWNERS ASSOCIATION, INC. AND ARLINGTON COMMERCIAL HOLDINGS, LLC, AND JAMES J. GROSS, DEFENDANTS

No. COA13-808

Filed 1 July 2014

1. Associations—homeowners—standing

A homeowner's association (ACO) in a complex that also included a commercial building, an office building, and a parking garage, had standing to bring a claim for monetary damages on behalf of its members where the service contract between the owner of the office building (SRS) and owner of the commercial building (ACH) harmed ACO by depriving it of payment for its services. Furthermore, ACO had standing pursuant to N.C.G.S. § 47C-3-102(a)(4) as ACO was defending matters affecting its condominiums.

2. Damages and Remedies—basis—unjust enrichment—not compensatory

Although the owner of a commercial building (ACH) contended the trial court erred by granting summary judgment on claims for monetary relief by a homeowners association (ACO) because ACO was not a party to the services agreement or parking deck lease between the owners of an office building (SRS) and ACH and could not demonstrate damages, the monetary relief granted by the trial court was based on restitution for unjust enrichment rather than on compensatory damages.

3. Unjust Enrichment—damages—stipulated payments received

The trial court did not err by awarding restitution of $101,544.50 based on quantum meruit in an action involving a residential tower, a commercial building, an office building, and a parking garage where the court found that $101,544.50 was stipulated by the parties to be the total amount of payments that the commercial building owners (ACH) received from the office building owners (SRS) from 4 June 2008 to 31 December 2011.

4. Compromise and Settlement—subsequent claim—different basis

A settlement agreement between a homeowner's association (ACO) and the owner of an office building (SRS) in a complex that also included a commercial building and a parking garage did not bar subsequent claims against the owner of the commercial building (ACH) under election of remedies. ACO sought consistent remedies, based on quantum meruit, to force all parties to disgorge ill-gotten profits, not compensatory damages.

5. Damages and Remedies—punitive—waiver of claim

A homeowners association (ACO) waived its claim for punitive damages by clearly stating to the trial court several times that it was not asking for punitive damages and acknowledging that it lacked sufficient evidence to bring a claim for punitive damages.

Cross-appeals by defendants from order entered 15 February 2013 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2014.

Katten Muchin Rosenman LLP, by Richard L. Farley, Rebecca K. Lindahl, and Meghan D. Engle, for defendant-appellee Arlington Condominium Owners Association, Inc.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellants Arlington Commercial Holdings, LLC, and James J. Gross.

BRYANT, Judge.

A homeowners' association has standing to bring a claim on behalf of its members. A claim for unjust enrichment/*quantum meruit* is a claim for restitution which seeks to force a party to disgorge its ill-gotten profits. Where a party brings claims for restitution, the doctrine of election of remedies is not applicable. Summary judgment as to a claim is appropriate where a party has abandoned a claim.

The Arlington Condominium, completed on 28 January 2003, is comprised of three structures: a multi-level parking garage, a residential condominium tower, and a commercial building housing retail shops and offices. A second, separate three-story office building stands adjacent to the Arlington Condominium; both buildings share the multi-level parking garage. Defendant-appellant Arlington Commercial Holdings,

LLC ("ACH"), currently owns the commercial building that is part of the Arlington Condominium. ACH also previously owned the separate three-story office building until it was sold to plaintiffs SRS Arlington Office, 1, LLC, *et al.* ("SRS"), in 2008.

The residential tower is maintained by defendant-appellee Arlington Condominium Owners Association, Inc. ("ACO"). ACO, acting in the usual manner of a homeowners' association, collects dues and pays for the common expenses of the residential tower which includes maintenance of the garage. ACO also provides services including garage and common area maintenance, landscaping, and utilities to both of the commercial office buildings.

When ACH sold the separate three-story office building to SRS in 2008, SRS entered into a service agreement whereby ACH would provide services such as building maintenance, utilities, etc., to SRS. Also in 2008, SRS and ACH entered into a parking lease which permitted SRS limited use of certain spaces within the multi-level parking garage; ACO was not a party to either agreement. From 2008 to 2011, ACH received payment pursuant to the parking lease and services agreement with SRS for maintenance of the garage and common areas, landscaping, utilities, etc. However, the services, including maintenance of the garage and other areas, were actually provided by ACO, and ACO never received compensation from ACH or SRS.

In May 2010, SRS filed a complaint seeking determination of the validity and enforcement of the parking garage lease between SRS and ACH. Thereafter, SRS filed an amended complaint seeking enforcement of the services and utilities agreement between SRS and ACH, in addition to enforcement of the parking garage lease. SRS also filed a trespass upon easement claim against ACO.

ACO asserted counterclaims against SRS for declaratory judgment, *quantum meruit*, and trespass, and asserted cross-claims against ACH for *quantum meruit* in the alternative. ACO also filed a motion for summary judgment against SRS. ACO then amended its complaint, counterclaims, and cross-claims, adding James J. Gross ("Gross") as a cross-defendant, and asserting counterclaims for constructive fraud and breach of fiduciary duty against Gross.[1]

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1. James Gross was the developer of the Arlington Condominium and three-story office building, member and manager of ACH, and president of ACO's board of directors until 2008. Gross negotiated the sale of the three-story office building on behalf of ACH in June 2008.

On 22 November 2011, SRS and ACO entered into a settlement agreement which "settled all claims" between these two parties. The settlement agreement was enforced by order of the trial court entered 22 August 2012. Meanwhile, both ACH and ACO filed motions for summary judgment against each other.

On 29 October 2012, the trial court heard arguments concerning ACO's and ACH's motions for summary judgment. In an order issued 15 February 2013, the trial court granted Gross's motion for summary judgment as to punitive damages but denied summary judgment as to all remaining claims. The trial court granted ACO's motion for summary judgment dismissing all of ACH's claims except claim five regarding ACO's parking garage easement which was denied in part and granted in part. The trial court, after concluding that ACH was unjustly enriched due to payments received under the services and utilities agreement, and that Gross breached his fiduciary duty to ACO by causing SRS and ACH to enter into the agreement, entered judgment against ACH and Gross, jointly and severally, for $101,544.50. ACO, ACH, and Gross appeal.[2]

On appeal, ACH alleges the trial court erred in granting summary judgment to ACO because: (I) ACO lacked standing to bring a claim for monetary damages; (II) ACO failed to demonstrate any damages; and (III) ACO's election of remedies against SRS barred ACO's subsequent claims against ACH. ACH further argues that (IV) the trial court erred by not reducing ACO's judgment. On cross-appeal, ACO argues that the trial court erred in granting summary judgment to Gross as to punitive damages.

ACH and Gross's Appeal

I.

[1] ACH[3] argues the trial court erred in granting summary judgment to ACO because ACO lacked standing to bring a claim for monetary damages on behalf of its members. We disagree.

As all claims on appeal presented by ACO and ACH concern the trial court's granting or denial of motions for summary judgment, this Court reviews a motion for summary judgment *de novo*. *See Falk Integrated*

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2. SRS is not a party to this appeal.

3. For ease of reading we use ACH to represent the joint appeal of ACH and Gross.

Techs., Inc. v. Stack, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999) (citations omitted). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

"A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citation omitted). "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002) (citations omitted). To have standing, a party must be a "real party in interest." *See Energy Investors Fund*, 351 N.C. at 337, 525 S.E.2d at 445.

In its argument, ACH specifically contends that ACO lacks standing because ACO has not been harmed by the actions of ACH and, therefore, the condominium residents, rather than ACO, are the real parties in interest. An association like ACO has representational standing for its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citation omitted). North Carolina General Statutes, section 47C-3-102, provides that a condominium owner's association may "[i]nstitute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium[.]" N.C. Gen. Stat. § 47C-3-102(a)(4) (2013). Moreover, this Court has held that a property owner's association has standing to sue where the association's inability to collect assessments harmed its ability to carry out its duties as set forth by its declaration of covenants. *See Indian Rock Ass'n, Inc. v. Ball*, 167 N.C. App. 648, 606 S.E.2d 179 (2004); *see also Federal Point Yacht Club Ass'n, Inc. v. Moore*, ___ N.C. App. ___, ___ S.E.2d ___ (April 1, 2014) (No. COA13-681) (holding that a homeowner's association had standing as a corporate entity to bring suit against a defendant who repeatedly violated the association's covenants).

Here, the evidence indicated that the services agreement between SRS and ACH harmed ACO by depriving ACO of payment for services which ACO provided to SRS. As such, the loss of payment for services rendered has injured ACO and, thus, permits standing.

Furthermore, we note that ACO has standing pursuant to N.C.G.S. § 47C-3-102(a)(4)[4] as ACO is defending matters affecting its condominiums. ACH's argument as to standing is overruled.

II.

[2] ACH next argues the trial court erred in awarding summary judgment to ACO on ACO's claim for monetary damages because ACO failed to demonstrate damages. We disagree.

In its motion for summary judgment, ACO stated that:

> 4. [ACO] provided, and ACH has accepted, services and utilities to the office building that is adjacent to the Condominium (the "Office Building") nongratuitously and without payment, and SRS has been unjustly enriched thereby[.]
>
> . . .
>
> 6. Gross breached a fiduciary duty to the [condominium] unit owners and engaged in self-dealing during his term as President and member of the board of directors of [ACO].

The trial court, in its conclusions of law regarding ACO's motion for summary judgment, noted the following:

> 6. There is no dispute of material fact with respect to [ACO's] Second Crossclaim against ACH or its Fifth Crossclaim against Gross, and the Court finds as a matter of law that (a) ACH was unjustly enriched by reason of the payments received by it under the Services and Utilities Agreement and (b) Gross violated his fiduciary duties to [ACO] by causing SRS and ACH to enter into the Services and Utilities Agreement, and summary judgment in favor of [ACO], as non-moving party, is appropriate. Accordingly, the Court finds that [ACO] is entitled to judgment as a matter of law on its Second Claim – Quantum Meruit claim against ACH and on its Fifth Claim – Breach of Fiduciary Duty against Gross in the amount of $101,544.50, which sum was stipulated to by the parties as the total amount of

4. "Unless the declaration expressly provides to the contrary, the [homeowners] association, even if unincorporated, may: . . . [i]nstitute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium[.]" N.C.G.S. § 47C-3-102(a)(4) (2013).

> payments that ACH received from [SRS] from the period June 4, 2008 to December 31, 2011, without offset.

ACH contends the trial court erred in granting summary judgment on ACO's claims for monetary relief because ACO was not a party to the services agreement or parking deck lease between SRS and ACH and, therefore, ACO cannot demonstrate damages. We note for the record that the monetary relief granted by the trial court was based not on proof of compensatory damages but restitution based on unjust enrichment. Therefore, we do not further address ACH's arguments that attempt to challenge an award of compensatory damages.

[3] "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy . . . ." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414-15 (1998) (citations omitted).

> [R]estitution . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987) (citations and quotations omitted).

Here, the court found that the sum of $101,544.50 was stipulated by the parties to be the total amount of payments ACH received from SRS from 4 June 2008 to 31 December 2011. Therefore, because ACH was unjustly enriched by the payments it received from SRS pursuant to the services and utilities agreement, the trial court did not err in awarding restitution in the amount of $101,544.50 based on *quantum meruit*. ACH's argument is overruled.

III.

[4] ACH next contends the trial court erred in granting ACO's motion for summary judgment because ACO's settlement agreement with SRS barred ACO's subsequent claims against ACH based on the doctrine of election of remedies. We disagree.

> The whole doctrine of election [of remedies] is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other.

> But the principle does not apply to co-existing and consistent remedies.

Richardson v. Richardson, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964) (citation and quotations omitted).

> A plaintiff is deemed to have made an election of remedies, and therefore estopped from suing a second defendant, only if he has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action. The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong. One is held to have made an election of remedies when one chooses with knowledge of the facts between two inconsistent remedial rights. The doctrine does not apply to co-existing and consistent remedies.

Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 203-04, 532 S.E.2d 833, 835 (2000) (citations and quotation omitted).

Here, ACO sought consistent remedies, based on *quantum meruit*, to force all parties – SRS, ACH, and Gross – to disgorge ill-gotten profits. On 22 November 2011, ACO settled its claims against SRS through a settlement agreement which was enforced by order of the trial court. The agreement does not appear to address compensation for services provided by ACO, as ACH and Gross assert. Instead, the settlement agreement between ACO and SRS appeared to be a global settlement as it required SRS to pay ACO a lump sum of $125,000.00. The settlement agreement also set forth provisions for future payments by SRS to ACO for utilities, services, and parking expenses, among many other terms. All claims between ACO and SRS were extinguished by the settlement. Thereafter, ACO moved for summary judgment against ACH and Gross, alleging that ACH had been unjustly enriched and that Gross had breached his fiduciary duty by engaging in self-dealing while serving as president of ACO's board of directors.

In a 30 October 2012 hearing, the trial court found that ACH had been unjustly enriched, and that "under these circumstances [it] should find as a matter of law that [Gross] was . . . not in addition liable, but simply jointly and severally liable with ACH to the extent of those damages." The damages referred to was the $101,544.50 stipulated by the parties to be the amount of payments received by ACH from SRS under the services agreement from 4 June 2008 to 31 December 2011.

ACH's contention that ACO's claim is barred by the doctrine of election of remedies is without merit, as ACO's claims sought restitution based on *quantum meruit*, not compensatory damages. "The term '*quantum meruit*' can denote both a method of measuring recovery in restitution and a substantive theory of relief in restitution." *Paul A. Whitfield, P.A. v. Gilchrist*, 126 N.C. App. 241, 244-45, 485 S.E.2d 61, 63 (1997), *rev'd on other grounds*, 348 N.C. 39, 497 S.E.2d 412.

> Restitution recovery and damages recovery are based on entirely different theories. [T]he main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher, 86 N.C. App. at 393—94, 358 S.E.2d at 129 (citations and quotations omitted).

Here, ACO brought a claim for *quantum meruit* against ACH and Gross, alleging that ACH accepted non-gratuitous services from ACO without payment which unjustly enriched SRS. As such, ACO's claim was for restitution, rather than compensation; ACO sought to force ACH to "disgorge benefits that it would be unjust for [ACH] to keep." Therefore, ACO has neither sought nor obtained an impermissible double recovery based on its settlement agreement with SRS, as ACO has consistently sought restitution by seeking to force all parties to disgorge "ill-gotten profits" rather than compensation.

The trial court awarded summary judgment to ACO, finding ACH and Gross to be jointly and severally liable for the amount of $101,544.50. This amount represented the benefits received by ACH and Gross based on their actions in this case. Therefore, the trial court did not err in awarding summary judgment to ACO on its claim against ACH and Gross. Accordingly, we need not reach ACH's fourth argument on appeal.

ACO's Cross-Appeal

[5] On cross-appeal, ACO argues that the trial court erred in denying its motion for summary judgment as to Gross for punitive damages. We disagree.

As we review a motion for summary judgment *de novo*, we must look to see whether there is truly no genuine issue of material fact. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013) (holding that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.").

In the 15 February 2013 hearing, counsel for ACO raised the issue of punitive damages against Gross to the trial court:

> I want to address punitive damages. Believe me, if I thought the evidence met the standard for punitive damages in Chapter 1B, I would have put that in the order, too. I'm not asking you to enter an award of punitive damages.
>
> . . .
>
> We are not asking for punitive damages. I wish we could. Because in my opinion, he needs to be punished, but that's not going to happen.

After ACH asked the trial court to note on its order that "[ACO] has announced we're waiving the claim for your damages. I'd like that in the order because I think that's important[,]" ACO responded that "I'm not saying we're waiving it. I'm saying the evidence doesn't –." The trial court then found as a matter of law that ACO was not entitled to punitive damages against Gross:

> [T]he Court also finds that there is no dispute of material fact with respect to [ACO's] claim for punitive damages against Gross and the Court finds, as a matter of law, that Gross is entitled to summary judgment in his favor with respect to the claim for punitive damages pursuant to Chapter 1D of the North Carolina General Statutes.

Where a party informs the trial court that it does not intend to pursue a particular claim, that claim is deemed abandoned. *See Shroyer v. Cnty. of Mecklenburg*, 154 N.C. App. 163, 168-69, 571 S.E.2d 849, 852 (2002) (holding that the plaintiffs had expressly abandoned a claim for negligence where the plaintiffs made statements to the trial court

indicating that although the plaintiffs had originally brought claims for breach of contract and negligence against the defendant, "only the breach of contract claim[] will be tried in this case. Plaintiffs have elected not to pursue the negligence claim[] against [defendant].").

We agree with the trial court's conclusion that ACO waived its claim for punitive damages, as ACO clearly stated to the trial court several times that "[ACO is] not asking for punitive damages." Further, we note that ACO acknowledged it lacked sufficient evidence to bring a claim for punitive damages, telling the trial court that "if [ACO] thought the evidence met the standard for punitive damages in Chapter 1B, [ACO] would have put that in the order, too." As such, ACO waived its claim for punitive damages. Accordingly, the trial court did not err in denying ACO's summary judgment motion as to Gross for punitive damages.

Affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404

Filed 1 July 2014

1. Indictment and Information—larceny—fatally flawed—failure to allege entity capable of property ownership

Defendant's conviction for larceny was vacated where the indictment was fatally flawed because it failed to allege that Manna Baptist Church was an entity capable of owning property. Where an indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment.

2. Burglary and Unlawful Breaking or Entering—insufficient evidence—intent to commit larceny therein

The trial court erred by denying defendant's motion to dismiss the charge of felony breaking or entering a place of worship because there was insufficient evidence of his intent to commit larceny therein. However, there was ample evidence to support a conviction

for misdemeanor breaking or entering and the case was remanded for entry of judgment on that offense and resentencing.

3. Constitutional Law—effective assistance of counsel—failure to move to exclude evidence—not prejudicial

Defendant's argument that he received ineffective assistance of counsel in a larceny and breaking or entering a place of religious worship case was overruled. Although trial counsel failed to move in limine to exclude evidence that defendant had been arrested on an unrelated breaking or entering charge and initially failed to object to introduction of that evidence at trial, there was insufficient evidence of defendant's intent to commit larceny therein and defendant could not show prejudice from any failure of his trial counsel to object to this evidence.

Appeal by defendant from Judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Heard in the Court of Appeals 7 May 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Allison A. Angell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Thomas Campbell ("defendant") appeals from the judgment entered after a Cleveland County jury found him guilty of larceny and breaking or entering a place of religious worship. We vacate defendant's larceny conviction and reverse his conviction for breaking or entering a place of religious worship. We remand for entry of judgment and resentencing on misdemeanor breaking or entering.

I. Background

On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant "willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy Stephens and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a)." Defendant pled not guilty and proceeded to jury trial.

At trial, the State's evidence tended to show that Pastor Andy Stephens of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor Stephens found a wallet in the baptistery changing area that contained a driver's license belonging to defendant.

Pastor Stephens testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor Stephens admitted that the church door had been left unlocked overnight before. Pastor Stephens said that the secretary did not notice anything amiss on Thursday morning.

After Pastor Stephens realized that the audio equipment was missing he called the Cleveland County Sheriff's Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "this can't possibly be good. What have I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a 51 year old man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until he came upon the church. He noticed that the door was cracked slightly and a "sliver of light" was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.

Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant's call, also testified on defendant's behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.

After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant's prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant's testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant's testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under Rule 403. At the close of

all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.

The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and sentenced defendant to a split sentence of 13-25 months imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

II. Larceny Indictment

[1] Defendant first argues that the larceny indictment on which he was tried was fatally defective because it "failed to allege that Manna Baptist Church was an entity capable of owning property." We agree.

"It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation and quotation marks omitted). "A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010).

"An indictment must allege all of the essential elements of the crime sought to be charged." *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (citation and quotation marks omitted), *disc. rev. denied*, 360 N.C. 73, 622 S.E.2d 624 (2005). "The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Justice*, ___ N.C. App. ___, ___, 723 S.E.2d 798, 801 (2012) (citation, quotation marks, and brackets omitted). "[A]n indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is defective." *State v. Abbott*, ___ N.C. App. ___, ___, 720 S.E.2d 437, 440 (2011) (citation and quotation marks omitted).

Here, the indictment alleged two owners of the stolen property—Andy Stephens and Manna Baptist Church. Andy Stephens is a natural person, but the indictment does not allege that Manna Baptist Church is a legal entity capable of owning property. Failure to include such an allegation is normally fatal to the indictment. *See State v. Cathey*, 162 N.C. App. 350, 353, 590 S.E.2d 408, 410 (2004). The inclusion of Pastor Stephens as co-owner does not cure the omission here.

Where an indictment alleges two owners of the stolen property, the State must prove that each owner had at least some property interest in

it. *See State v. Greene*, 289 N.C. 578, 585, 223 S.E.2d 365, 370 (1976) ("If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit."); *State v. Burgess*, 74 N.C. 272, 273 (1876) ("If one is charged with stealing the property of A, it will not do to prove that he stole the joint property of A and B."); *State v. Hill*, 79 N.C. 656, 659 (1878) (holding that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners). If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest. Therefore, where the indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment. Consequently, the indictment here is fatally flawed and defendant's conviction for larceny must be vacated. *See Abbott*, ___ N.C. App. at ___, 720 S.E.2d at 441.

III. Breaking or Entering a Place of Worship

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of felony breaking or entering a place of worship because there was insufficient evidence of his intent to commit larceny therein. We agree.

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant['s] being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Chillo, 208 N.C. App. 541, 545, 705 S.E.2d 394, 397 (2010) (citation and quotation marks omitted).

A person commits the felony of breaking or entering a place of worship if he "[1] wrongfully breaks or enters [2] any building that is a place of religious worship [3] with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54.1(a) (2011). There are two lesser-included offenses to this charge: felony breaking or entering under N.C. Gen. Stat. § 14-54(a) (2011), which lacks the "place of religious worship" element, and misdemeanor breaking or entering under N.C. Gen. Stat. § 14-54(b) (2011), which lacks both the "place of religious worship" element and the intent element.

Defendant does not contend that the State failed to present sufficient evidence that he wrongfully entered a place of religious worship. He argues that the State failed to present sufficient evidence of intent to commit a larceny therein.

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398. "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the [building]." *State v. Brewer*, 80 N.C. App. 195, 199, 341 S.E.2d 354, 357 (1986) (citation and quotation marks omitted). "For example, the intent to commit larceny may be inferred from the fact that defendant committed larceny." *Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398 (citation and quotation marks omitted). "Further, a defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (citation, quotation marks, and brackets omitted), *disc. rev. denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). Finally, "[i]n the absence of a showing of a lawful motive, an intent to commit larceny may be reasonably inferred from an unlawful entry." *State v. Quilliams*, 55 N.C. App. 349, 351, 285 S.E.2d 617, 619, *cert. denied*, 305 N.C. 590, 292 S.E.2d 11 (1982); *see State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887) (establishing that an inference of felonious intent may be made where a defendant breaks into a dwelling at night with "no explanatory facts or circumstances"). However, this inference may be precluded by evidence of facts or circumstances that reveal an innocent reason for the defendant's entering into the building.[1]

1. *See, e.g.*, *State v. Cook*, 242 N.C. 700, 703, 89 S.E.2d 383, 385 (1955) (evidence sufficient to preclude inference where the defendant did not flee when discovered, explained that he was looking for a particular person, and left when requested), *State v. Moore*, 62 N.C. App. 431, 434, 303 S.E.2d 230, 232 (1983) (holding that there was sufficient evidence of innocent intent where both the State's and defendant's evidence showed that the defendant was coerced at knifepoint to enter), *State v. Humphries*, 82 N.C. App. 749, 751,

> The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived from [an unlawful entry] is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. Proof of [unlawful entry] by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt.

State v. Fair, 291 N.C. 171, 173, 229 S.E.2d 189, 191 (1976) (citations omitted).

Here, defendant admitted entering the church, but he explained that he entered to seek sanctuary, drink water, and pray. Defendant testified that the door to the church was unlocked when he arrived there. He stated that he saw that the door was slightly ajar and that a "sliver of light" was coming from within. He testified that he did not enter intending to steal anything and did not in fact steal anything. None of the State's evidence contradicts this testimony. Pastor Stephens testified that when the church secretary arrived on the morning of 20 August 2012, she found the front door unlocked. There were no signs of forced entry. Pastor Stephens admitted that the door could have been left unlocked accidentally after Wednesday night services, which ended around 9 p.m.

Defendant testified that he arrived at the church after 12 a.m. and set back out on the road around sunrise, but that shortly thereafter he began having chest pains and called 911. Mr. Cobb, the EMT who responded to defendant's call, testified that he was dispatched around 6:30 a.m. At the time, defendant was near an open field at the intersection of Burke Road and River Hill Road. The church is also located on Burke Road, though its distance from the intersection is not clear from the testimony. When Mr. Cobb arrived, defendant was sitting on the back of a fire truck, which had responded first. Defendant looked disheveled and worn out.

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348 S.E.2d 167, 169 (1986) (holding that the evidence was sufficient to preclude inference where defendant believed house to be that of his girlfriend and nothing in the dwelling had been disturbed), *disc. rev. dismissed*, 320 N.C. 165, 357 S.E.2d 359 (1987), *State v. Lamson*, 75 N.C. App. 132, 133, 135, 330 S.E.2d 68, 68, 70 (holding that the evidence was sufficient to preclude inference where he tried to enter the house drunk and was staying at the neighboring house), *disc. rev. denied*, 314 N.C. 545, 335 S.E.2d 318 (1985); *see also*, *State v. Keitt*, 153 N.C. App. 671, 675-76, 571 S.E.2d 35, 37-38 (2002) (discussing the rebuttable *McBryde* inference and holding that evidence of intoxication alone is insufficient to rebut it), *aff'd per curiam*, 357 N.C. 155, 579 S.E.2d 250 (2003).

He had worn through the soles of his shoes. Defendant explained to Mr. Cobb that he had been wandering all night. Mr. Cobb testified that defendant was not carrying anything and did not have anything in his pockets.

Four days later, after Sunday services, Pastor Stephens noticed that an audio receiver, some microphones, and some audio cords were missing. These items were kept at various places around the church, including by the sound system, in the front of the church, and in the baptistery changing area, where defendant's wallet was found. Investigator Woosley checked a pawn shop database, but found no reports of items matching those missing from the church. Neither the officers nor any of the church staff searched the area around the church for the missing items. The items were never recovered.

When Investigator Woosley spoke with defendant at the Cleveland County Detention Center, defendant admitted that he had been to the church, but stated that he could not remember what he had done there. Defendant explained that he was a religious man and that "he had been on a spiritual [journey]." He admitted having periodic blackouts related to his mental health issues and medications, but never admitted taking anything from the church or entering the church with intent to steal.[2] He said that he remembered going to the church and that the church door was open when he got there, but that he did not remember doing anything wrong once inside.

We conclude that these facts are sufficient "explanatory facts and circumstances" to preclude the *McBryde* inference. *See McBryde*, 97 N.C. at 397, 1 S.E. at 927; *Lamson*, 75 N.C. App. at 135, 330 S.E.2d at 70. Unlike in the cases finding the evidence sufficient to infer intent from the breaking or entering alone, there was evidence of innocent intent and no evidence that defendant was discovered in the church and fled from the building. *Cf. State v. Hill*, 38 N.C. App. 75, 78, 247 S.E.2d 295, 297 (1978). Instead, he called 911 from a location near the church. There was no evidence that defendant attacked occupants of the building. *Cf. State v. Accor*, 277 N.C. 65, 73, 175 S.E.2d 583, 588-89 (1970). There was no evidence that defendant entered the building in a manner consistent with criminal intent—he entered through an unlocked front door. *Cf. State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976)

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2. Defendant did admit that he had previously broken into a residence, but there was no evidence that this offense had anything to do with the church, that it was in the same vicinity, or that it was uniquely similar to the facts here. Indeed, when the State attempted to elaborate on this other offense in rebuttal, the trial court excluded this evidence under Rule 403.

(applying the *McBryde* presumption where the defendant pushed in a windowpane to retrieve a key, cut telephone wires, was familiar with the layout of the house, and fled when confronted); *Quilliams*, 55 N.C. App. at 351, 285 S.E.2d at 619 (concluding that there was sufficient evidence to survive a motion to dismiss where the defendant broke through a window, cut through a screen, and fled when discovered).

"Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption." *Fair*, 291 N.C. at 173-74, 229 S.E.2d at 190 (citation and quotation marks omitted). Here, there was no evidence to contradict the innocent "facts and circumstances" offered by defendant. Therefore, the State was not entitled to rely on the *McBryde* inference to meet its burden.

Absent such an inference, we conclude that the evidence was insufficient, even taken in the light most favorable to the State, to show that defendant entered the church with intent to commit larceny. *Brewer*, 80 N.C. App. at 199, 341 S.E.2d at 357. The church was unlocked for over three hours before defendant arrived. There was no evidence of forced entry. Several hours later, when Mr. Cobb encountered defendant on the same road as the church, defendant was not carrying anything. None of the church staff noticed that the items were missing until four days later, after Sunday services. There was no evidence that defendant tried to sell the items in local pawn shops. There was no evidence that defendant touched the audio system. In fact, the State presented no evidence that showed defendant ever possessed the missing items. *Cf. Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398; *Baskin*, 190 N.C. App. at 109, 660 S.E.2d at 572.

We hold that the State failed to meet its burden as to the intent element of felonious breaking or entering a place of worship. The evidence is insufficient to support a reasonable inference that defendant entered the church with intent to commit larceny. Taken in the light most favorable to the State, the evidence here "raises no more than a suspicion of guilt." *Chillo*, 208 N.C. App. at 545, 705 S.E.2d at 397. Therefore, the trial court erred in denying defendant's motion to dismiss at the close of all the evidence. *See id.*

Although there was insufficient evidence to sustain a conviction for felonious breaking or entering, as defendant concedes, there was ample evidence to support a conviction for misdemeanor breaking or entering. Therefore, we remand for entry of judgment on that offense and resentencing. *See State v. Dawkins*, 305 N.C. 289, 291, 287 S.E.2d 885,

887 (1982) (remanding for entry of judgment on misdemeanor breaking or entering where evidence was sufficient to support that offense, but not felonious intent).

IV. Ineffective Assistance of Counsel

[3] Defendant next argues that he received ineffective assistance of counsel because his trial counsel failed to move *in limine* to exclude evidence that he had been arrested on an unrelated breaking or entering charge and initially failed to object to introduction of that evidence at trial. When his trial counsel did object to the State's attempt to call a witness in rebuttal to testify regarding the other charge, the trial court sustained the objection under Rule 403.

> To prevail in a claim for [ineffective assistance of counsel], a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Smith, ___ N.C. App. ___, ___, 749 S.E.2d 507, 509 (2013) (citation and quotation marks omitted).

The relevance of the objected-to evidence here relates—at very best—to the defendant's intent to commit larceny upon entering the church. Given our disposition of the breaking or entering charge, defendant cannot show prejudice from any failure of his trial counsel to object to this evidence. Therefore, he is not entitled to a new trial.

V. Conclusion

For the foregoing reasons, we conclude that the trial court was without jurisdiction to try defendant on the larceny charge and that it erred in denying defendant's motion to dismiss the felony breaking or entering charge. Because there was sufficient evidence to sustain a conviction for misdemeanor breaking or entering, we remand for entry of judgment and resentencing on that offense.

VACATED, in part; REVERSED, in part; and REMANDED.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
SHAWN CARLOS GODLEY

No. COA13-1337

Filed 1 July 2014

1. Constitutional Law—public trial—indecent liberties—courtroom closed during victim's testimony

Defendant's constitutional right to a public trial was not violated in an indecent liberties prosecution where the courtroom was closed during the victim's testimony. While the trial court's findings of fact were not supported by competent evidence in its original order, the trial court reevaluated the State's motion to close the courtroom pursuant to remand instructions and made numerous supplemental findings regarding such things as the nature of the charges, the young age of the victim, the judge's experience in that courthouse and the lack of alternatives. Those findings were sufficient to support the courtroom closure.

2. Indecent Liberties—substantial evidence—arousing or gratifying sexual desire

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child. Specifically, defendant contends that the State failed to demonstrate sufficient substantial evidence that he committed indecent liberties for the purpose of arousing or gratifying sexual desire. Testimony from the State's witnesses coupled with the other instances of defendant's alleged sexual misconduct that gave rise to the first-degree rape charges are sufficient evidence to infer defendant's purpose of arousing or gratifying sexual desire.

Appeal by defendant from judgment entered 1 May 2013 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.

William D. Spence, for defendant.

ELMORE, Judge.

On 1 May 2013, a jury found Shawn Carlos Godley (defendant) guilty of indecent liberties with a child, and defendant pled guilty to being a habitual felon. Judge W. Russell Duke, Jr. consolidated the convictions into one judgment and sentenced defendant to 84-110 months of active imprisonment. Defendant appeals and raises as error the trial court's decision to: 1.) grant the State's motion to close the courtroom doors during the victim's testimony and 2.) deny his motion to dismiss the indecent liberties charge. After careful consideration, we hold that the trial court did not err.

I. Facts

On 26 September 2011, a twelve-year-old female (the victim) and her grandmother went to the City of Washington Police Department to report a series of four alleged sexual events between the victim and defendant. Defendant was the boyfriend of the victim's aunt and lived in the same residence as the victim during the alleged acts. The reported instances of sexual activity occurred between June and August 2011 and included kissing, fondling, masturbation, and intercourse. As a result, defendant was charged with three counts of first-degree rape of a child and taking indecent liberties with a child.

At trial, the State made an oral motion to close the courtroom doors during the testimony of its first witness, the victim. Over defendant's objection, the trial court granted the State's motion. Following the victim's testimony, the State called Detective Dean Watson of the City of Washington Police Department as a witness and subsequently presented no further evidence. Four witnesses testified for defendant: defendant's cousin, the legal assistant for defendant's attorney, and the victim's father and aunt. At the close of the State's evidence, defendant made a motion to dismiss the indecent liberties charge for insufficiency of the evidence, which was denied by the trial court. The jury returned a verdict of not guilty as to the three counts of first-degree rape but guilty of taking indecent liberties with a child.

On 30 April 2014, this Court entered an order remanding this matter to the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding the temporary closure of the courtroom in accordance with *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216-17, 81 L.Ed.2d 31, 39 (1984), as interpreted by this Court in *State v. Rollins* (*Rollins I*), ___ N.C. App. ___, ___, 729 S.E.2d 73, 77-79 (2012). Defendant's appeal was held in abeyance pending this Court's receipt of the trial court's order containing these new findings.

A hearing was held by the trial court on 22 May 2014. On 28 May 2014, the trial court entered an order containing findings of fact and conclusions of law as directed by this Court.

II. Analysis

a. Closing the Courtroom

[1] Defendant argues that the trial court erred in closing the courtroom during the victim's testimony. Specifically, defendant avers that his constitutional right to a public trial was violated because the State failed to present evidence sufficient to support the trial court's decision to close the courtroom. We disagree.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). This court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d, 892, 897 (2007).

Pursuant to the Sixth Amendment of the United States Constitution, a criminal defendant is entitled to a "public trial." U.S. Const. amend. VI.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller, 467 U.S. at 46, 104 S.Ct. at 2215 (citations and quotations omitted). However, "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45, 104 S.Ct. at 2215. In accordance with this principle, N.C. Gen.

Stat. § 15-166 (2013) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

> In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

Before a trial court may allow a courtroom closure, it must comply with the rule set forth in *Waller*. *State v. Comeaux*, ___ N.C. App. ___, ___, 741 S.E.2d 346, 350 (2012). The State carries the burden "to present sufficient evidence, either in its case in chief or by *voir dire*, to permit the trial court to satisfy the *Waller* test[.]" *State v. Rollins* (*Rollins II*), ___ N.C. App. ___, ___, 752 S.E.2d 230, 233 (2013). The trial court must balance the interests of the State with defendant's constitutional right to a public trial through use of a four-part test: "(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect this interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure." *Rollins I*, ___ N.C. App. at ___, 729 S.E.2d at 77 (internal quotations and citations omitted). In making its findings, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *Rollins II*, ___ N.C. App. ___, ___, 752 S.E.2d at 235 (citation omitted). When this Court, on remand, directs a trial court to conduct a rehearing to make supplemental findings of fact and conclusions of law regarding the temporary closure of a courtroom, the trial court may base its supplemental findings of fact on evidence presented after the State's original motion. *See id.* at ___, 752 S.E.2d at 233-34 (rejecting defendant's contention that on remand "the trial judge ought to place himself back at that point in time in the trial when he heard the State's initial motion, and to consider only those facts he (the trial judge) knew at the time" and acknowledging that findings can "be based upon evidence presented . . . after the ruling upon the motion [for closure]").

Here, the State made its original oral motion to close the courtroom before any evidence had been presented, as the motion was made immediately after opening statements and before any witness testified. In support of the motion, the State presented no evidence through *voir-dire*

or its case-in-chief but merely offered an argument and referenced the charging documents to convince the trial court to close the courtroom:

> PROSECUTOR: Judge, at this time, the State is making a motion to close the courtroom to any non-essential personnel during the testimony of the next witness . . . who is alleged as the victim in the indictment. I would assert that there's a compelling interest, that given her age at the time of the offense and her age now, that the presence of non-necessary personnel would create a hardship on her and make it difficult in testifying and her testimony is essential and that it's not available to be admitted from any other source. So, for those reasons, I would ask to have non-essential personnel removed during her testimony only. . . . Judge, you know by the nature of the charges, and even though I guess it's not evidence, what you've heard from both counsel's opening statements of what the allegations are in regard to a *quasi* family relationship, and, of course, Your Honor has enough experience to know what the testimony generally is – I mean, that and it involves minor child and there's not an available alternative that I'm aware of.

Based on the above colloquy, the trial court originally made the following findings of fact:

> 1. The crimes alleged in the case at trial are of a sexual nature, 2. The crimes alleged in the case at trial involve an alleged victim [sic] is a minor child who is 13 years old now and crimes that took place in July and August of 2011. 3. The facts involve a relationship between the alleged victim and the defendant that are of a quasi-family nature. 4. The state contends that the evidence that would come from the minor child is not admissible by non-hearsay means from another reliable source. 5. The [d]efendant objected to any closure of the courtroom on 6th Amendment grounds of due process, fundamental fairness, and right to confront his accuser in a public trial.

While the trial court's findings of fact were not supported by competent evidence in its original order, the trial court reevaluated the State's motion to close the courtroom on 22 May 2014, pursuant to our remand instructions. The trial court made numerous supplemental findings of fact, including:

1. The Court, prior to and during the selection of the jury and prior to the impaneling of the jury, made an extensive and exhaustive examination of the Clerk of Court's criminal file and the indictments herein and readily recognized that the crimes alleged . . . are of a sexual nature, that the alleged victim is a minor child who is 13 years of age at the time of trial and that the crimes allegedly took place in July and August of 2011, almost two years earlier.

2. [T]he right side of the Courtroom [is] occupied . . . with people charged with various misdemeanors and felonies and possibly their witnesses . . . and one reporter with the local newspaper who the Court did not recognize, and various attorneys of those persons, seated against the right wall of the Courtroom within the Bar.

3. During the calling of the case for trial and during the selection of the jury, the Court has had the opportunity to observe the alleged victim, a teenager of 13 years of age, the defendant, a man with a criminal record allowing him to be charged as an habitual felon, and those people seated on the right side of the Courtroom and the attitude and demeanor of the victim and the defendant and the general nature and character of the audience seated on the right side of the Courtroom.

4. Upon the jury being selected and . . . having been informed by the State in open court and at a bench conference, with defendant's counsel present, of the quasi-familial nature of the relationship of the defendant and the alleged victim and that the testimony of the alleged victim is essential and uncorroborated and not available from any other source and would take only the remaining one hour and 15 minutes of the Court day (all of such representations were subsequently supported by the evidence proffered by the State), and the Court having considered the demeanor of the victim, the defendant and the nature and character of the remaining audience situated on the right side of the Courtroom, the Court ordered those people who were *not* members of the defendant's family, defense counsel seated against the right hand side of the wall of the Courtroom inside the Bar, witnesses in this case, other prosecutors and not other court personnel, to temporarily leave the Courtroom[.]

. . .

> 5. Having presided from time to time in Beaufort County Superior Court for over twenty years, the Court is well aware that a video feed or other technology that might allow remote testimony is not available . . . and no alternative method that would allow the victim to testify in front of the defendant or where the defendant would have the opportunity to view the testimony of the victim and where the jury could consider the evidence and the public could be present, is available so as for the trial to proceed in the Beaufort County Courthouse.

These supplemental findings are supported by competent evidence in light of the 1.) trial court's own observations of the criminal file, indictments, and personnel inside the courtroom; 2.) bench conference; 3.) trial court's experience in Beaufort County's courthouse; and 4.) trial court's consideration of the evidence presented during the State's case-in-chief. Moreover, the young age of the victim, nature of the charges, quasi-familial relationship with defendant, type of other persons present in the courtroom, necessity of the victim's non-hearsay testimony, limited time and scope of the courtroom closure, and lack of any reasonable alternatives to closing the courtroom are findings sufficient to support the courtroom closure. Accordingly, defendant's constitutional right to a public trial was not violated.

b. Motion to Dismiss

[2] Defendant also argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child. Specifically, defendant contends that the State failed to demonstrate sufficient substantial evidence that he committed indecent liberties for the purpose of arousing or gratifying sexual desire pursuant to N.C. Gen. Stat. § 14-202.1(a)(1). We disagree.

"A motion to dismiss for insufficiency of the evidence is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged; and (2) that defendant is the perpetrator of such offense." *State v. Fuller*, 166 N.C. App. 548, 554, 603 S.E.2d 569, 574 (2004) (internal citation omitted). "The trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. The evidence is to be considered in the light most favorable to the State." *Id.* (internal citations and quotations omitted).

The following elements are necessary to establish indecent liberties with a child under N.C. Gen. Stat. § 14-202.1(a)(1): "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (internal citation omitted). "Indecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper." *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (citations and internal quotations omitted). Moreover, "[t]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *State v. Sims*, 216 N.C. App. 168, 171, 720 S.E.2d 398, 400 (2011) (citation and quotation omitted).

Defendant's indecent liberties with the victim in June 2011 are illustrated by the State's witnesses. The victim stated that while at her grandmother's house, defendant kissed her on the mouth, told her not to tell anyone about what transpired, and continued to kiss her even after she asked him to stop. Detective Watson testified that when the victim spoke to police officers on 26 September 2011 about the sexual activity at her grandmother's house, she indicated that defendant "made sexual advances on her while he was drunk[,]" kissed her, fondled her "under her clothing," "touch[ed] her breasts and vagina, but did not penetrate her." Such testimony constitutes substantial evidence of taking indecent liberties with the victim. Moreover, this testimony coupled with the other instances of defendant's alleged sexual misconduct that gave rise to the first-degree rape charges are sufficient evidence to infer defendant's purpose of arousing or gratifying sexual desire. *See State v. Minyard*, ___ N.C. App. ___, ___, 753 S.E.2d 176, 182-188 (2014) *appeal dismissed*, *disc. review denied*, 50P14, 2014 WL 1512491 (2014) (holding that the victim's statements that the defendant used his penis to touch the victim's buttocks and penis multiple times "provide[d] ample evidence to infer [the] [d]efendant's purpose of obtaining sexual gratification"); *see also State v. Creech*, 128 N.C. App. 592, 599, 495 S.E.2d 752, 756-57 (1998) (holding that "the jury could reasonably conclude" that the defendant's acts "were committed to arouse defendant's sexual desire" where he gave the victim massages while only wearing "his underwear while [the victim] wore only his shorts[,]" and the State offered testimony "concerning [the] defendant's similar pattern of behavior during massages with other young males"). Accordingly, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

III. Conclusion

In sum, the trial court neither erred in granting the State's motion to close the courtroom doors during the victim's testimony nor in denying defendant's motion to dismiss the indecent liberties charge for insufficient evidence.

No error.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DOUGLAS EUGENE VEAL

No. COA13-1407

Filed 1 July 2014

Search and Seizure—reasonable suspicion—driving while impaired—tip from gas station attendant

The trial court in a prosecution for impaired driving and other offenses properly denied defendant's motion to suppress all evidence stemming from the initial stop where an attendant at a gas station called in a tip, an officer was dispatched, and defendant was arrested after failing field sobriety tests. This tip was more reliable than one from a true anonymous caller because the caller was identified as an employee of the gas station, defendant was not "seized" by the officer's approach and initial questioning, and the officer's personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter were a sufficient basis for reasonable suspicion to support a stop.

Appeal by defendant from judgment entered 6 August 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2014.

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

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

McCULLOUGH, Judge.

Douglas Eugene Veal ("defendant") appeals the order of the trial court, denying his motion to suppress evidence. For the following reasons, we affirm the order of the trial court.

I. Background

On 4 July 2011, Officer Rodney Cloer of the Asheville Police Department ("Officer Cloer") was dispatched to a report of an intoxicated driver in a green Chevy truck at the Citistop gas station located at 760 Haywood Road. The report of an intoxicated person came through dispatch from an employee at the Citistop gas station. Dispatch reported that there was a very intoxicated male subject trying to leave the gas station in a green Chevy truck with a bed cover. Dispatch also identified the subject as an elderly white male in a white hat. Officer Cloer responded to the call and drove to the gas station and parked his car in the parking lot. He then observed defendant driving his green truck in the parking lot. Officer Cloer approached defendant on foot and asked to speak with him. While speaking with defendant, Officer Cloer noticed an odor of alcohol coming from defendant and observed an unopened can of beer in the truck. Defendant told Officer Cloer that he was going to a funeral in Alabama. Officer Cloer noted that defendant had slurred speech. Due to his observations, Officer Cloer asked defendant to get out of his vehicle. While attempting to get out of his truck, defendant stumbled and nearly fell and used the side of the vehicle to maintain his balance.

Officer Cloer, certified in standardized field sobriety testing, instructed defendant to perform the "Horizontal Gaze Nystagmus" test. While Officer Cloer was performing the test, Officer Cloer observed six out of the six signs indicating impairment. He also asked defendant to perform the "Walk and Turn" test. While attempting to administer the test, defendant continued to ask questions during the instructional phase, lost his footing three times, used his arms for balance, and started the test without being asked. Due to these actions, Officer Cloer terminated the test and placed defendant under arrest for Driving While Impaired.

During the process of his arrest, defendant asked to be let go if he told Officer Cloer a location where drugs and stolen guns could be found. Officer Cloer explained that defendant was under arrest and he was not able to make any deals with defendant. Defendant was then transported to the jail where he subsequently refused to take the Intoxilyzer breath test to determine his blood alcohol level. Officer Cloer obtained a search

warrant from the magistrate in order to perform a blood test on defendant. Defendant was transported to Memorial Mission Hospital where his blood was drawn in an ambulance in the parking lot.

On 3 October 2011, defendant was indicted for habitual impaired driving and operating a motor vehicle without an operator's license. On 5 March 2012, defendant was indicted on attaining habitual felon status and failure to appear on the charge of habitual impaired driving after being released. On 5 July 2013, defendant filed a motion to suppress all evidence obtained from the alleged illegal seizure, arguing that Officer Cloer lacked reasonable articulable suspicion of criminal wrongdoing. The same day, defendant also filed a motion to suppress blood seized from defendant, and a motion to suppress evidence of statements made by defendant. On 29 July 2013, defendant filed a motion to exclude and objection to evidence of his alleged refusal of the Intoxilyzer test.

Defendant's trial came on for hearing on the 29 July 2013 criminal session of Buncombe County Superior Court. At the hearing, Aaron Wakenhut, the employee who called in the report of an intoxicated person, testified to his observations in the store. He could not remember the incident at the time of the trial, but testified by reading his witness statement aloud. In his statement he said that "the man was stumply [sic] walking, made a slight mess with hot water for his soup. Hard time talking and slurred. Took a very long time to respond." By order entered 1 August 2013, the trial court denied the motions to suppress. The order made the following pertinent findings of fact:

> 1. During the late evening hours of July the 4th, 2011, while on duty, Officer Cloer from the Asheville Police Department was dispatched to a gas station on Haywood Road to investigate an impaired person, and that he went there and that he parked his vehicle, got out, and observed the Defendant driving a truck in the parking lot.
>
> 2. That Officer Cloer went up to the Defendant's truck, at which time it was stopped, asked if he could speak to the Defendant, then detected the odor of alcohol, and at that same time observed an unopened container of beer in the truck, and then upon observing that and smelling that and opining that the Defendant had slurred speech, he was unsteady on his feet, he had him submit to field sobriety tests.

. . . .

6. The officer did not observe the Defendant driving, except in the lot; however, he was dispatched there for the purpose of investigating the potential of that illegal activity, and that the Defendant was under the wheel of a truck that was moving and the motor was on and it was in a public vehicular area.

On 6 August 2013, defendant pled guilty to the charge of habitual driving while impaired and attaining habitual felon status, while preserving his right to appeal his motion to suppress. The charges of no operator's license and failure to appear on the charge of habitual impaired driving after being released were dismissed. Defendant was sentenced to a term of 66 to 89 months imprisonment. Defendant entered notice of appeal on 6 August 2013.

II. Standard of Review

Our review of a trial court's motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Any unchallenged findings of fact are "deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). The trial court's conclusions of law are fully reviewable *de novo* on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (alteration in original) (internal quotation marks and citations omitted).

III. Discussion

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to suppress all evidence stemming from the initial stop because Officer Cloer made an illegal stop of defendant's vehicle. Defendant contends that the initial stop was illegal because it was not warranted by a reasonable and articulable suspicion of criminal activity.

The Fourth Amendment of the Constitution provides the right of people to be secure in their persons and protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. However, the

United States Supreme Court has held that "[n]o one is protected by the Constitution against the mere approach of police officers in a public place." *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (quoting *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973)). The Supreme Court has also held that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 428, 434, 115 L. Ed. 2d 389, 398 (1991).

Our Supreme Court held in *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994), that neither reasonable suspicion nor probable cause were required for an agent to approach the defendant and engage in conversation. In *Brooks*, the officer approached the vehicle while the defendant was sitting in the driver's seat. *Id.* at 137, 446 S.E.2d at 583. The officer shined a flashlight on the defendant and noticed an empty holster within the reach of the defendant. *Id.* The officer asked where his gun was located and the defendant responded that he was sitting on the gun. *Id.* The officer asked the defendant to "ease it out real slow" and the defendant reached under his right thigh and handed the gun to the officer. *Id.* The defendant was allowed to exit and enter the vehicle multiple times during the interaction. Without putting the defendant under arrest, the officer asked him if he had any "dope" in the car. The defendant replied in the negative and asked if the officer would like to search the vehicle. *Brooks* at 137-38, 446 S.E.2d at 583. Upon searching the vehicle, with the defendant's help, the officer discovered a bag of cocaine and arrested the defendant for possession of cocaine and carrying a concealed weapon. *Id.* at 138, 446 S.E.2d at 583-84. The defendant filed a motion to suppress the search and seizure of drugs from his vehicle, arguing that the officer lacked probable cause. *Id.* at 136, 446 S.E.2d at 582-83. The Court found that there was no evidence that the officer "made a physical application of force or that the defendant submitted to any show of force." *Id.* at 142, 446 S.E.2d at 586. Our Supreme Court held that "[o]fficers who lawfully approach a car and look inside with a flashlight do not conduct a 'search' within the meaning of the Fourth Amendment. If, as a result, the officers see some evidence of a crime, this may establish probable cause to arrest the occupants." *Brooks* at 144, 446 S.E.2d at 587 (internal citations omitted).

In *State v. Isenhour*, 194 N.C. App. 539, 670 S.E.2d 264 (2008), officers were patrolling in a high crime area when they observed the defendant and a passenger parked in the back corner of a fast food restaurant parking lot. The officers parked the patrol car eight feet away from the defendant's vehicle and approached on foot. *Id.* at 540, 670 S.E.2d at 266. The defendant's window would not roll down so he opened the car door

to speak with the officers. Due to the inconsistency between the defendant's and passenger's reason for being in the parking lot, the defendant was asked to exit his vehicle. *Id.* at 541, 670 S.E.2d at 266. The officer patted down the defendant and asked for consent to search his vehicle. The defendant consented, and while searching the vehicle, the officers found a pill bottle containing methadone pills. *Id.* This Court found that the officer did not create "any real 'psychological barriers' to defendant's leaving such as using his police siren, turning on his blue strobe lights, taking his gun out of his holster, or using threatening language." *Id.* at 544, 670 S.E.2d at 268. Our Court held that the officer's actions did not constitute a seizure of the defendant, so "no reasonable suspicion was required for [the officer] to approach defendant's car and ask him questions." *Id.*

In this case, similar to *Brooks*, there is no evidence that Officer Cloer used any physical force when approaching defendant. Officer Cloer approached defendant's vehicle and engaged in conversation with him, as the officer did in *Brooks*. He testified that he walked up to defendant's car on foot and asked to speak with him. During that conversation, Officer Cloer observed signs of intoxication (the odor of alcohol on defendant, an unopened can of beer, and slurred speech) leading him to investigate defendant further. Similar to *Isenhour*, Officer Cloer also did not use any "psychological barriers" while initiating contact with defendant. He testified that he did not activate his blue lights and there is no evidence that he removed his gun from his holster or used a threatening tone initiating contact with defendant. Thus, as found in *Brooks* and *Isenhour*, Officer Cloer engaged in a voluntary encounter with defendant.

The test for determining whether a seizure has occurred "is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Florida* at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565 (1988)). In the present case, Officer Cloer pulled into the parking lot of the gas station and parked his vehicle. He testified that he did not pull his vehicle in behind defendant's car, he did not activate his blue lights, and there is no evidence that he spoke in a threatening tone. He further testified that he got out of his vehicle and approached defendant's truck on foot and asked to speak with defendant. Our Supreme Court has held that these actions do not constitute a "seizure" of defendant. *See State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994). Because defendant was not "seized" by Officer

Cloer's approach and initial questioning, reasonable suspicion of criminal activity is not required.

Unlike a voluntary encounter, "[a]n investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). Reasonable suspicion requires that

> [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training. The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'

Id. at 441-42, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)) (quotation marks and internal citations omitted). "The Fourth Amendment requires that police have an articulable and reasonable suspicion of criminal conduct *before* making an investigative stop of an automobile." *United States v. Arzaga*, 9 F.3d 91, 93 (10th Cir. 1993) (emphasis added).

Since we have determined that Officer Cloer's initial interaction with defendant was a voluntary encounter, his personal observations during that time may be used to determine reasonable suspicion for the subsequent investigatory stop. When he approached defendant's vehicle, Officer Cloer noticed the odor of alcohol coming from defendant and observed an unopened container of beer in defendant's truck. This Court has previously held that similar observations observed during a consensual encounter establish reasonable suspicion to further detain and investigate defendant. *State v. Veazey*, 191 N.C. App. 181, 195, 662 S.E.2d 683, 692 (2008) (stating that during the initial lawful checkpoint detention, the officer's observations of "a strong odor of alcohol in the vehicle and . . . that Defendant's eyes were red and glassy . . . provided a sufficient basis for reasonable suspicion permitting Trooper Carroll to pursue further investigation and detention of Defendant").

Officer Cloer initiated an investigatory stop when, suspecting that defendant was impaired, he asked defendant to step out of his vehicle to further investigate. We find that his personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter are a sufficient basis for reasonable suspicion to support the stop.

Defendant also argues that the basis of his stop was from an anonymous tip. The report of an impaired driver came from information given by an unnamed employee. Since the caller was not identified by name, defendant argues that these facts constitute a stop based on an anonymous tip.

It is well established that "[a]n anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000). Even if a tip lacks sufficient indicia of reliability, it "may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.* "In sum, to provide the justification for a warrantless stop, an anonymous tip 'must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.' " *State v. Peele, Jr.*, 196 N.C. App. 668, 672, 675 S.E.2d 682, 685 (2009) (quoting *Hughes* at 207, 539 S.E.2d at 630).

In *United States v. Quarles*, 330 F.3d 650 (4th Cir. 2003), an individual called 911 and reported that the defendant was walking down Nash Street and was wanted by the U.S. Attorney's Office. The caller provided a description, including that the defendant was a black male with dreadlocks, and an accurate description of what the defendant was currently wearing. *Id.* at 652. The 911 operator asked the caller why the U.S. Attorney's office was interested in the defendant. The caller stated that he was wanted for carrying a gun and that the defendant had killed the caller's brother, but had "beat the case." *Id.* The caller was kept on the phone with the operator and continued to follow the defendant, keeping the operator updated until the caller saw officers arrive and put the defendant on the ground. *Id.* The court stated that "the caller here gave enough information to be identified later, and therefore, was not totally anonymous at any time." *Quarles* at 654. It also held that the caller "provided sufficient information to the police that he could have been held accountable for his statements." *Id.* at 656.

Similarly, in the present case, the caller was identified as an employee of the Citistop gas station where defendant's car was located. This information was sufficient to ascertain his identity when police arrived. The second officer on the scene, Officer McCullough, was able to identify the caller as Aaron Wakenhut and obtain a statement from him. Thus, Wakenhut was "bound to have felt as though he was being held accountable for what he was saying." *Quarles* at 656. Wakenhut also gave information based off his personal observations of defendant's behavior inside the store. He testified that defendant was stumbling, made a mess with the hot water for his soup, had slurred speech, a hard

time talking, and took a very long time to respond. Accordingly, the tip in this case would be a more reliable tip than a true anonymous caller case where the caller gives no identifying information.

Since we have determined defendant was not seized when Officer Cloer approached him and engaged in conversation, Officer Cloer was able to corroborate the caller's information before initiating a stop. Officer Cloer's personal observations of the odor of alcohol coming from defendant and an unopened container of beer on the passenger seat corroborated the caller's tip of an impaired person. Officer Cloer's observations during the voluntary encounter with defendant, prior to asking him to get out of his vehicle, along with the information from the caller's tip, established reasonable suspicion for the stop.

Defendant cites to *State v. Blankenship*, __ N.C. App. __, 748 S.E.2d 616 (2013), as his main source of authority for why the trial court erred. In *Blankenship*, officers received a "be-on-the-lookout" message from dispatch. A taxicab driver anonymously called 911 and reported that he observed a red Mustang convertible with a black soft top driving erratically, running over traffic cones, and continuing west on Patton Avenue. *Id.* at __, 748 S.E.2d at 617. The caller also provided the license plate, "XXT-9756". *Id.* A few minutes later, the officers spotted a red Mustang with a black soft top and an "X" in the license plate heading west on Patton Avenue. *Id.* When the officers caught up to the vehicle, it had made a turn and was approaching a security gate. *Id.* As the driver attempted to open the gate, the officers activated their blue lights and stopped the defendant. *Blankenship* at __, 748 S.E.2d at 617. At this time, the officers had not observed the "defendant violating any traffic laws or see any evidence of improper driving that would suggest impairment[.]" When one of the officers spoke to the defendant, he detected a strong odor of alcohol and asked him to perform field sobriety tests. *Id.* Based on his performance, the defendant was arrested for driving while impaired. This Court found that the officers were unable to judge the caller's "credibility and to confirm firsthand that the tip possessed sufficient indicia of reliability. Since [the caller's] anonymous tip did not possess sufficient indicia of reliability, [the officers] did not possess reasonable, articulable suspicion to stop defendant's car." *Id.* at __, 748 S.E.2d at 620.

This case is distinguishable from *Blankenship* in two distinct ways. In *Blankenship*, the call was a true anonymous tip because the taxicab driver did not give any information that would enable the caller to be identified. His identity was only discovered because the 911 operator was able to go back and trace the phone number. *Id.* at __, 748

S.E.2d at 617. By not identifying himself, the officers could not judge the caller's credibility. "Since the officers did not have an opportunity to assess his credibility," the caller lacked sufficient indicia of reliability. *Id.* at __, 748 S.E.2d at 618. However, in this case, the caller was identified as an employee of the business where defendant was located, thus giving enough information that allowed for his identity to be ascertained at the scene and making him a more reliable tipster than the one in *Blankenship*.

In *Blankenship*, although the officers did not personally observe the defendant committing any unlawful behavior, they immediately initiated a stop by activating their blue lights as the "driver, defendant, attempted to open the gate." *Id.* at __, 748 S.E.2d at 617. The initial encounter was not voluntary because the immediate activation of their blue lights acted as a show of authority that would make a reasonable person feel that they were not free to leave. Because it was not voluntary, reasonable suspicion was required to conduct the stop. In the case at hand, Officer Cloer did not activate his blue lights when he pulled into the parking lot and parked his car away from defendant's vehicle. He approached defendant on foot and engaged in a conversation in a voluntary encounter allowing Officer Cloer to make his own personal observations of the odor of alcohol and an unopened container of beer inside the car. Thus, unlike in *Blankenship*, Officer Cloer was able to personally observe defendant's behavior to corroborate the caller's tip prior to initiating the stop and he was able to form the necessary reasonable suspicion of criminal activity. Therefore, defendant's reliance on *Blankenship* is misplaced.

IV. Conclusion

We conclude that the initial encounter between Officer Cloer and the defendant was a voluntary encounter and thus did not require reasonable suspicion. Accordingly, Officer Cloer's observations during the consensual encounter (the odor of alcohol and an unopened container) established reasonable suspicion to further detain and investigate the defendant. Based on the foregoing, we hold the trial court properly denied defendant's motion to suppress all evidence stemming from the initial stop.

Affirmed.

Judges ELMORE and DAVIS concur.

STATE v. WATLINGTON

[234 N.C. App. 580 (2014)]

STATE OF NORTH CAROLINA
v.
THORNE OLIVER WATLINGTON

No. COA13-661

Filed 1 July 2014

1. Appeal and Error—appellee's brief—not timely—motion to dismiss—denied

Defendant's motion to strike the State's brief as untimely filed was denied. The filing of an appellee's brief is not a prerequisite for the perfection of an appeal and an appellee's failure to file a brief in a timely manner should not result in striking the brief, absent a showing of material prejudice to the appellant. The record here clearly established that defendant did not demonstrate particularized prejudice and defendant's motion was denied in an exercise of the Court of Appeal's discretion. However, the State's counsel was strongly admonished to refrain from such conduct.

2. Evidence—text messages—not prejudicial

Defendant's contention that the trial court erred by sustaining the State's objections to the admission of evidence concerning the contents of certain text messages was overruled. Assuming without deciding that the text messages were properly authenticated and were relevant, there was no reasonable possibility that the outcome would have been different otherwise.

3. Criminal Law—instructions—eyewitness identification

The trial court did not err in a prosecution for armed robbery and other offenses by refusing to give defendant's requested instruction on eyewitness identification evidence. The instruction that defendant requested bore a strong resemblance to the New Jersey instruction developed as a result of *State v. Henderson*, 208 N.J. 208, which contained numerous factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness. Given that there was no such evidence in the present record, along with the instructions actually given, the trial court did not err by declining to deliver defendant's requested instruction.

STATE v. WATLINGTON

[234 N.C. App. 580 (2014)]

Appeal by defendant from judgments entered 5 October 2012 by Judge Henry W. Hight, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 9 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor, for Defendant.

ERVIN, Judge.

Defendant Thorne Oliver Watlington appeals from judgments sentencing him to a term of eight to ten months imprisonment based upon his conviction for felonious breaking or entering, to a consecutive term of eight to ten months imprisonment based upon his conviction for felonious larceny, to a consecutive term of fourteen to seventeen months imprisonment based upon his conviction for possession of a firearm by a felon, and to a consecutive term of sixty days imprisonment based upon his conviction for assault by pointing a gun. On appeal, Defendant contends that the trial court erred by refusing to admit the contents of certain text messages and by failing to deliver his requested instruction concerning the manner in which the jury should evaluate the validity of eyewitness identification evidence. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

a. Background Information

Defendant's cousin, Loven McLaughlin, has known Defendant his entire life. In the summer of 2011, Defendant came to live with Loven McLaughlin and Loven McLauchlin's mother in the Forestdale Apartments because Defendant was not getting along with his own parents. In the latter part of July, Loven McLaughlin's mother told Defendant that he would have to leave. After Defendant's departure, Loven McLaughlin noticed that Defendant was sleeping in the woods near the Mellow Mushroom.

b. Firearm Theft

In July 2011, Cody May, who had gone to high school with Defendant, lived in the Forestdale Apartments. After seeing Defendant in the apartment complex, Mr. May reestablished a connection with him.

On 25 July 2011, Mr. May stayed home from work. At noon, he left to go to a medical appointment with his girlfriend to learn the gender of their baby. As a result of the fact that Defendant was present when Mr. May departed, the two of them left simultaneously. Defendant had only been to Mr. May's apartment on a few occasions before the date in question.

About forty-five minutes after leaving his apartment, Mr. May realized that he had forgotten something and returned home. Upon arriving at his apartment, Mr. May discovered that the back door had been kicked in and that an Xbox video game system; three rifles, including a Norinco SKS with a laser sight and that held 7.62 millimeter rounds; and a laptop had been stolen.

c. Mellow Mushroom Incident

Kenneth Pryor was working at the Mellow Mushroom on the evening of 27 July 2011. After going outside for a cigarette break, Mr. Pryor noticed a man exiting his truck. Upon making this observation, Mr. Pryor yelled at and ran towards the intruder, causing him to head in the opposite direction. As Mr. Pryor caught up with the intruder, the intruder turned around, pulled what appeared to be an SKS rifle out of a bag, pointed it at Mr. Pryor, and told him to lie down on the ground. Instead of complying with this command, Mr. Pryor ran in the opposite direction.

A few days later, Mr. Pryor identified Defendant as his assailant after viewing a photographic lineup, claiming to be 90% certain that his identification was accurate. At trial, however, Mr. Pryor only expressed a 50% certainty that his identification of Defendant as the assailant was correct. In support of Mr. Pryor's identification testimony, Loven McLaughlin testified that he had gone to the Mellow Mushroom on the date of the incident involving Mr. Pryor so that Defendant could use his cell phone and that, upon arriving at the Mellow Mushroom, he had observed Defendant being chased, displaying a firearm with a laser sight, and chasing the individual who had been pursuing him.

d. Arby's Incident

On the night of 29 July 2011, Anja Frick and Jessi Richardson were working at the Arby's Restaurant on Huffman Mill Road. After helping

Ms. Frick close the store at around 1:40 a.m., Ms. Richardson got into her car. At that point, she noticed an African-American male standing beside her car and gesturing as if he wanted her to roll down her window or exit the car. After Ms. Richardson did neither, the man went away.

As Ms. Frick locked the door to the store, she saw a light emanating from a laser shining on the wall beside her. Although Ms. Frick initially believed that the light had been caused by a co-worker or either her father or her brother, who had come to pick her up, an individual approached her as she neared the vehicle in which she was to ride. After telling this person to go away, Ms. Frick realized that another individual was holding a long gun with a laser sight to her father's head on the other side of the car.

After Ms. Frick's father stated that he did not have any money, the individual who had approached Ms. Frick said, "just shoot him." At that point, Ms. Frick's father realized that another person was present and saw that this person was pointing a rifle directly at his head. Eventually, the armed assailant took wallets from both Ms. Frick's father and brother and took a cell phone from her brother before running towards the woods with the individual who had approached her. As the men ran away, one of them said, "give me the gun." Ms. Frick then went to a nearby Walmart with her father and brother and called the police. Andre McLaughlin, Loven McLaughlin's first cousin, testified that he and Defendant had committed the Arby's robbery.

On the following morning, Ms. Frick's father and brother returned to the scene of the robbery in the hope of finding their wallets, which contained family photographs. As the two men looked for their wallets, they found an identification card that contained a photograph of Defendant near the edge of the parking lot. Ms. Frick's father stated, "that's the guy that robbed us," as soon as he looked at it. Ms. Frick's father had a 70% level of confidence in the accuracy of his identification of the person depicted on the identification card as one of the perpetrators of the robbery. He then called the police, informed them that he had found the card, and left it in their possession. At trial, Ms. Frick's father identified Defendant as being the individual who had robbed him and his son.

e. Apprehension of Suspects

During the course of the investigation into the Arby's robbery, Ms. Frick's brother provided Detective Gary Matthew Fitch of the Burlington Police Department with his cell phone number. After Detective Fitch called Ms. Fitch's brother's cell phone in order to determine its location, investigating officers went to the Forestdale Apartments and began

randomly knocking on doors for the purpose of seeking information concerning the Arby's robbery.

At approximately 12:30 p.m., the investigating officers went to Apartment H-F. After knocking and receiving no response, the investigating officers noticed two cell phones in the rear of a nearby Honda automobile, one of which resembled the cell phone that had been taken from Ms. Frick's brother. In addition, the investigating officers noticed that there was a rifle shell in the front seat. Upon calling the number assigned to Ms. Frick's brother's cell phone, the investigating officers heard a cell phone vibration emanating from the interior of the Honda automobile.

At approximately 3:00 p.m., Rashawn Alston emerged from Apartment H-F and entered the Honda automobile. Investigating officers detained Mr. Alston before he was able to leave. About an hour later, Loven and Andre McLaughlin came out of the same apartment and were taken into custody. Upon learning that yet another individual remained in the apartment, investigating officers entered the apartment and detained Defendant. During a subsequent search of the apartment, officers found a wallet that resembled the one that had been taken from Ms. Frick's father. At a nearby abandoned building, investigating officers found a vehicle that contained a rifle with an attached laser sight and 7.29 by 39 millimeter rounds that had been loaded into an SKS magazine. In addition, Defendant's fingerprints were found on an ammunition box seized from the vehicle.

2. Defendant's Evidence

Defendant and Loven McLaughlin, with whom he had grown up, are second cousins. Defendant knew Andre McLaughlin from high school. After graduating high school, Defendant enlisted in the Army. While serving in the military, Defendant was arrested for being in a stolen vehicle, entered a negotiated plea to a felony, and received a twelve-month sentence.

After his release from incarceration, Defendant went to stay with Loven McLaughlin. Defendant denied that Loven McLaughlin's mother had requested that he leave and claimed, on the contrary, that Loven McLaughlin was in the process of leaving as the result of numerous noise complaints. Upon being re-called, however, Loven McLaughlin testified that his mother had told Defendant that he needed to leave because she had heard that he was getting into trouble around town.

After coming to live with Loven McLaughlin, Defendant visited Mr. May, whom he had known in high school, on three occasions. On the first visit, during which he was accompanied by Loven McLaughlin, Mr. May

showed a pistol to the two men. In the course of the second visit, during which Loven McLaughlin was not present, Mr. May showed Defendant a number of guns and asked for Defendant's help in locating a purchaser for these weapons. Mr. May did not ever show Defendant an SKS rifle. Subsequently, Defendant mentioned Mr. May's request to Loven McLaughlin and Mr. Alston, whom he had met at Loven McLaughlin's apartment. The third and final visit to Mr. May's apartment occurred on the day of the theft. During his visits to Mr. May's apartment, Defendant had noticed ammunition crates in the living room and touched one of them given his curiosity about what was inside.

Defendant denied having returned to Mr. May's apartment on the day of the theft, breaking into Mr. May's apartment, or stealing firearms and ammunition from Mr. May. Similarly, Defendant denied having asked Loven McLaughlin to come to the Mellow Mushroom or having pointed a firearm at Mr. Pryor.

Although he initially told investigating officers that he and his friends had been at home at the time of the Arby's robbery, Defendant testified at trial that, after Loven McLaughlin and Andre McLaughlin arrived at the apartment, a woman named Sonia, whose last name he did not recall, picked him up and took him to a hotel, where they stayed all night. The following morning, Defendant returned to Loven McLaughlin's apartment, where he fell asleep. Upon awakening, Defendant noticed that the house was empty, called Loven McLaughlin's phone to find out where he was, and went to a Kmart for the purpose of meeting Loven McLaughlin and Andre McLaughlin.

Subsequently, Mr. Alston picked the group up and took them back to Loven McLaughlin's apartment. After arriving at the apartment, however, Loven McLaughlin observed that investigating officers were in the area. Although an officer knocked on the door, no one answered. At that point, Defendant decided to sleep for a few hours.

Once Defendant woke up, the members of the group began leaving the apartment. However, Defendant decided to use the restroom before exiting. As he left the restroom, investigating officers entered the apartment and took him into custody. He was then taken to the police department for questioning.

Defendant speculated that he might have dropped his identification card near the Arby's at which the robbery occurred since he regularly used a walking route near that location. In a letter that Defendant wrote to Mr. May after his incarceration, Defendant denied having stolen anything from Mr. May, claimed to have been in Raleigh at the time of the

theft, and opined that Mr. Alston had committed the theft given that evidence of the theft had been found in his car. In addition, Defendant told Mr. May that he had reached the conclusion that Mr. Alston was the culprit because Mr. Alston had mentioned an Xbox 360 to him and because Defendant had told Mr. Alston about Mr. May's guns. Finally, Defendant requested that Mr. May contact Loven McLaughlin on his behalf and provided Mr. May with Loven McLaughlin's number, which he listed as (336) 263-9913.

B. Procedural History

On 31 July 2011, warrants for arrest were issued charging Defendant with two counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, possession of a stolen motor vehicle, possession of stolen property, breaking or entering a motor vehicle, assault by pointing a gun, financial transaction card theft, and possession of a firearm by a felon. On 29 August 2011, the Alamance County grand jury returned bills of indictment charging Defendant with two counts of robbery with a dangerous weapon; two counts of attempted robbery with a dangerous weapon; possession of a stolen motor vehicle; possession of stolen property; breaking or entering into a motor vehicle; assault by pointing a gun; financial transaction card theft; and possession of a firearm by a felon. On 1 September 2011, a warrant for arrest charging Defendant with felonious breaking or entering, felonious larceny, and possession of stolen goods was issued. On 5 March 2012, the Alamance County grand jury returned a bill of indictment charging Defendant with felonious breaking or entering, felonious larceny, and possession of stolen goods. On 25 September 2012, the State voluntarily dismissed the financial transaction card theft charge.

The charges against Defendant came on for trial at the 25 September 2012 criminal session of the Alamance County Superior Court before the trial court and a jury. At the conclusion of the trial, the jury found Defendant guilty of felonious breaking or entering, felonious larceny, one count of felonious possession of stolen property, breaking or entering a motor vehicle, assault by pointing a gun, and possession of a firearm by a convicted felon; not guilty of one count of attempted robbery with a firearm, possession of a stolen motor vehicle, and a second count of possession of stolen property; and failed to reach a unanimous verdict with respect to two counts of robbery with a dangerous weapon and a second count of attempted robbery with a dangerous weapon.[1] After arresting

1. The effect of the jury's verdict in practical terms was to convict Defendant of breaking into Mr. May's apartment and stealing his laptop computer, Xbox, and firearms;

judgment in connection with Defendant's conviction for possession of stolen property, the trial court entered judgments sentencing Defendant to four consecutive active terms totaling thirty-two to thirty-nine months imprisonment, and one suspended term of six to eight months imprisonment, with Defendant being placed on supervised probation for a period of thirty-six months subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Motion to Strike the State's Brief

[1] As an initial matter, we must address Defendant's motion to strike the State's brief, which was filed in an untimely manner without any justification or excuse and after several extensions of the time within which it was authorized to do so had been obtained. Although the complete failure on the part of counsel for the State to comply with our rules concerning the timing within which the State's brief should have been filed is quite troubling and although we strongly admonish counsel for the State to refrain from engaging in such conduct in the future, we conclude that Defendant's dismissal motion should be denied for a number of reasons.

As an initial matter, we note that the filing of an appellee's brief, as compared to the filing of an appellant's brief, is not a prerequisite for the perfection of an appeal. According to the relevant provisions of the North Carolina Rules of Appellate Procedure, while "the appeal may be dismissed" "[i]f an appellant fails to file and serve a brief within the time allowed," an appellee's failure to file his or her brief in a timely manner simply means that he or she may not "be heard in oral argument except by permission of the court." N.C.R. App. P. 13(c). For that reason, decisions such as *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 706, 567 S.E.2d 184, 186-87 (2002), and *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 53-54, 578 S.E.2d 599, 602, *cert. denied*, 357 N.C. 457, 585 S.E.2d 383 (2003) *cert. denied sub nom Bennett v. Wake Cnty. Dep't of Human Servs.*, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004), in which this Court dismissed appeals based upon the appellant's failure to file a brief, shed little light

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breaking into Mr. Pryor's motor vehicle, assaulting Mr. Pryor by pointing a gun, and possessing a firearm at the time of the assault upon Mr. Pryor; to acquit Defendant of attempting to rob Ms. Richardson with a dangerous weapon, possessing Ms. Frick's brother's wallet, and possessing a stolen motor vehicle; and to fail to reach agreement with respect to the issue of whether Defendant robbed Ms. Frick's father and brother and attempted to rob Ms. Frick.

on the proper resolution of this issue. As a result, since nothing in the relevant provisions of the North Carolina Rules of Appellate Procedure mandates the striking of the State's brief, we must evaluate the merits of Defendant's motion to strike based upon an analysis of the decisions governing the manner in which violations of the North Carolina Rules of Appellate Procedure should be sanctioned.

Although the Rules of Appellate Procedure "are mandatory and [the] failure to follow these rules will subject an appeal to dismissal," *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999), "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Instead, N.C.R. App. P. 25(b) and N.C.R. App. P. 34 provide this Court with substantial discretion in determining an appropriate sanction in the event that a party commits a non-jurisdictional violation of the North Carolina Rules of Appellate Procedure.

Admittedly, a decision to strike a party's brief is not as significant as a decision to dismiss a party's appeal. However, striking an appellee's brief is among the most significant sanctions, if not the most significant, that can be imposed upon an appellee. For that reason, we are inclined to believe that an appellee's failure to file his or her brief in a timely manner should not, as a general proposition, result in the striking of that party's brief in the absence of a showing that the appellee's conduct has resulted in material prejudice to the appellant. Although the record clearly establishes that the State has completely failed to provide any legitimate excuse for its failure to file its brief in a timely manner, the record also clearly establishes that Defendant has not demonstrated that he suffered any particularized prejudice as a result of the State's lack of timely action. As a result, we hereby conclude, in the exercise of our discretion, that Defendant's motion to strike the State's brief should be, and hereby is, denied. Counsel for the State is, however, strongly admonished to refrain from engaging in such inexcusable conduct in the future and should understand that any repetition of the conduct disclosed by the present record will result in the imposition of significant sanctions upon both the State and himself personally.

B. Substantive Legal Issues

1. Admissibility of Text Messages

[2] In his brief, Defendant contends that the trial court erred by sustaining the State's objections to the admission of evidence concerning the contents of certain text messages obtained by investigating officers

during an examination of Mr. Alston's cell phone. More specifically, Defendant contends that the cell phone messages were relevant and properly authenticated and that the exclusion of the evidence in question prejudiced his chances for a more favorable outcome at trial. We do not find Defendant's argument persuasive.

a. Relevant Facts

The phone number listed on Loven McLaughlin's arrest report was (336) 263-9913. According to Loven McLaughlin, the investigating officers did not confiscate his cell phone at the time that he was taken into custody and never asked him to verify his phone number. In addition, Loven McLaughlin testified that he could not remember the cell phone number assigned to his phone as of the date upon which he was arrested given the large number of phones that he had utilized.

Although Detective Jennifer Bradley Matherly of the Burlington Police Department prepared Loven McLaughlin's arrest report, she acknowledged that the names, dates, phone numbers, and other information that she recorded on that document could have emanated from a range of sources, such as information provided by the suspect, information contained in the warrant for arrest, or information on file with or available to the Burlington Police Department. For that reason, Detective Matherly indicated that, while she could have confirmed a phone number shown on the arrest report with the suspect, she might have obtained that information in another way as well and did not know the source of any specific item of information shown on Loven McLaughlin's arrest report. Detective Matherly did state, however, that she would not have used information obtained from one suspect in filling out an arrest report relating to a different suspect.

After recovering Mr. Alston's cell phone, investigating officers photographed each individual text message found in that instrument. During this process, investigating officers found messages sent to Mr. Alston from individuals identified as "LuvBoat" and "SnakeNDAGrass." Although Andre McLaughlin testified that Mr. Alston referred to Loven McLaughlin as "LuvBoat," Loven McLaughlin denied that Mr. Alston called him by that name and asserted, instead, that Mr. Alston called him "Slogey." In addition, Loven McLaughlin testified that he was not planning on moving, that he is not related to Mr. Alston, and that he and Mr. Alston never referred to each other as "cuz."

After Defendant began to cross-examine Loven McLaughlin about the text messages taken from Mr. Alston's phone, the State lodged a successful objection. Subsequently, during his own case in chief, Defendant

sought to obtain the admission of the text messages in question. However, the trial court sustained the State's objection to the admission of these text messages. In both instances, the State's objections were predicated on authentication and relevance grounds.

The text messages sought to be introduced showed a callback number of (336) 263-9913. Without reciting the contents of these text messages in their entirety, certain messages that "LuvBoat" sent to Mr. Alston's phone contained repeated statements concerning "LuvBoat's" need for money in order "to find a place to stay," inquiring if "ur cuzin" was going to "sell it," and asking if Mr. Alston had "got the money." During the same time that he was receiving these text messages from "LuvBoat," messages were sent from Mr. Alston's phone to "Cuz" stating "u gta choppa" and "r u strap[p]ed." The undisputed evidence reflects that "choppa" is a reference to an assault rifle, while the fact that someone is "strapped" means that he or she is in possession of a weapon.

b. Admissibility of Text Messages

According to well-established North Carolina law, the requirement that an item be properly authenticated before being admitted into evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a). "A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Crawley*, __ N.C. App. __, __, 719 S.E.2d 632, 637 (2011), *disc. review denied*, 365 N.C. 553, 722 S.E.2d 607 (2012). Similarly, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "Although '[a] trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

Assuming, without deciding, that the text messages at issue in this case were properly authenticated and were relevant to the matters at issue at trial, we are unable to determine that there was a reasonable possibility that the outcome at Defendant's trial would have been different had these errors not been committed. The ultimate effect of the jury's verdicts was to convict Defendant of breaking into Mr. May's apartment and stealing various electronic items and firearms and breaking into Mr. Pryor's motor vehicle and pointing an assault rifle at him. In attempting to persuade us that the exclusion of these text messages constituted prejudicial error, Defendant contends that these messages undercut the credibility of Loven McLaughlin's testimony by refuting his contention that he, rather than Defendant, was being forced to move and suggested that Loven McLaughlin had been involved in the theft of the firearms from Mr. May's apartment and their subsequent use in the commission of other offenses given his attempt to get Mr. Alston to sell the firearms taken at that time. Although the record might support the inferences that Defendant contends should be drawn from these text messages, those inferences have little strength.

As an initial matter, even if the record suffices to support an inference that the text messages from "LuvBoat" were sent by Loven McLaughlin, the record contains substantial evidence that would support a contrary inference. Secondly, the record contains no evidence concerning the identity of "Cuz," to whom the text messages concerning the firearms were sent. Thirdly, the text messages from "LuvBoat" simply inquire whether "ur cuzin [is] goin to sell it," which is less than a clear cut reference to the sale of one or more firearms, much less those taken from Mr. May's apartment. Fourthly, the inference that the firearms referred to in the text messages to "Cuz" are the same weapons that had been taken from Mr. May's apartment is less than compelling. Finally, as the trial court noted, even if the text messages in question establish that Loven McLaughlin was involved in the entry into Mr. May's apartment, that fact, without more, does not exonerate Defendant of any involvement in the commission of that crime given the undisputed evidence that Defendant, Loven McLaughlin, Andre McLaughlin, and Mr. Alston were spending a great deal of time together during the time in which that crime was committed. As a result, the inference that Defendant wishes us to draw from the text messages in question is, at best, an ambiguous and equivocal one.

In addition, the record contains substantial additional evidence of Defendant's guilt. For example, the record contains the essentially undisputed testimony of Mr. May to the effect that Defendant was

familiar with his property and that his apartment had been broken into and his property taken within a relatively short period of time after he and Defendant left the premises. In addition, Mr. Pryor identified Defendant as the individual who broke into his motor vehicle and pointed a rifle at him. Although the strength of Mr. Pryor's identification of Defendant waned between the time of the investigation and the time of trial, that fact, standing alone, should not divert our attention from the fact that the jury heard evidence that Mr. Pryor was 90% certain that Defendant was the individual who had broken into his vehicle and pointed an assault rifle at him shortly after the commission of those crimes. In short, the other evidence of Defendant's guilt, while perhaps not overwhelming, was certainly strong. As a result, given the limited strength of the inferences that Defendant wishes us to draw from the text messages at issue in this case coupled with the relative strength of the State's other evidence of Defendant's guilt, we are unable to say that Defendant has shown that there is a reasonable possibility that the outcome at trial would have been different had the evidence in question been admitted at Defendant's trial. For that reason, we hold that Defendant is not entitled to an award of appellate relief based upon this challenge to the trial court's judgments.

2. Jury Instructions

[3] Secondly, Defendant contends that the trial court erred by refusing to instruct the jury in accordance with his requested instruction relating to the manner in which it should consider the credibility of eyewitness identification evidence. More specifically, Defendant contends that the trial court should have informed the jury about the results of recent research into factors bearing upon the accuracy of such evidence during its instructions to the jury. Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.

a. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). For that reason, a "[f]ailure [by the trial court] to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). While "[i]t is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language of the request," "when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982).

This Court reviews issues relating to the substance of the trial court's instructions using a *de novo* standard of review. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

b. Applicable Background Information

In 2012, the New Jersey Supreme Court released a new pattern jury instruction addressing eyewitness identification issues[2] that was based upon its decision in *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). In *Henderson*, the defendant contended "that the identification [of him as the culprit] was not reliable because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness." 208 N.J. at 217, 27 A.3d at 877. During its consideration of *Henderson*, the New Jersey Supreme Court ordered that an evidentiary hearing be held for the purpose of evaluating whether the "assumptions and other factors reflected in the two-part" test set out in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and the five factors that must be considered in the course of applying that test remained "valid and appropriate in light of recent scientific and other evidence." *Id.* at 228, 27 A.3d at 884. On remand, the parties developed a record that included testimony from "seven experts and [contained] more than 2,000 pages of transcripts along with hundreds of scientific studies." *Id.* at 217-18, 27 A.3d at 877. In reviewing the resulting special master's report, the New Jersey Supreme Court determined "that the scientific evidence considered at the remand hearing [was] reliable"; that, "based on the testimony and ample record developed at the hearing," "a number of system and estimator variables can affect the reliability of eyewitness identifications"; and that the "evidence offer[ed] convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised." *Id.* at 218, 283-85, 27 A.3d at 877, 916-17.

After making these preliminary determinations, the New Jersey Supreme Court concluded that, "[t]o evaluate whether there is evidence of suggestiveness to trigger a [pretrial] hearing, courts should consider the following non-exhaustive list of system variables," including:

> 1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" . . . to ensure that the administrator had no

2. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, (19 July 2012), http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm.

knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings.* Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. *Showups.* Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors.* Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made.* Did the eyewitness initially make no choice or choose a different suspect or filler?

Id. at 289-91, 27 A.3d at 920-21. In addition, the New Jersey Supreme Court held that, in order to determine whether an identification was valid, courts should consider particular "estimator" variables, including:

1. *Stress.* Did the event involve a high level of stress?

2. *Weapon focus.* Was a visible weapon used during a crime of short duration?

3. *Duration.* How much time did the witness have to observe the event?

4. *Distance and Lighting.* How close were the witness and perpetrator? What were the lighting conditions at the time?

5. *Witness Characteristics.* Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. *Characteristics of Perpetrator.* Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. *Memory decay.* How much time elapsed between the crime and the identification?

8. *Race-bias.* Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in *Neil v. Biggers*, *supra*, 409 U.S.at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411, which we nonetheless repeat:

9. *Opportunity to view the criminal at the time of the crime.*

10. *Degree of attention.*

11. *Accuracy of prior description of the criminal.*

12. *Level of certainty demonstrated at the confrontation.*

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. T*he time between the crime and the confrontation.* (Encompassed fully by "memory decay" above.)

Id. at 291-92, 27 A.3d at 921-22. After describing the manner in which the trial courts should evaluate the admissibility of eyewitness identification testimony, the New Jersey Supreme Court noted that "juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel"; directed that "enhanced instructions be given to guide juries about the

various factors that may affect the reliability of an identification in a particular case" "[b]ased on the record developed on remand"; and created a process under which various committees would draft proposed revisions to the existing pattern instructions relating to the validity of eyewitness identification evidence based upon the determinations set out in the *Henderson* opinion for its consideration. *Id.* at 296, 298-99, 27 A.3d at 924-26.[3]

c. Defendant's Requested Eyewitness Identification Instruction

The eyewitness identification instruction that Defendant requested the trial court to deliver in this case was eight pages long and contained language that bore a strong resemblance to the New Jersey instruction developed as a result of the *Henderson* decision. Among other things, Defendant requested the trial court to instruct the jury that "there are risks of making mistaken identifications" and that the jury should consider a number of factors in evaluating the credibility of the eyewitness identification testimony presented in this case, including, among other things, the witness' "opportunity to view the person who committed the offense"; the witness' "level of stress," given that high levels of stress can reduce an eyewitness's ability to recall; "[t]he amount of time [the witness had] to observe an event"; whether the "witness saw a weapon during the incident," since "the presence of a visible weapon may reduce the reliability of a subsequent identification"; the distance between the witness and the person being identified; the adequacy of the lighting conditions at the time that the witness saw the perpetrator; the extent to which the witness' level of intoxication "affect[ed] the reliability of the identification"; the possible use of a disguise; the "accuracy of any description [that] the witness gave after observing the incident and before identifying the perpetrator"; the degree to which the witness is confident about the accuracy of his or her identification, subject to the caveat that an "eyewitness's confidence is generally an unreliable indicator of accuracy"; the extent to which there have been "delays between the commission of a crime and the time an[] identification is made"; and, since "[r]esearch has shown that people may have greater difficulty in accurately identifying members of a different race," whether the witness and the alleged perpetrator are of the same or different races. In addition, Defendant's proposed instruction informed the jury that, in considering the reliability of any identification procedure described in the record, the jury should consider whether any person stood "out from

3. The pattern instructions are available in full at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

other members of the lineup"; whether a minimum of "six persons or photos" had been included in the lineup; whether the witness viewed the suspect in multiple lineups, since "the risk of mistaken identification is increased" "if a witness views an innocent suspect in multiple identification procedures"; whether the witness identified the suspect in a show-up, since "show ups conducted more than two hours after an event present a heightened risk of misidentification"; whether the line-up administrator knew the suspect's identity; what was said to the witness prior to viewing a lineup or photographic array; and whether "police officers or witnesses to an event who are not law enforcement officials[] signal to eyewitnesses that they correctly identified the suspect."

d. Trial Court's Eyewitness Identification Instruction

The trial court declined to give the eyewitness identification instruction that Defendant requested and, instead, instructed the jury that:

> You, ladies and gentlemen, are the sole judges of the credibility and the believability of each and every witness, that is their worthiness of belief. You must decide for yourselves whether to believe the testimony of any witness, or you may believe all or any part or none of what a witness has said on the witness stand.
>
> In determining whether to believe any witness, you should apply the same tests of truthfulness which you do apply in your own everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrence about which the witness testified; the manner and the appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether the witness's testimony is reasonable and whether such testimony is consistent with other believable evidence in the case.
>
> You are the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.
>
> . . . .
>
> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the

> crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

In addition, the trial court delivered the instruction relating to the manner in which the jury should evaluate the validity of photographic identification procedures as required by N.C. Gen. Stat. § 15A-284.52(d)(3), with this instruction having included a lengthy recitation of the criteria for a proper identification procedure set out in N.C. Gen. Stat. § 15A-284.52(b). We do not believe, given the record developed before the trial court in this case and the content of the instructions actually delivered by the trial court, that the trial court erred by declining to deliver Defendant's requested eyewitness identification instruction.

e. Relevant Appellate Decisions

The appellate courts in this jurisdiction have addressed the appropriateness of delivering additional instructions concerning the credibility of eyewitness identification testimony on a number of occasions. In *State v. Green*, the defendant requested the trial court to instruct the jury to consider the mental state of the witness and the adequacy of the witness' eyesight in evaluating the credibility of the eyewitness identification testimony. 305 N.C. at 475-76, 290 S.E.2d at 633. In lieu of delivering the instruction requested by the defendant, the trial court instructed the jury in accordance with the pattern jury instructions addressing the weight and credibility of the evidence and the necessity for the jury to find beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before returning a verdict of guilty. *Id.* at 476, 290 S.E.2d at 633. In reviewing the defendant's challenge on appeal to the trial court's refusal to deliver his requested instruction, the Supreme Court held that the instructions delivered by the trial court, considered as a whole, were "adequate[] [to] explain[] to the jury the various factors they should consider in evaluating the testimony of witnesses." *Id.* at 477, 290 S.E.2d at 633.

Similarly, in *State v. Dodd*, 330 N.C. 747, 752, 412 S.E.2d 46, 49 (1992), the defendant requested the trial court to instruct the jury in such a manner as to "emphasize[] at length the jury's need to examine the testimony of the witnesses to assess whether they had the opportunity to observe the alleged crime, their ability to identify the perpetrator given the length of time they had to observe, their mental and physical conditions, and the lighting and other conditions that might have affected their observation." Although these instructions focused on a somewhat

different set of factors than were addressed in the requested instruction at issue in *Green*, the Supreme Court upheld the trial court's decision to refrain from delivering the instruction requested by the defendant and to utilize the pattern jury instructions concerning the weight and credibility of the evidence and the necessity for the jury to find beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before returning a guilty verdict on the grounds that the instructions actually delivered by the trial court adequately informed the jury about the factors that should be considered in evaluating the credibility of eyewitness identification testimony. *Id.* at 753, 412 S.E.2d at 49.

An examination of the Supreme Court's decisions in *Green* and *Dodd*, coupled with our similar decision in *State v. Summey*, 109 N.C. App. 518, 525-26, 428 S.E.2d 245, 249-50 (1993) (holding that the trial court did not err by failing to instruct the jury to consider certain additional factors in evaluating the validity of eyewitness identification testimony), reveals that this Court and the Supreme Court have clearly held that the existing pattern jury instructions governing the manner in which jurors should evaluate the weight and credibility of the evidence and the necessity for the jury to find that the defendant perpetrated the crime charged beyond a reasonable doubt sufficiently address the issues arising from the presentation of eyewitness identification testimony. In recognition of these decisions, Defendant contends that, while the weight, credibility, and identity instructions held to be adequate in *Green* and *Dodd* are sufficient in cases, such as those involving poor lighting, distance, or intoxication, in which the alleged deficiencies in an eyewitness identification should be obvious, they do not suffice to provide jurors with adequate information concerning more subtle and less obvious deficiencies in eyewitness identification evidence. In support of this argument, Defendant relies upon the logic set out in *Henderson*, in which the New Jersey Supreme Court stated, among other things, that, while "[e]veryone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face," other "findings are less obvious," with many people clearly believing that "witnesses to a highly stressful, threatening event will 'never forget a face' because of their intense focus at the time, the research suggests that is not necessarily so." *Henderson*, 208 N.J. at 272, 27 A.3d at 910. As a result, Defendant essentially argues that we should treat *Green*, *Dodd*, and *Summey* as distinguishable based upon the nature of the factors addressed in the requested instructions deemed unnecessary there.

Assuming, without deciding, that the distinction upon which Defendant relies is a valid one, a point that we need not address in this

instance, we do not believe that the additional instruction that Defendant requested in this case had adequate evidentiary support. In essence, the difference between the instructions that the trial court delivered and the instruction that Defendant requested is that the latter, unlike the former, contained numerous factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness in identifying the defendant as the perpetrator. For example, the effect of a decision to deliver Defendant's requested instruction would put the trial courts in the position of making numerous factual statements about the impact of various factors on the validity of eyewitness identification testimony, such as assertions that "[t]he process of remembering consists of three stages"; that "research has shown that there are risks of making mistaken identifications"; that "[r]esearch has revealed that human memory is not like a video recording"; that "the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration"; that an "eyewitness's confidence is generally an unreliable indicator of accuracy"; and that "[r]esearch has shown that people may have greater difficulty in accurately identifying members of a different race." Although the record developed in *Henderson* contained evidence relating to these issues, there is no such evidence in the present record and Defendant has not argued, much less established, that we are entitled to take judicial notice of the information upon which the *Henderson* Court relied in adopting the pattern instruction upon which Defendant relies. *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (stating that, "generally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or is *capable of demonstration by readily accessible sources of indisputable accuracy*"). As a result, a decision to reverse the trial court for failing to deliver Defendant's requested instruction relating to the credibility of eyewitness identification testimony would, in essence, put this Court in the position of making factual determinations and exercising rule-making authority, neither of which we have the authority to do. *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, __ N.C. App. __, __, 723 S.E.2d 352, 358 (2012) (holding that "[t]his Court is an error-correcting court, not a law-making court"). As a result, we hold, in light of the previous decisions of the Supreme Court and this Court, by which we are bound; the absence of any evidentiary support for the instruction that Defendant contends that the trial court should have delivered; and the well-established limitations under which this Court operates, that the trial court did not commit prejudicial error by failing to give Defendant's requested instruction concerning the manner in which the

jury should evaluate the credibility of the eyewitness identification testimony presented for its consideration.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
THORNE OLIVER WATLINGTON

No. COA13-925

Filed 1 July 2014

1. Appeal and Error—issue decided—companion case

The trial court did not err by refusing to give the jury a requested instruction. Defendant's argument presented the same issue decided against him in *Watlington I*, COA13-661, (filed 1 July 2014).

2. Appeal and Error—preservation of issues—exclusion of expert testimony—basis

An issue concerning the testimony of a fingerprint expert was not preserved for appellate review. Defendant failed to properly move for exclusion of the expert's testimony on the basis that her methods were not reliable.

3. Criminal Law—State's closing argument—improper—new trial not required

The trial court did not commit reversible error by overruling defendant's objections to the State's closing argument. The remarks by the State about a rifle used by an accomplice were improper and should have been precluded by the trial court, but did not require a new trial.

4. Sentencing—partial retrial—increased sentence—prior record—convictions from first trial

The trial court erred on a partial retrial by increasing defendant's sentence for the charges that were joined at the first trial which resulted in convictions. None of the first trial's convictions could have been used in calculating defendant's prior record level had the jury in the first trial reached guilty verdicts on all of the charges. It would be unjust to punish a defendant more harshly simply because the jury in his first trial could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges.

Appeal by Defendant from judgments entered 30 November 2012 by Judge Henry W. Hight, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 4 February 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor, for Defendant.

McGEE, Judge.

Keith LaMay, Sr. ("LaMay, Sr.") and Keith LaMay, Jr. ("LaMay, Jr.") were robbed at gunpoint in the parking lot of an Arby's restaurant in Burlington at approximately 1:30 a.m. on 30 July 2011. Thorne Oliver Watlington ("Defendant") was tried on six charges related to that robbery at the 25 September 2012 criminal session of Superior Court, Alamance County, along with charges related to other incidents. A jury convicted Defendant of charges unrelated to the Arby's incident on 5 October 2012, found Defendant not guilty of three charges related to the Arby's incident, but was unable to reach a unanimous verdict on three additional charges related to the Arby's incident. The trial court declared a mistrial on the last three charges: two counts of robbery with a firearm and one count of attempted robbery with a firearm. Defendant appealed from the 5 October 2012 judgments, and that appeal is decided in *State v. Watlington*, ___ N.C. App. ___, ___ S.E.2d ___ (2014) ("*Watlington I*") (COA13-661, filed on the same date as this opinion). Defendant was retried on the three remaining charges and was found guilty on all three charges on 30 November 2012. Defendant appeals. A full factual recitation may be found in this Court's opinion in *Watlington I*.

I.

[1] Defendant contends in his first argument that the trial court erred in refusing to give the jury a requested instruction. We disagree.

Defendant made this same argument in *Watlington I*. In *Watlington I*, this Court found no error in the trial court's decision not to give the instruction Defendant requested. Defendant's argument presents the same issue already decided against Defendant in *Watlington I*. Therefore, in the present case, we must also find no error as related to this issue.

II.

[2] Defendant contends in his second argument that the trial court erred by allowing the State's fingerprint expert to testify, "because her proffered method of proof was an unreliable and untested system[.]" This argument has not been preserved for appellate review.

Lori Oxendine ("Oxendine"), a civilian employee of the Burlington Police Department testified as an expert in fingerprint identification. At trial, Defendant moved to exclude Oxendine's testimony. Defendant's attorney engaged in the following relevant colloquy with the trial court:

> MR. CHAMPION: Your Honor, at this time I'd like to renew my motion that I had filed back before the first trial in this action, involving these cases, in which I objected to the scientific basis or reliability of fingerprint testimony.
>
> THE COURT: I've -- you've passed up an article which was reviewed. If you've got any other evidence you would like to show, I'll be more than happy to hear it. I [am] assuming you have some person who's going to get up here and testify that it's not reliable.
>
> MR. CHAMPION: No, sir.
>
> THE COURT: Well, you can cite me to somebody who says it's not reliable and has not been held so in any court in North Carolina or the Fourth District.
>
> MR. CHAMPION: No, Your Honor, I'm just making[-]
>
> THE COURT: I understand that. I just want it to be clear for the record what it is.
>
> MR. CHAMPION: No, sir, other than what I've already handed up for the court to review. I just wanted --

> THE COURT: And I want you to know that I'll give you any opportunity you want to put on any person who would challenge that here in front of this [c]ourt, so that we can make a record.
>
> MR. CHAMPION: Yes, sir. I do not have anyone to present.
>
> THE COURT: Okay.
>
> MR. CHAMPION: Out of an abundance of caution, I would be objecting to her qualifications as an expert in fingerprint comparison or identification. I don't know if the Court would want to bring the jury back in to go through preliminaries and then --
>
> THE COURT: Okay. And based upon, if you want to challenge her qualifications now, I'll be more than happy to [do] that in the absence of the jury, you know, give you an opportunity to do that. Although, she's testified in front of us on something earlier, this is a different trial. So I'll be glad to hear you.

Mr. Champion then commenced *voir dire* of Oxendine, and concluded by stating: "No more questions on qualifications." The State then questioned Oxendine, and Mr. Champion declined to question her further. Mr. Champion argued his motion to the trial court, and the trial court responded, as follows:

> THE COURT: Okay. I'll be glad to hear you now, but I mean, from what I recall is based upon her 24 years of training and experience or 24 years of experience daily in fingerprint comparison and identification, her prior training, she would appear to qualify to have knowledge to make a comparison and a determination. If you've got something different.
>
> MR. CHAMPION: Your Honor, I, several of the agencies that are, that qualify and certify people, she does not have the qualifications. She's not even aware of their qualifications. She understands that they have some agencies that qualify even including bachelor degrees and some science degree level work. This is considered scientific type evidence, more so than, okay, that's a green shirt versus a green shirt. This is actually looking at microscopic level work, and we just don't feel like she has the, the training

> and educational experience to qualify her as an expert in fingerprint analysis and comparisons.
>
> THE COURT: Thank you, sir. Noted for the record. If she's appropriately qualified in front of the jury, I will accept her.

Although Defendant may have handed some materials to the trial court regarding "the reliability of fingerprint testimony," Defendant did not directly challenge the reliability of fingerprint testimony in general, or more particularly, the reliability of the methods used by Oxendine. Defendant challenged Oxendine's qualifications to testify as an expert in fingerprint analysis, and the trial court made a ruling only on that challenge.

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

N.C.R. App. P. 10(a)(1). "The appellate courts will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Washington*, 134 N.C. App. 479, 485, 518 S.E.2d 14, 17 (1999) (citation omitted).

Because Defendant failed to properly move for exclusion of Oxendine's testimony on the basis that the methods used by Oxendine were not reliable, and because the trial court never ruled on any such motion, that issue is not properly before us. *Id.* This argument is dismissed.

III.

[3] Defendant contends in his third argument that the trial court committed reversible error in overruling Defendant's objections during the State's closing argument. We disagree.

Our Supreme Court has stated:

> Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury. The trial court is required, upon objection, to censor remarks either not warranted by the law or facts or made only to prejudice or mislead the jury. The conduct

> of the arguments of counsel is left to the sound discretion of the trial judge. In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial. Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse *ex mero motu*.

State v. Britt, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977) (citations omitted). The portion of the State's closing at issue was as follows:

> Ladies and gentlemen, again, Andre McLaughlin [who was also charged in the Arby's incident] has a lot to answer for, but on the, that one incidence, rifle had 14 rounds in it, one for each, actually each one each of you jurors, and –
>
> MR. CHAMPION: Objection.
>
> MR. THOMPSON: -- one to spare.
>
> THE COURT: Go on.
>
> MR. THOMPSON: If [Defendant] had gotten hold of this rifle, this might have been an entirely different kind of case. But be that as it may, he didn't get the rifle, but he did commit a robbery.
>
> I'm not sure if I've been talking 30 minutes or so. I'm not going to take up the whole time.

Mr. Thompson then concluded his closing argument with a few additional statements.

We hold that the remarks by the State were improper, and should have been precluded by the trial court. The trial court then should have given a curative instruction. There was no basis for the State's implication that, had Defendant had the rifle, "this might have been an entirely different kind of case." Furthermore, stating that there was a round for each member of the jury and "one to spare" was clearly inappropriate. Defendant properly objected to the comment concerning "14 rounds," but failed to object to the comment concerning what might have occurred had Defendant had the rifle. There are different standards of review, depending on whether Defendant objected to the argument at trial.

> The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing

> to sustain the objection. *See*, *e.g.*, *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (holding that appellate courts will review the exercise of such discretion when counsel's remarks are extreme and calculated to prejudice the jury)[.]

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citation omitted). If we find the argument was improper, "we [next] determine if the remarks were of such a magnitude that their inclusion prejudiced defendant[.]" *Id.*

However, the standard of review when no objection has been made requires an elevated showing of impropriety.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. at 133, 558 S.E.2d at 107 (citations omitted).

Although we find that these comments were improper, we do not find, pursuant to either appropriate standard, that error requiring a new trial resulted from these comments in the State's closing argument. LaMay, Sr. and LaMay, Jr. both returned to the Arby's parking lot early 30 July 2011, approximately eight hours after the robbery. LaMay, Jr. found an identification card in the woods near the Arby's parking lot, and showed it to LaMay, Sr., who said: "That's the guy that robbed us." That identification card belonged to Defendant. Law enforcement officers located Defendant in Apartment F of Forestdale Apartments in Burlington, immediately after other individuals involved in the robbery were arrested as they exited Apartment F. When officers knocked on the door of Apartment F, Defendant opened the door, then immediately closed it upon seeing the officers. Defendant has failed in his burden of showing prejudice resulted from the improper statements made by the State in its closing argument.

IV.

[4] Defendant contends in his final argument that the trial court erred in increasing his sentence based upon his convictions for charges that had been joined for trial with the charges currently before us. We agree.

Before Defendant's first trial, the State moved to join all charges: felonious breaking or entering, felonious larceny, two counts of felonious possession of stolen goods, breaking or entering into a motor vehicle, assault by pointing a gun, possession of a firearm by a felon, two counts of robbery with a firearm, two counts of attempted robbery with a firearm, and possession of a stolen motor vehicle. The first trial concluded on 5 October 2012. Defendant was found guilty on six charges unrelated to the Arby's incident, not guilty on three charges that were related to the Arby's incident, but the jury could not reach a unanimous verdict on three additional charges related to the Arby's incident: two counts of robbery with a firearm and one count of attempted robbery with a firearm. A mistrial was declared on those charges. Defendant was retried, and found guilty on all three charges on 30 November 2012. Defendant's prior record level was calculated using the judgments entered 5 October 2012, and Defendant was sentenced, based upon the trial court's finding him to be a prior record level III.

In the present case, Defendant argues it was improper for the trial court to use the 5 October 2012 convictions in calculating his prior record level because those charges had been consolidated with the charges that resulted in the 30 November 2012 convictions, and the only reason Defendant ended up being convicted on those charges on a different day was the inability of the first jury to reach a unanimous verdict.

It is clear that, had the jury in the first trial reached guilty verdicts on these three charges as well, none of the 5 October convictions could have been used when calculating Defendant's prior record level. N.C. Gen. Stat. § 15A-1340.14(d) states: "**Multiple Prior Convictions Obtained in One Court Week.**— For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2013). We have noted:

> Nothing within the Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels. We agree . . . that the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention

> of the intent of the General Assembly. *See State v. Jones*, 353 N.C. 159, 170, 538 S.E.2d 917, 926 (indicating that "[w]hen interpreting statutes, this Court presumes that the legislature did not intend an unjust result").
>
> Further, "the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention."

State v. West, 180 N.C. App. 664, 669-70, 638 S.E.2d 508, 512 (2006) (citations omitted). It would be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges. There is no policy reason that would support such a result and, because the General Assembly has not clearly stated an intention to allow for harsher punishments in such situations, we hold the "rule of lenity" forbids such a construction of the sentencing statutes. *Id.* We reverse and remand for resentencing consistent with our holding.

No error in part, dismissed in part, reversed and remanded in part.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA
v.
ERIC DONOVAN MASSENBURG

No. COA13-1434

Filed 1 July 2014

1. Jury—unanimous verdict—Allen charge—substantial compliance with statute

The trial court did not commit plain error in a felonious breaking or entering and assault inflicting serious bodily injury case by failing to properly instruct the jury of its duty to make reasonable efforts to reach a unanimous verdict. Although the trial court's *Allen* charge failed to state the words of N.C.G.S. § 15A-1235(b)(3) verbatim, the charge was in substantial compliance with N.C.G.S. § 15A-1235.

2. Sentencing—special probation—presumptive range—no abuse of discretion

The trial court did not abuse its discretion in a felonious breaking or entering and assault inflicting serious bodily injury case by imposing a term of special probation of 135 days in the Division of Adult Correction instead of regular probation. The sentence imposed was within the presumptive range and the record did not show that the sentence was discriminatory based on poverty.

Appeal by defendant from judgment entered 10 May 2013 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

BRYANT, Judge.

Where the trial court's *Allen* charge to the jury was in substantial compliance with N.C. Gen. Stat. § 15A-1235, there was no coercion of the jury verdict. Where the sentence imposed was within the presumptive range, the trial court did not abuse its discretion by imposing an intermediate sanction of special probation.

On 10 December 2012, defendant Eric D. Massenburg was indicted on charges of felonious breaking or entering and assault inflicting serious bodily injury. The matter was brought to trial during the 7 May 2013 session in Wake County Superior Court, the Honorable G. Wayne Abernathy, Judge presiding.

The evidence presented at trial tended to show that on the evening of 23 September 2012, defendant accompanied his mother Henrietta Massenburg to the home of defendant's ex-sister-in-law Patricia Massenburg. Then, defendant left. Patricia's boyfriend Joe Perry was at the residence. Henrietta called defendant after Joe began cursing at her and ordering her to leave. When defendant returned to the residence, Joe brandished a butcher's knife. Though testimony differed as to whether Joe put the knife down prior to the time defendant began hitting him, the testimony was consistent in showing that defendant punched Joe repeatedly. Due to defendant's assault, Joe spent three days in the hospital, lost several of his teeth, and had a plate inserted into his jaw.

At the close of the evidence, the charge of felonious breaking and entering was dismissed but the State was allowed to proceed on the charge of misdemeanor breaking or entering. The trial court instructed the jury on misdemeanor breaking or entering and assault inflicting serious bodily injury. At five o'clock, after a few hours of deliberation, the jury advised the court that it had reached a unanimous verdict on the charge of breaking or entering but could not agree on the assault inflicting serious bodily injury charge and did not feel they would reach a unanimous verdict with more time. The court emphasized to the jury that it was their duty to reach a verdict if they could do so without surrendering their honest convictions, then instructed the jury that deliberations would resume the following morning.

The next day, the jury returned a verdict of guilty on the charge of assault inflicting serious bodily injury and a verdict of not guilty on the charge of misdemeanor breaking or entering. Defendant appeals.

On appeal, defendant raises the following two arguments: the trial court (I) erred in failing to properly instruct the jury; and (II) abused its discretion in sentencing defendant to an active term of imprisonment.

I

[1] Defendant argues that after receiving notice that the jury was deadlocked, the trial court erred in failing to properly instruct the jury of its duty to make reasonable efforts to reach a unanimous verdict pursuant to General Statutes, section 15A-1235, also known as an *Allen* charge,[1] and as a result, the jury's guilty verdict was coerced. We disagree.

Initially, we note that defendant failed to preserve this issue for review as he failed to object to the trial court's jury instruction that he now challenges. *See* N.C. R. App. P. 10(a)(2) (2014) (objection required

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1. *Allen v. United States*, 164 U.S. 492, 501-02 (1896) (finding no error in trial court's reinstruction to jury where jury could not reach a unanimous verdict. The Supreme Court reasoned that "[w]hile, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.").

to allow appeal of a jury charge); *see also State v. Storm*, ___ N.C. App. ___, ___, 743 S.E.2d 713, 716 (2013) (Where the defendant failed to object to the trial court's instruction and did not object after the trial court's instruction, the challenge was not properly preserved.). Therefore, we review this matter for plain error.[2] *See State v. Williams*, 315 N.C. 310, 328, 338 S.E.2d 75, 86 (1986) (reviewing the defendant's challenge to the trial court's *Allen* charge based on a failure to comply with General Statutes, section 15A-1235 for plain error where the defendant failed to preserve his argument at trial).

"[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted); *see generally State v. Conley*, ___ N.C. App. ___, ___, 724 S.E.2d 163, 169, *disc. review denied*, 366 N.C. 238, 731 S.E.2d 413 (2012) ("Where trial counsel fails to object to the trial court's instructions in response to a question from the jury seeking clarification, we review for plain error."). "Preserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error." *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citations omitted).

> 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.

Id. at 518, 723 S.E.2d at 334 (citations omitted).

Pursuant to North Carolina General Statutes, section 15A-1235, "[i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)." N.C. Gen. Stat. § 15A-1235(c) (2013).

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

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2. Defendant cites to *State v. May*, ___ N.C. App. ___, 749 S.E.2d 483 (2013), for the proposition that this issue is subject to harmless error analysis as opposed to plain error. We note, however, that our Supreme Court has granted a stay as to *May*. We therefore do not use it as a basis for our standard of review or analysis of this issue.

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

Id. § 15A-1235 (a), (b).

Defendant contends that the trial court's *Allen* charge failed to instruct the jury in accordance with section 15A-1235(b)(3), "a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous[,]" and because of this omission, he is entitled to a new trial. We disagree.

In *Williams*, 315 N.C. 310, 338 S.E.2d 75, the defendant argued that the trial court's *Allen* charge failed to comply with General Statutes, section 15A-1235(b)(3) and (4). The Court reasoned that "whenever the trial judge gives the jury any of the instructions authorized by N.C.G.S. § 15A–1235(b), whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them." *Id.* at 327, 338 S.E.2d at 85.

> Since the trial judge gave the instruction after forming the opinion that the jury was deadlocked, he committed error when he gave the instructions set out in N.C.G.S. § 15A–1235(b)(1) and (2), but failed to give the instructions set out in N.C.G.S. § 15A–1235(b)(3) and (4).
>
> This error does not, however, automatically entitle the defendant to a new trial.

Id. at 327, 338 S.E.2d at 86. In *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), our Supreme Court reasoned as follows:

> [t]he trial court's instructions did not suggest that jurors should surrender their beliefs or include extraneous references to the expense and inconvenience of another trial, as has been found erroneous by this Court.
>
> Moreover, by comparing the trial court's instructions with those contained in Section 15A–1235 above, it is clear that the trial court's instructions contained the substance of the statutory instructions. The instructions fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

Id. at 22-23, 484 S.E.2d at 363-64 (citations omitted).

Here, the trial court gave the following charge:

> THE COURT: Ladies and gentlemen, I want to emphasize to you the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and reconcile your differences if you can without surrendering any conscious convictions. No juror should surrender his honest convictions as to the weight or the effect of the evidence solely because the opinion of a fellow juror or for the mere purpose of returning a verdict. Each of you must decide this case for yourself with impartial consideration [of] the evidence. Y'all have a duty to consult with one another and to deliberate with the view of reaching an agreement if it can be done without injury to your personal judgment.

We acknowledge that the trial court's charge fails to state the words of section 15A-1235(b)(3) verbatim. However, it is clear that the trial court's instructions contain the substance of General Statutes, section 15A-1235(b). Moreover, we again note that based on *Fernandez*, the substance of the instruction "fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict." *Id.* at 23, 484 S.E.2d at 364; *see also State v. Gettys*, ___ N.C. App. ___, ___, 724 S.E.2d 579, 586 (2012) (reviewing for plain error the trial court's *Allen* charge). Accordingly, we overrule defendant's argument.

II

[2] Next, defendant argues the trial court abused its discretion and violated the Equal Protection Clause of both the United States and North Carolina constitutions by choosing to impose upon defendant a term of special probation of 135 days in the Division of Adult Correction as an intermediate sanction. Specifically, defendant argues the trial court chose a sentence with active time as opposed to regular probation because defendant would "never make [enough] money working . . . to pay back taxpayers for the cost of Medicaid." We disagree.

"In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17, 100 L. Ed. 891, 898 (1956). "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citation and quotation omitted). " 'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' " *State v. Cameron*, 83 N.C. App. 69, 76, 349 S.E.2d 327, 332 (1986) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

Here, after hearing from defendant who requested a mitigated-range sentence of 11 to 23 months with a short active sentence, and the State's request of a presumptive range sentence, the trial court imposed a presumptive range sentence of 19—32 months. The sentence contained an intermediate sanction – a term of special probation of 135 days in the Division of Adult Correction. The trial court then gave the following basis for the sentence imposed:

> THE COURT: . . . Well, I noticed that the Defendant has three prior breakings and possession of schedule six and possession of a firearm with obliterated serial number. That, of course, is of concern. What bothers me is that he has probation violations six times for the same offense. In a perfect world, I would leave him on probation, make him pay back the taxpayers who probably paid $50-$75,000 in Medicaid damage he did to this man's head. But he won't make probation. He won't make it in the sense he'll never make the money working at McDonald's to pay back the taxpayers for the cost of Medicaid.

It does appear to me that the force was clearly excessive in this case . . . . But regardless, I think the jury has spoken. I believe they've spoken correctly.

Stand up, please, [defendant]. The lawyers are right, the range of sentences provided to me to choose from by the legislature range from a minimum of 11 months to a maximum of about 32 months in the presumptive range, and they also allow for suspension. I want you to realize you sentenced the victim in this case to a lifetime of a plate in his jaw and only half the teeth in his head, so he doesn't ever get over this.

How much time is he doing in federal?

. . .

[Defense counsel]: He's got 24 months, additional months, he's pulling everyday.

THE COURT: Well, I'll take into consideration the fact he's going to be in prison for 24 months in the federal system as a result of this violation, this conviction. Rather than your straight active sentence which was my inclination, which I would do if he did not have the 24 months facing him, which he will serve.

. . .

I was going to sentence him at the bottom of the presumptive and make it all active. What I think I'm going to do is move -- that was my thought process, maybe move to the top of the presumptive and give him some suspension.

In this case, madam clerk, the Defendant admits that he has five points for felony sentencing purposes, which makes him a level two. This is a class F felony. It is the judgment of the Court that the Defendant be imprisoned in the [Division] of Adult Corrections for Male Prisoners for a minimum of [19] months and a maximum of [32] months; however, in view of the fact he is going to be in prison for 24 months in the federal system, the Court is going to suspend all but [four months and 15 days (135 days)], and he's placed on supervised probation for 24 months on the condition that he have no contact with the victim or any witnesses for the State.

It appears the trial court's reference to a sentence of probation was intended as consideration of an exceptional circumstance – "[i]n a perfect world, I would leave him on probation, make him pay back the taxpayers who probably paid $50-$75,000 in Medicaid damage." However, the trial court's sentence could be considered lenient by most accounts: Defendant was a Level II offender convicted of a violent Class F felony, sentenced in the presumptive range, but given a special probationary sentence of 135 days in the Division of Adult Correction, as opposed to a straight active sentence. Defendant was also serving or about to serve an active sentence in the federal system. On this record, defendant cannot show that the sentence ordered by the court was a discriminatory sentence predicated on poverty. The trial court did not abuse its discretion, engage in procedural conduct prejudicial to defendant, operate in circumstances manifesting an inherent unfairness and injustice, or engage in conduct offensive to a sense of fair play. *See Cameron*, 83 N.C. App. at 76, 349 S.E.2d at 332. Defendant's argument is overruled.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

SWAN BEACH COROLLA, L.L.C., OCEAN ASSOCIATES, LP, LITTLE NECK TOWERS, L.L.C., GERALD FRIEDMAN, NANCY FRIEDMAN, CHARLES S. FRIEDMAN, TIL MORNING, LLC, AND SECOND STAR, L.L.C., PLAINTIFFS

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA13-1272

Filed 1 July 2014

1. Zoning—vested rights claim—exhaustion of administrative remedies—not required

Plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring this civil action and the trial court erred by dismissing their common law vested rights claim under N.C.G.S. § 1A-1, Rule 12(b)(1) A plaintiff is not required to request that a board of adjustment issue a variance that it does not have the authority to issue.

2. Zoning—common law vested rights—statement of claim—sufficient

Plaintiffs' claim of common law vests rights in developing property was sufficiently pled to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Taking plaintiff's allegations as true, their clearing of lots, canal digging, dune building, and road grading were substantial expenditures, their property was not zoned at the time they made their expenditures, and their expenditures were made in good faith.

3. Civil Rights—§ 1983—development of land—failure to exhaust administrative remedies—sovereign immunity—statute of limitations

The trial court erred by dismissing plaintiffs' claims under 42 U.S.C. § 1983 because these claims were not barred by state law sovereign immunity or failure to exhaust administrative remedies. Defendants did not preserve a statute of limitations issue for appeal because they did not argue the statute of limitations at the motion hearing and it was not clear that they obtained a ruling on the issue.

4. Zoning—state constitution—tax classification—claim dismissed

The trial court did not err in a zoning case by dismissing plaintiffs' allegations under Article V, Section 2 of the North Carolina Constitution that the County had refused to allow business development on property that it had classified as business property for tax purposes. Plaintiffs did not challenge the tax classification or the uniformity of the tax rules. The tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim, but their allegations were insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution.

Appeal by plaintiffs from Order entered 24 July 2013 by Judge Wayland J. Sermons in Superior Court, Currituck County. Heard in the Court of Appeals 24 April 2014.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Lacy H. Reaves and J. Mitchell Armbruster, for plaintiffs-appellants.

County of Currituck, by Donald I. McRee, Jr., for defendants-appellees.

STROUD, Judge.

Plaintiffs appeal from an order entered 24 July 2013 dismissing their complaint for declaratory judgment regarding vested rights they claimed to develop their property commercially, for violations of constitutional rights under 42 U.S.C. § 1983, and for violation of Article V, Section 2 of the North Carolina Constitution. We reverse in part, affirm in part, and remand for further proceedings.

I. Background

Plaintiffs are five companies and three individuals who own property in the Swan Beach Subdivision in Currituck County. On 6 July 2012, they filed a complaint against the County of Currituck, the Currituck Board of Commissioners, and the commissioners themselves in their official capacities. Plaintiff Ocean Associates was the original developer of the land and the other plaintiffs purchased their land from it.[1] They alleged that they have common law vested rights to develop commercial uses on their property. They also raised claims of laches, "easement rights" to commercially develop their property, state constitutional violations, and violations of federal equal protection and due process under 42 U.S.C. § 1983.

According to the complaint, plaintiff Ocean Associates, LP, purchased approximately 1400 acres of property in the Carova Beach area of Currituck County in 1966 to develop a residential subdivision along with related commercial services.[2] In 1969, Ocean Associates created and recorded a plat indicating that it intended to divide the property into residential and business lots. At the time, Currituck County had no applicable zoning ordinance. However, the County asked Ocean Associates to refrain from developing the business lots until the residential lots were sufficiently occupied. After filing the plat, Ocean Associates began to prepare both the residential and business lots for development. They spent $425,050.00 on services such as surveying, land geosciences, general engineering, road grading, canal digging, dune building, filling lots, evacuating ditches, and landscaping. This infrastructure would serve both the business and residential lots.

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1. The precise nature of the relationship between Ocean Associates and the other plaintiffs is not clear from the complaint.

2. Because this case comes to us on a motion to dismiss, all of the following facts are from the complaint; we express no opinion as to their veracity.

In 1971, Currituck County adopted a zoning ordinance. The 1971 ordinance designated plaintiffs' property as RA-20. The RA-20 district allowed for low density residential and agricultural uses with only limited business uses. Plaintiffs allege that they did not know that the zoning of their property had changed. In 1975, the County enacted a new zoning ordinance. This ordinance zoned plaintiffs' property in a similar manner to the previous ordinance. Plaintiffs believed that the County would still permit them to develop their property for commercial uses because the County had allowed other property owners to do the same.

In 1989, Currituck County enacted a Unified Development Ordinance (UDO). The UDO zoned plaintiffs' property RO2, which does not allow business uses except for marinas, campgrounds, outdoor recreational facilities, and small professional offices. The business and commercial uses intended by plaintiffs would not be permitted under this ordinance. Nevertheless, plaintiffs continued to believe that they would be allowed to commercially develop their property.

In 2004, plaintiffs decided to move forward with development of the business lots because the density of the residential lots had finally become sufficient to support such use. They wanted to build a convenience store, real estate offices, a post office, and a restaurant. Around September 2004, the County informed plaintiffs that such uses would not be permitted. Plaintiffs asserted that they had vested rights to use their property in this manner, but the County disagreed, asserting that the UDO barred such uses. Over the next three years, plaintiffs then attempted to convince the County to rezone their property so that they could develop their property for business uses. The parties agreed that such uses would not be permitted on their property under the UDO.

Plaintiffs allege that despite the County's assertion that the UDO prohibits business development in the RO2 district, the County has permitted other businesses to operate in the area. They alleged that the County treated plaintiffs differently without a rational basis, or because the individual plaintiffs are Jewish.

On 12 September 2012, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). Defendants argued that plaintiffs failed to exhaust applicable administrative remedies and that they are protected by sovereign, governmental, and legislative immunity. They further argued that plaintiffs' complaint is barred by the applicable statutes of limitations.

Plaintiffs filed an amended complaint on 13 February 2013. The amended complaint added an allegation that the County adopted a zoning ordinance in 1968, but that there was no map accompanying the ordinance and that their property was not zoned at that time. The amended complaint also added a claim under Article V, Section 2 of the North Carolina Constitution. Plaintiffs alleged that the County had taxed their property as business property since 1969, so its failure to permit plaintiffs to develop their property for business uses contravenes the requirement of taxation by uniform rule.

Defendants then filed an amended motion to dismiss and an amended brief in support of their motion. The motion was heard by the superior court on 20 May 2013. By order entered 24 July 2013, the superior court allowed defendants' 12(b)(1) motion to dismiss for failure to exhaust administrative remedies and their 12(b)(6) motion for failure to state a claim, though it did not specify a reason. Plaintiffs timely appealed to this Court.

II. Standard of Review

Defendants moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1)(2011) and for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)(2011).

> Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings. Pursuant to the de novo standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trivette v. Yount, ___ N.C. App. ___, ___, 720 S.E.2d 732, 735 (2011) (citations, quotation marks, brackets, and italics omitted).

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals

> that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts 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.

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., ___ N.C. App. ___, ___, 752 S.E.2d 661, 663-64 (2013) (citation and quotation marks omitted).

III. Common Law Vested Rights Claim

[1] Plaintiffs argue that the trial court erred in dismissing their common law vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies. Defendants counter that even if it was error to dismiss under Rule 12(b)(1), dismissal was proper under Rule 12(b)(6). We hold that plaintiffs did not fail to exhaust administrative remedies and that their common law vested rights claim was sufficiently pled to survive a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6).

A. Exhaustion of Administrative Remedies

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004). Nevertheless, "a party need not exhaust an administrative remedy where the remedy is inadequate." *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002). Facts justifying avoidance of administrative procedure must be pled in the complaint. *Id.* at 534, 571 S.E.2d at 58.

"The [administrative] remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim." *Jackson for Jackson v. North Carolina Dept. of Human Resources*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 904 (1998) (citation and quotation marks omitted), *disc. rev. denied*, 350 N.C. 594, 537 S.E.2d 213 (1999). Generally, constitutional claims are not subject to administrative remedies, so failure to pursue such remedies is not fatal to those claims.

See Meads v N.C. Dep't of Agric., 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1988); *Hardy ex rel. Hardy v. Beaufort County Bd. of Educ.*, 200 N.C. App. 403, 409, 683 S.E.2d 774, 779 (2009).[3]

Here, plaintiffs specifically pled that they were not required to exhaust administrative remedies and that the administrative remedies are inadequate. Nevertheless, we must consider whether the facts as pled justify failure to exhaust administrative procedures. We hold that plaintiffs sufficiently pled futility because the Currituck County Board of Adjustment would not be authorized to hear plaintiffs' common law vested rights claim.

> The 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. A determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures.

Huntington Properties, LLC v. Currituck County, 153 N.C. App. 218, 226, 569 S.E.2d 695, 701 (2002) (citations, quotation marks, and brackets omitted).

"In reviewing the determination of an administrative enforcement officer pursuant to N.C. Gen. Stat. § 160A-388, a board of adjustment sits in a 'quasi-judicial capacity' and has only the authority it is granted under that statute." *Dobo v. Zoning Bd. of Adjustment of City of Wilmington*, 149 N.C. App. 701, 706, 562 S.E.2d 108, 111 (2002), *rev'd in part on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003). N.C. Gen. Stat. § 160A-388(b) (2011) authorizes boards of adjustment to "hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance." Its role is solely related to the interpretation of the ordinances and deciding whether to grant a variance from those ordinances. *See Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). Boards of adjustment do not have the authority to adjudicate constitutional claims. *Id.*; *Dobo*, 149 N.C. App. at 706, 562 S.E.2d at 111.

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3. Exhaustion may be required for procedural due process claims. *See Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 435, 471 S.E.2d 342, 347 (1996), *cert. denied*, 519 U.S. 1112, 136 L.Ed. 2d 839 (1997); *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010).

Some common law vested rights cases have been appealed from boards of adjustment[4]; others have been brought as civil actions without prior administrative proceedings.[5] These cases do not announce a clear rule for the proper method to pursue a vested rights claim. Nevertheless, a rule can be inferred from the appellate courts' treatment of those cases and the statutory authority of boards of adjustment discussed above. Our Supreme Court has differentiated between interpretations of zoning ordinances, which are properly considered by boards of adjustment, and constitutional challenges, which are not. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-62 (holding that it was error to join a claim concerning the interpretation of development ordinances with constitutional challenges thereto), *cert. denied*, 496 U.S. 931, 110 L.Ed. 2d 651 (1990). We have noted that where interpretation of an ordinance is involved the property owner should follow the administrative procedure of seeking permission for a nonconforming use from the board of adjustment. *See Huntington Properties, LLC*, 153 N.C. App. at 227, 569 S.E.2d at 702; *see also Kirkpatrick*, 138 N.C. App. at 87-88, 530 S.E.2d at 343-44 (considering a common law vested rights claim in a case first brought to the board of adjustment, along with issues concerning interpretation of the ordinances). However, the discretion of a board of adjustment is not unlimited. Its "power to 'determine and vary' is limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit." *Lee v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946). A plaintiff is not required to request that the board of adjustment issue a variance that it does not have the authority to issue. *See Smith*, 276 N.C. at 57, 170 S.E.2d at 911.

Where the interpretation of the ordinance is not at issue, the ordinance prohibits the property owner's intended use, and the property owner is claiming a common law vested right to such a nonconforming use, the only claim is a constitutional one. In such a case, plaintiffs are not required to first exhaust the procedures before the board of adjustment. Here, as in *Smith*, plaintiffs' "contention is that they have a legal

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4. *See, e.g., Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 215 S.E.2d 73 (1975), *Browning-Ferris Industries Of South Atlantic, Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 484 S.E.2d 411 (1997), *Kirkpatrick v. Village Council for Village of Pinehurst*, 138 N.C. App. 79, 530 S.E.2d 338 (2000).

5. *See, e.g., Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969), *Russell v. Guilford County*, 100 N.C. App. 541, 397 S.E.2d 335 (1990), *MLC Automotive, LLC v. Town of Southern Pines*, 207 N.C. App. 555, 702 S.E.2d 68 (2010), *disc. rev. denied*, 365 N.C. 211, 710 S.E.2d 2 (2011).

right to build, which right the city cannot take from them and for which no permit is authorized by the ordinance. . . . [T]he law does not require them to make a vain trip to the City Hall before exercising it." *Id.* at 57, 170 S.E.2d at 911. Plaintiffs specifically alleged that the meaning of the UDO was not in dispute and that their desired use was not allowed under the ordinance.

Therefore, we conclude that plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring the present civil action. The trial court erred in dismissing plaintiffs' vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies.

B. Sufficiency of Claim

[2] Next, we must consider whether plaintiffs' common law vested rights claim was sufficiently pled to state a cause of action. We hold that plaintiffs sufficiently pled their common law vested rights claim to survive a motion to dismiss.[6]

> A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the [enactment or] amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C. App. at 171-72, 484 S.E.2d at 414 (citations and quotation marks omitted).

"[W]hen a property owner makes expenditures in the absence of zoning . . . , subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use." *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). A property owner need not rely on the existence of a permit authorizing construction if none was

6. This case involves only common law vested rights; plaintiffs do not assert statutory vested rights under N.C. Gen. Stat. § 160A-385.1.

required at the time the expenditures were made. *MLC Automotive, LLC*, 207 N.C. App. at 565, 702 S.E.2d at 75. "To acquire such vested property right[s] it is sufficient that, prior to the . . . enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense." *Campsites Unlimited*, 287 N.C. at 501, 215 S.E.2d at 78 (citation and quotation marks omitted). "A party acts in good faith reliance when it has an honest belief that the nonconforming use would not violate declared public policy." *Kirkpatrick*, 138 N.C. App. at 87, 530 S.E.2d at 343 (citation, quotation marks, and brackets omitted).

As we are considering a 12(b)(6) motion to dismiss, we must assume that the facts alleged by plaintiffs are true and liberally construe the complaint. *Mosteller v. Duke Energy Corp.*, 207 N.C. App. 1, 11, 698 S.E.2d 424, 431 (2010), *disc. rev. denied*, 365 N.C. 211, 710 S.E.2d 38 (2011). The relevant allegations are as follows:

In 1966, plaintiffs or their predecessors in interest acquired approximately 1400 acres of property in Currituck County. The property was not then zoned and commercial development was allowed. In June 1966, the County adopted a "Subdivision Ordinance." On 2 September 1969, consistent with this ordinance, Plaintiff Ocean Associates recorded a plat showing 577 residential lots and six business areas on the property. Such commercial uses were permitted in that area at the time. The County asked that the commercial development not begin until there was sufficient residential density in the area to support the businesses and plaintiffs agreed. Plaintiffs began development in 1969. Between 1968 and 1971, plaintiffs spent approximately $425,050.00 to prepare both the residential and the business lots. These expenditures included general engineering, land geosciences, road grading, canal digging, dune building, lot filling, evacuating ditches, landscaping, and surveying. Plaintiffs would not have expended these funds "but for the fact that business and commercial uses were permitted on the Property under County law . . . ." In the early 1970s, plaintiffs completed the infrastructure that would serve both the business and residential lots.

In October 1971, Currituck County adopted a zoning ordinance and prepared a map. The map seemed to designate the property as "RA-20." The RA-20 district permitted mostly low density residential and agricultural uses, with only limited business or commercial uses. The County adopted a second zoning ordinance in 1975, which seemed to continue designating plaintiffs' property as RA-20. The County assured property owners that subdivisions approved prior to adoption of these ordinances would continue to be allowed.

In 1989, the County adopted a UDO, which is still in effect. Although unclear, plaintiffs' property was apparently zoned RO2. The RO2 district allows only limited business uses. Plaintiffs' planned uses for the property are not allowed under the UDO. Plaintiffs moved forward with further development of the business lots in 2004. The County informed plaintiffs that their intended uses were not permitted under the UDO and denied that plaintiffs had any vested rights to use their property in that manner.

Taking these facts as true, we hold that plaintiffs sufficiently pled their claim for common law vested rights to survive a motion to dismiss. Plaintiffs have alleged that their property was not zoned at the time they made their expenditures to prepare the business lots. They have alleged that this use was lawful at the time the expenditures were made and that the expenditures were made in good faith reliance on that fact. They have alleged that they expended over $400,000 on the development. They allege that they are prejudiced by the zoning ordinance because their intended commercial use would not be permitted under the ordinance.

In *Campsites Unlimited*, our Supreme Court held that the property owners had a vested right because they made substantial expenditures in reliance on the lack of zoning. 287 N.C. at 502, 215 S.E.2d at 78. In that case, the property owners had cleared and constructed roadways and staked out lots. *Id.* The alleged construction activities here were at least as substantial as those in *Campsites Unlimited*, if not more. Plaintiffs' clearing of the lots, canal digging, dune building, and road grading were intended to prepare the site for development. *Cf. Russell*, 100 N.C. App. at 545, 397 S.E.2d at 337 (holding that the plaintiff's expenditures were not substantial where there was "no evidence of ground breaking, tree clearing or anything else done to prepare the site for development"). We conclude that these expenditures were "substantial."

Additionally, taking the allegations of the complaint as true, plaintiffs' reliance on the lawfulness of their project was in good faith. The required "good faith"

> is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

Campsites Unlimited, 287 N.C. at 503, 215 S.E.2d at 79 (citation and quotation marks omitted).

Here, plaintiffs filed plats indicating business development before any zoning ordinance was in place. There is no indication that they were aware of any plans to zone their property such that business development would not be allowed. *Cf. id.* The face of the complaint does not reveal that plaintiffs failed to acquire any other permits required to begin construction. *Cf. Browning-Ferris*, 126 N.C. App. at 172, 484 S.E.2d at 414. Indeed, plaintiffs have alleged that the County was aware of their plans and condoned them.

In sum, plaintiffs' allegations, if true, show that they have made substantial expenditures in good faith reliance on the lack of zoning at the time the expenditures were made. We conclude that plaintiffs have sufficiently pled a common law vested rights claim. Accordingly, we hold that the trial court erred in allowing defendants' motion to dismiss under Rule 12(b)(6).[7]

IV. Equal Protection and Due Process § 1983 Claims

[3] Plaintiffs next argue that the trial court erred in dismissing their equal protection and substantive due process claims under 42 U.S.C. § 1983 (2006) for failure to exhaust administrative remedies and sovereign immunity.[8] Although the basis for its decision is not clear from the trial court's order, defendants moved to dismiss plaintiffs' § 1983 claims on the basis of failure to exhaust administrative remedies, sovereign immunity, and legislative immunity. Defendants did not argue at the motion hearing that the § 1983 claim was improperly pled or that the claims would be barred by the statute of limitations. On appeal, defendants do not argue that they are immune.

"To state a claim under 42 U.S.C. § 1983, a plaintiff must show that [a person], acting under color of law, has 'subjected [him] to the deprivation of any rights, privileges, or immunities secured by the Constitution

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7. There was a question raised at oral arguments concerning whether the plaintiffs other than Ocean Associates could bring a vested rights claim as successors in interest even though they did not actually expend the funds themselves. The individuals involved with the property are apparently the same, but the corporate forms have changed. This issue was not raised in the pleadings, briefed by the parties, or addressed by the trial court, so we express no opinion on that question.

8. Defendants did not argue to the trial court and do not argue on appeal that plaintiffs failed to allege any element of these claims.

and laws.' " *Copper*, 363 N.C. at 789, 688 S.E.2d at 429 (quoting 42 U.S.C. § 1983 (2006)). "[A] municipality is a 'person' within the meaning of section 1983." *Moore v. City of Creedmoor*, 345 N.C. 356, 365, 481 S.E.2d 14, 20 (1997).

Plaintiffs alleged that the County has allowed other similarly situated property owners to operate businesses in the zoning districts that prohibit commercial buildings while denying plaintiffs the opportunity to do the same. They have alleged that the County treated them differently because they are Jewish. Moreover, plaintiffs allege that the County's decision to treat them differently was arbitrary and without any rational relationship to a valid governmental objective. They allege that they have been damaged by this discrimination because they have lost income they could have received from the commercial development of their property. All of the claims were brought against the County itself and the individual County Commissioners in their official capacity.

First, plaintiffs' § 1983 claims may not be dismissed for failure to exhaust administrative remedies. While claims for violation of procedural due process may be subject to exhaustion requirements, *Copper*, 363 N.C. at 789-90, at 688 S.E.2d at 430, substantive constitutional claims are not, *Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347. Here, plaintiffs' claims are founded on substantive due process and equal protection. They were not required to exhaust any administrative process to bring these claims. *See Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347.

Second, defendants are not protected from § 1983 claims on the basis of sovereign immunity. *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 772, 413 S.E.2d 276, 283 ("[S]overeign immunity alleged under state law is not a permissible defense to section 1983 actions."), *disc. rev. denied*, 506 U.S. 985, 121 L.Ed. 2d 431 (1992); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 627, 538 S.E.2d 601, 616 (2000) (noting that "a municipal entity has no claim to immunity in a section 1983 suit" (citation and quotation marks omitted)), *disc. rev. denied*, 353 N.C. 372, 547 S.E.2d 811 (2001). Indeed, defendants do not argue on appeal that they are immune from suit under § 1983.

Finally, defendants argue that plaintiffs' § 1983 claim is barred by the statute of limitations concerning challenges to zoning ordinances. Plaintiffs urge us not to consider this argument since it was not raised below. Defendants *did* argue in their brief to the trial court that the statute of limitation barred plaintiffs' § 1983 claims, but only "[t]o the extent

Plaintiffs[’] due process and equal protection claims are a based on" a lack of notice of the amendments to the zoning ordinances. But plaintiffs' § 1983 claims are not based on any notice issue. Plaintiffs specifically alleged in their amended complaint that they are not "attacking a defect in the ordinance adoption process . . . ." Defendants apparently recognized this fact as they did not argue at the motions hearing that the statute of limitations would require dismissal of these claims. Moreover, it is not clear that they ever received a ruling from the trial court on this issue. Therefore, they have not preserved this issue for our review and we will not address it. N.C.R. App. P. 10(a)(1); *Lovelace v. City of Shelby*, 153 N.C. App. 378, 384, 570 S.E.2d 136, 140 (declining to address an appellee's argument that was not raised below), *disc. rev. denied*, 356 N.C. 437, 572 S.E.2d 785 (2002).

We hold that the trial court erred in dismissing plaintiffs' claims under 42 U.S.C. § 1983 because the claims are not barred by sovereign immunity or failure to exhaust administrative remedies. Therefore, we reverse the portion of the trial court's order dismissing these claims.

V. Tax Claim

[4] Plaintiffs finally argue that the trial court erred in dismissing their claim under Article V, Section 2(2) of the North Carolina Constitution. We disagree.

Plaintiffs alleged that defendant violated Article V, Section 2(2) of the North Carolina Constitution by refusing to allow business development on property that it has classified for tax purposes as business property. The North Carolina Constitution "requires that taxation must be imposed by a uniform rule." *HED, Inc. v. Powers*, 84 N.C. App. 292, 294, 352 S.E.2d 265, 266, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 4 (1987). That requirement is met "if the rate is uniform throughout each taxing authority's jurisdiction." *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 49, 165 S.E.2d 201, 206 (1969).

Here, plaintiffs do not actually challenge the tax classification or the uniformity of the tax rules. Indeed, they assert that the tax classification of their property as business property is entirely accurate. They have not alleged that defendants tax such property in a non-uniform manner. At best, the tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim. But their allegations are insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution. Therefore, we affirm the trial court's dismissal of this claim.

VI. Conclusion

For the foregoing reasons, we conclude that the trial court erred in dismissing plaintiffs' vested rights claim and their § 1983 claims, but that it properly dismissed plaintiffs' tax claim. Therefore, we reverse those portions of the trial court's order dismissing the vested rights and § 1983 claims, affirm the portion dismissing the tax claim, and remand for further proceedings.

REVERSED, in part; AFFIRMED, in part; and REMANDED.

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

WALLACH v. LINVILLE OWNERS ASS'N, INC.

[234 N.C. App. 632 (2014)]

ANN B. WALLACH; DAVID WALLACH; PHILIP C. MILLER AND STEEN CONSTRUCTION COMPANY, PLAINTIFFS

v.

LINVILLE OWNERS ASSOCIATION, INC.; WILLIAM BUFF CLAYTON; JAMES B. CUSHMAN; KIRSTEN M. CUSHMAN; DALIP AWASTHI; MONICA AWASTHI; WILLIAM J. SPARKMAN; ROXANNE E. SPARKMAN; RAJESH K. MANICKAM; REEMA PATEL MANICKAM; MARGARET S. NORTON, TRUSTEE OF MARGARET S. NORTON REVOCABLE LIVING TRUST DATED 12-4-2007; STUART P. GOLDBLATT; N.C. PEAKS, LLC; FELICIA R. KADIS; MATTHEW C. KING, JR.; JAMES A. WILLETTS; LINDA BADDOUR; CLAUDE Z. DEMBY; DONNA H. DEMBY; ROBERT D. HILLMANN; SUSAN L. HILLMANN; SHAWN M. BRITT; AARON VEDDER; MICHELLE VEDDER; TODD R. STIEFEL; DIANA G. STIEFEL; SCOTT J. POOLE; MATTHEW S. PALKA, JR.; FRANCES K. O'SULLIVAN; KEITH THOMAS SHELLY; KATHARINE KNOBIL; JOSIP CERMIN; LANTY L. SMITH; MARGARET G. SMITH; SCOTT ALLEN BROWN; SARA BETH BROWN; MASOUD MOGHADASS; MARIA D. CLARK AND CHRISTOPHER JAMES CLARK, TRUSTEES OF THE MARIA D. CLARK LIVING TRUST DATED SEPTEMBER 17, 2010, AND ANY AMENDMENTS THERETO; PABLO E. PRIU; HEIDI D. PRIU; SHEHZAD H. CHOUDRY; SABEEN J. KHAWAJA; JASON L. PAYTON; AMIR A. FIROZVI; ASRA S. FIROZVI; CHARLES STIEFEL; DANEEN STIEFEL; MARK F. KOZACKO; TAMMY Y. KOZACKO; MARK A. REIN; TARA A. DOW-REIN; MOHIT PASI; SONIA PASI; WILLIAM H. SCHEICK, JR., TRUSTEE OF THE CAROLYN R. SCHEICK REVOCABLE TRUST-1994/TR; CAROLYN R. SCHEICK, TRUSTEE OF THE WILLIAM H. SCHEICK REVOCABLE TRUST-1994/TR; JOHN T. SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI IRREVOCABLE TRUST-1994; CAROLYN R. SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI IRREVOCABLE TRUST-1994; JOHN T. SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI REVOCABLE TRUST 1994 GST EXEMPTION TRUST; CAROLYN R. SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI REVOCABLE TRUST 1994 GST EXEMPTION TRUST; STEVEN KJELLBERG; JULIE KJELLBERG; RICHARD P. McCOOK; ANNA T. McCOOK; IMAD OMAR; PAUL F. BONAVITA; HEATEHR S. BONAVITA; DIMITRI LYSANDER STOCKTON; RENEE CECILE ALLAIN-STOCKTON, DEFENDANTS

No. COA13-1116

Filed 1 July 2014

1. Parties—joinder—necessary—proper—amendment to restrictive covenants

The trial court did not err in a case involving amendments to the Declaration of Covenants, Conditions, Easements and Restrictions of a residential community by denying defendant's motion to dismiss for failure to join the necessary parties. The parties defendant alleged needed to be joined were proper but not necessary.

2. Associations—homeowners' associations—amendment to restrictive covenants—unreasonable and unenforceable

The trial court erred in a case involving an Assessment Amendment to the Declaration of Covenants, Conditions,

Easements and Restrictions (Declaration) of a residential community by granting partial summary judgment and awarding attorneys' fees in favor of defendant. The Amendment disregarded the purpose of the Declaration's original provisions and completely eliminated the benefits to builders. Thus, the amendment was unreasonable, invalid, and unenforceable.

Appeals by plaintiffs and defendant from final judgment entered 12 March 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 February 2014.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellants.

Jordan Price Wall Gray Jones & Carlton, by Brian S. Edlin and J. Matthew Waters, for defendant-appellant.

McCULLOUGH, Judge.

Linville Owners Association, Inc. (the "Association"), appeals the trial court's denial of its motion to dismiss for failure to join necessary parties. Ann B. Wallach and David Wallach, the owners of Lot 40 and Lot 46 in Linville Subdivision, and Steen Construction Company, the owner of Lot 44 in Linville Subdivision (together "plaintiffs"), appeal the trial court's grant of partial summary judgment and award of attorneys' fees in favor of the Association. For the following reasons, we affirm the denial of the Association's motion to dismiss and reverse the grant of partial summary judgment and the award of attorneys' fees.

I. Background

This case concerns amendments to the Declaration of Covenants, Conditions, Easements and Restrictions (the "Declaration") for Linville Subdivision, a gated community in North Raleigh.

The Declaration was first recorded in the Wake County Register of Deeds on page 197 of book 10362 on 13 August 2003. It was then re-recorded in the Wake County Register of Deeds on page 2198 of book 11283 on 29 March 2005 to include an exhibit that was inadvertently omitted during the first recording. Prior to June 2005, the Declaration governed only those lots in "phase one" of Linville Subdivision. However, on 9 June 2005, a supplementary declaration was recorded in the Wake County Register of Deeds on page 2201 of book 11483 subjecting additional land, "phase two" of Linville Subdivision, to the terms of the Declaration. At all times relevant to this appeal, the

Declaration governed all forty-four lots comprising phases one and two of Linville Subdivision.[1]

Between October and December of 2011, amendments to the Declaration were recorded in the Wake County Register of Deeds. The amendments revised or added the following provisions: "Subdividing and Recombination of Lots," "Architectural Control," "Performance Bond and Builder Agreement," and "Date of Commencement of Annual Assessment." Particularly relevant to this appeal, the amendment regarding "Date of Commencement of Annual Assessment" (the "Assessment Amendment") was recorded in the Wake County Register of Deeds on page 2295 of book 14530 on 7 November 2011.

On 6 August 2012, plaintiffs and Philip C. Miller, all of whom owned vacant lots in Linville Subdivision, commenced this action by filing a complaint seeking a declaratory judgment that the amendments to the Declaration were invalid and unenforceable. The Association and all other lot owners at the time the suit was filed were named as defendants.

In order to provide notice of the action to those acquiring title to lots in Linville Subdivision following commencement of the action, plaintiffs filed a lis pendens in Wake County Superior Court on 17 September 2012.

The lis pendens, however, did not provide notice of the action to James B. Cushman, II, and Kirsten M. Cushman, who acquired title to Lot 2 from Capital Bank in the time between the commencement of this action and the filing of the lis pendens. As a result, on 29 September 2012, plaintiffs filed a motion to amend the complaint to substitute the Cushmans as defendants.

Thereafter, on 4 October 2012, Jordan L. Staal and Heather Staal acquired title to Lot 26 from Masoud Moghadass with notice of the pending action via the lis pendens. Plaintiffs never sought to substitute the Staals as defendants.

By order filed 5 November 2012, the trial court allowed plaintiffs' motion to amend the complaint to substitute the Cushmans as defendants. Plaintiffs then filed a second lis pendens naming the Cushmans as owners of Lot 2 on 7 November 2012.

On 8 November 2012, plaintiffs moved for summary judgment on the ground that the amendments were not reasonable, exceeded the

1. The lots in Linville Subdivision are numbered 1 through 46. Lots 15 and 18 were eliminated by consolidation with other lots.

purpose of the original Declaration, and were inconsistent with the original intent of the Declaration. The Association responded on 13 November 2012 by moving to quash the lis pendens as unnecessary and moving to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) for failure to join the Staals, whom the Association argues are necessary parties.

By order filed 14 December 2012, the trial court denied the Association's motion to dismiss and continued the hearing on plaintiffs' motion for summary judgment. The trial court concluded,

> All owners in the subdivision are not necessary parties to this action by virtue of the Lis Pendens filed by the Plaintiffs. Properties in the Linville Subdivision may be freely bought and sold without new owners having to be parties to the action and all owners at the time of the final judgment in this case are bound by the final judgment in this case even though they are not named parties to this action.

Following the denial of its motion to dismiss, the Association filed an answer and counterclaim on 31 December 2012. In the counterclaim, the Association sought to collect unpaid assessments owed by plaintiffs, foreclose on Claims of Lien filed and served on plaintiffs' lots to secure payment of the assessments, and collect attorneys' fees incurred in prosecuting the action.

On 4 February 2013, the Association filed a motion for summary judgment on plaintiffs' claims. Also on 4 February 2013, plaintiffs filed a response to the Association's counterclaim arguing no past due assessments were owed because the amendments to the declaration were invalid and unenforceable.

Plaintiffs' and the Association's motions for summary judgment came on for hearing in Wake County Superior Court before the Honorable Paul Ridgeway on 18 February 2013. On 4 March 2013, the trial court entered an order granting summary judgment in part and denying summary judgment in part. Pertinent to this appeal, the trial court determined the Assessment Amendment was valid and enforceable. The trial court further concluded that the Association's counterclaim was the only remaining matter to be tried.

Thereafter, the Associations' counterclaim came on for trial that same week in Wake County Superior Court, the Honorable Donald Stephens, Judge presiding. Following trial, the trial court entered

judgment in favor of the Association, ordering the Wallachs to pay $5,010 in unpaid assessments for Lots 40 and 46 and ordering Steen Construction Company to pay $2,345 in unpaid assessments for Lot 44. The trial court further ordered that a Commissioner be appointed and directed to sell the lots to satisfy the indebtedness due the Association. The issue of attorneys' fees was reserved until the Association's counsel filed a supplemental affidavit.

Following receipt of the supplemental affidavit, on 25 March 2013, the trial court awarded $5,000 in fees to the Association.

Plaintiffs gave notice of appeal on 10 April 2013. The Association gave notice of appeal on 11 April 2013.

II. Discussion

We address the Association's appeal first, followed by plaintiffs' appeal. The Association appeals the trial court's denial of its motion to dismiss. Plaintiffs appeal the trial court's partial summary judgment order finding the Assessment Amendment valid and enforceable and the trial court's order awarding the Association attorneys' fees.

Association's Appeal

[1] In the Association's appeal, the sole issue is whether the trial court erred in denying the Association's motion to dismiss for failure to join necessary parties. Upon review, we hold the trial court did not err in denying the Association's motion.

" 'A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.' " *Warrender v. Gull Harbor Yacht Club, Inc.*, _ N.C. App. _, _, 747 S.E.2d 592, 606 (2013) (quoting *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 451–52, 183 S.E.2d 834, 837 (1971)). " 'The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy.' " *N.C. Dep't of Transp. v. Stagecoach Village*, 174 N.C. App. 825, 827-28, 622 S.E.2d 142, 144 (2005) (quoting *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972)) (citation omitted in the original), *disc. rev. denied*, 360 N.C. 483, 630 S.E.2d 929 (2006). Pursuant to the North Carolina Rules of Civil Procedure, necessary parties "must be joined as plaintiffs or defendants[.]" N.C. Gen. Stat. § 1A-1, Rule 19(a) (2013).

On the other hand, "[a] proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Stagecoach Village*, 174 N.C. App. at 828, 622 S.E.2d at 144. " 'Proper parties may be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court.' " *DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 660, 698 S.E.2d 455, 464 (2010) (citations omitted) (emphasis in original).

On appeal, the Association claims the trial court erred in denying its motion to dismiss because the Staals, who acquired Lot 26 on 4 October 2012, were not named defendants in the action. Relying on *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (2000) and *Page v. Bald Head Ass'n.*, 170 N.C. App. 151, 611 S.E.2d 463, *disc. rev. denied*, 359 N.C. 635, 616 S.E.2d 542 (2005), the Association argues all lot owners in Linville Subdivision were necessary parties, without which the judgments are null and void. *See McCraw v. Aux*, 205 N.C. App. 717, 721, 696 S.E.2d 739, 741 (2010).

In *Karner*, our Supreme Court held nonparty property owners in a Charlotte subdivision were necessary parties to an action to enjoin a property owner from violating a residential use restrictive covenant running with each lot. *Karner*, 351 N.C. at 440, 527 S.E.2d at 44. The Court reasoned,

> each property owner within Elizabeth Heights has the right to enforce the residential restriction against any other property owner seeking to violate that covenant. This right has a "distinct worth." By operation of law, if the residential restrictive covenant is abrogated as to the lots owned by defendants, each property owner within the subdivision would lose the right to enforce that same restriction. Unless those parties are joined, they will not have been afforded their "day in court." An adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a "valid judgment." For this reason, we conclude the nonparty property owners of Elizabeth Heights are necessary parties to this action because the voiding of the residential-use restrictive covenant would extinguish their property rights.

Id. at 439-40, 527 S.E.2d at 44 (citations omitted).

Thereafter, in *Page* this Court affirmed the trial court's dismissal of an assessment claim for failure to join all property owners. *Page*, 170 N.C. App. at 154, 611 S.E.2d at 465. In affirming the trial court in *Page*, this Court simply cited *Karner* for the holding that "all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant[]" and indicated the plaintiffs acknowledged *Karner* controlled their case. *Id.* Thus, this Court found the plaintiffs' argument meritless. *Id.*

The Association now claims *Karner* and *Page* control the present case. We, however, find the present case distinguishable.

In *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n., Inc.*, 187 N.C. App. 22, 652 S.E.2d 378 (2007) this Court distinguished a covenant for the payment of recreational amenity fees from the residential use restriction at issue in *Karner*. This Court explained that, whereas a residential use restrictive covenant included in all deeds conveying lots in a subdivision according to a common plan of development was a valuable property right enforceable by all property owners,

> only the owner of the recreational amenities [in *Midsouth Golf*] ha[d] the power to levy such a recreational amenity charge. As such, only the owner of the recreational amenities ha[d] the power to enforce [the] restrictive covenant. None of the property owners within Fairfield Harbour ha[d] the right to enforce the covenant to pay amenity fees against any of the other owners. Accordingly, the extinguishment of the restrictive covenant in [*Midsouth Golf*] would not deprive the other property owners of any property right akin to the right that the nonparty property owners were deprived of in *Karner*.

Id. at 28-29, 652 S.E.2d at 383. In *Midsouth Golf*, this Court also addressed its decision in *Page*, indicating it could not rely upon *Page* because "*Page* does not reveal sufficient facts for us to determine whether the covenant at issue was similar to the one at issue in the present case." *Id.* at 29, 652 S.E.2d at 383. This Court further explained that:

> *Page* does not discuss how the nonparty property owners were in danger of losing a property right by invalidation of the covenant because the plaintiffs effectively conceded that *Karner* applied and that the Court was bound by *Karner*. While invalidation of the covenant in the present case could have some effect on nonparty property owners in Fairfield Harbor, invalidation of the covenant would

> not deprive them of any property right, which is required under *Karner* to make them necessary parties.

Id. at 29-30, 652 S.E.2d at 383-84 (citation omitted).

Following the reasoning in *Midsouth Golf*, we hold the Staals were proper parties to the action seeking to declare the amendments to the Declaration invalid and unenforceable, but were not necessary parties. The amendments at issue in the present case did not extinguish any property rights of the Staals akin to those in *Karner*. Therefore, we hold the trial court did not err in denying the Association's motion to dismiss.

Because the Staals were not necessary parties, we need not address whether the lis pendens was proper in this action.

Plaintiffs' Appeal

[2] In plaintiffs' appeal, plaintiffs first argue the trial court erred in entering partial summary judgment upholding the validity and enforceability of the Assessment Amendment. Specifically, plaintiffs contend the trial court erred because the assessment amendment was not signed by seventy-five percent (75%) of the lot owners and is not reasonable in light of the contracting parties' original intent.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

For background, the original Declaration required each lot owner to pay annual assessments to the Association. Builders, however, were afforded the following benefits:

> Lots owned by the builder of the initial improvements on the Lot ("Builder") shall be assessed at a rate of twenty-five percent (25%) of the amount of the assessment due for a Lot that is owned by the Builder. The assessments on Lots owned by a Builder shall accrue each month that the Builder owns the Lot and shall not be required to be paid by the Builder until the date of closing of the sale of a Lot from a Builder to a consumer-occupant Lot Owner or the date of rental of a Lot from a builder to a consumer-occupant Lot Owner.

The Assessment Amendment recorded in the Wake County Register of Deeds on 7 November 2011 eliminated these benefits to builders. Specifically, the Assessment Amendment provides:

> There shall be no reduced assessment or delayed payment schedule for any Lot, regardless who owns the Lot or whether or not the Lot has been developed. . . .
>
> As of the effective date of this amendment, Owners of developed/unsold, partially developed or undeveloped Lots will be required to pay all accrued assessments in full that were previously scheduled to be due per the old Article IV, Section 9 prior to this amendment (at the previous 25% rate). These assessments are to be paid by January 31, 2012.

Pursuant to its terms, the Assessment Amendment became effective 1 January 2012.

On appeal, plaintiffs first contend the trial court erred in upholding the Assessment Amendment because the Assessment amendment was not properly signed by the required number of lot owners.

The general provisions of the Declaration allow for amendment during the first twenty (20) years "by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners[.]" It is undisputed that at the time of the amendments, there were 44 lots in Linville Subdivision. Therefore, approval of an amendment required the signatures of the owners of 33 lots.

The Assessment Amendment, as recorded in the Wake County Register of Deeds, appears to include signatures of approval by owners of 33 lots. Additionally, a certification signed by the president and the secretary of the Association verifying the Assessment Amendment was "duly executed by the written signatures of seventy-five percent (75%) of the membership" was recorded with the Assessment Amendment.

On appeal, plaintiffs acknowledge that if the signatures for the 33 lots were properly executed, the procedural requirements for amendment were met. Plaintiffs, however, contend that the amendment was only properly signed by owners of 30 lots. Plaintiffs allege the signatures for Lot 5, Lot 22, and Lot 37 were inadequate to approve the Assessment Amendment.

Upon review of plaintiffs' argument, we find it is unnecessary to assess the validity of each signature.

> On a motion for summary judgment the moving party has the burden of establishing that there is no genuine issue as to any material fact. Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial[.]

Gillis v. Whitley's Discount Auto Sales, Inc., 70 N.C. App. 270, 274, 319 S.E.2d 661, 664 (1984) (citations omitted).

In this case, the Association moved for summary judgment and the Assessment Amendment, as recorded, appears to contain the required signatures for approval. As plaintiffs admitted, it is their burden to bring forward specific facts showing the Assessment Amendment was not properly approved. Plaintiffs have not done so in this case. We hold plaintiffs' allegations as to the lack of the signees' authority to sign on behalf of the contested lots, without more, is insufficient to raise an issue for trial.

Moreover, during oral arguments before this Court, plaintiffs focused on the validity of the signatures for Lot 37 by arguing an acknowledgment signed by the trustees of the trusts owning Lot 37 and recorded in the Wake County Register of Deeds on 22 December 2011 is evidence that the amendment was not properly signed. We are not convinced. The acknowledgement provided that the trustees of the trusts owning Lot 37 "were in agreement with the [Assessment] Amendment in all respects and intended to sign off on the amendment indicating their intent to be bound by the amendment and did, in fact, sign off on the [Assessment] Amendment indicating their intent to be bound by it[.]" In executing the acknowledgment, the trustees did not concede the Assessment Amendment was not executed properly. Moreover, the acknowledgement was signed and recorded prior to 1 January 2012, the effective date of the Assessment Amendment.

Nevertheless, plaintiffs' procedural argument is not determinative in this case. Plaintiffs also argue the trial court erred in entering partial summary judgment upholding the Assessment Amendment because the amendment contravenes the original intent of the Declaration. In support of their argument, plaintiffs rely on *Armstrong v. Ledges Homeowners Ass'n., Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006).

In *Armstrong*, our Supreme Court explained the following:

> The term amend means to improve, make right, remedy, correct an error, or repair. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain. In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration.

Id. at 558, 633 S.E.2d at 87 (citations omitted). Thus, the Court held that "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be *reasonable* in light of the contracting parties' original intent." *Id.* at 559, 633 S.E.2d at 87 (emphasis in original).

"[A] court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.* at 559, 633 S.E.2d at 88. Yet, "[i]n all such cases, a court reviewing the disputed declaration amendment must consider both the legitimate needs of the homeowners' association and the legitimate expectations of lot owners." *Id.* at 560, 633 S.E.2d at 88.

Applying the above to the facts of A*rmstrong*, the Court held an amendment authorizing "broad assessments 'for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of [the community] as may be more specifically authorized from time to time by the Board' [was] unreasonable[,]" and thus invalid and unenforceable. *Id.* at 560-61, 633 S.E.2d at 88. In reaching its conclusion, the Court noted the nature of the community and the fact that there was nothing in the original declaration revealing an intent to confer unlimited powers of assessment on the homeowners' association. Specifically, the community was a "small residential neighborhood with public roads, no common areas, and no amenities." *Id.* at 560, 633 S.E.2d at 88. Furthermore, the "petitioners purchased their lots without notice that they would be subjected to . . . additional affirmative monetary obligations imposed by a homeowners' association." *Id.* at 561, 633 S.E.2d at 89.

The Association, however, citing *Southeastern Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 598, 683 S.E.2d 366, 371 (2009) (holding an assessment amendment was reasonable given the community, which was in existence for nearly a century, was developed to foster a unique religious character, purchasers purchased lots with knowledge of the extensive amenities and with notice that the lots were subjected to a wide variety of detailed restrictions, and it was clear the original intent of the parties was to bind all purchasers to any rules deemed necessary to preserve the unique religious character and history of the community), argues the Assessment Amendment is reasonable in light of Linville Subdivision's unique characteristics and certain unanticipated circumstances.

Specifically, the Association distinguishes Linville Subdivision from the community in *Armstrong* on the grounds that Linville Subdivision is a private community with private roads, common areas, and amenities, all of which must be maintained and paid for by the Association. Quoting the Declaration, the Association further argues the prevailing intent behind the Declaration's original assessment provisions was to provide an assessment rate that was adequate to meet the needs of the Association. The Association contends it was never intended, nor anticipated, that builders would own unimproved lots and be exempt from the full assessment rate for extended periods of time. The developer expected that all lots would be built on by 2011. In fact, the Association points to a provision in builder agreements executed by plaintiffs that requires builders to build promptly to support its position that the Assessment Amendment is proper to address unanticipated circumstances.

While we agree with the Association that Linville Subdivision is easily distinguishable from the community in *Armstrong*, we also find the Assessment Amendment easily distinguishable from the amendment at issue in *Armstrong*. Owners of lots in Linville Subdivision have been subjected to assessments from the beginning. Unlike the amendments at issue in *Armstrong* and *Emerson*, the Assessment Amendment does not establish new assessments on the entire community, but instead eliminates benefits afforded builders; benefits that likely persuaded builders to purchase lots in the first place and were essential to the original bargain.

We find it evident from the Declaration's original language that the intent of the provision providing builders with reduced assessments and deferrals in the payment of assessments was to encourage builders to purchase lots from the developer earlier than they might otherwise have

purchased them; even before builders were ready to build. Not only did the provisions benefit builders, they also benefited the developer who was able to sell the lots more expeditiously. In a complete reversal, the Assessment Amendment eliminated the benefits that were essential to the original bargain with builders like plaintiffs.

While the primary purpose of the assessment provisions in the Declaration may be to provide sufficient funds for the Association to maintain the community and amenities, the Association originally approved the Declaration with the benefits to builders included. Now that all lots in Linville Subdivision are sold and the Association has the required number of votes for amendment, the Association cannot now amend the Declaration to the detriment of the builders who purchased lots with the expectation that they would be afforded the benefits. Moreover, with the exception of the easement for a separate construction entrance, the costs that the Association claims it cannot now afford because three out of the forty-four lots in Linville Subdivision do not pay the full assessment rate are costs that should have been anticipated to begin with. Lastly, we are not persuaded that the language in builder agreements requiring builders to build promptly controls where the intent of the Declaration's original provisions are clear. Besides, even if the builder agreements did control, this Court will not determine what constitutes prompt as a matter of law.

Where the Assessment Amendment disregards the purpose of the Declaration's original provisions and completely eliminates the benefits to builders, we hold the amendment unreasonable, invalid, and unenforceable. Holding otherwise would permit homeowners' associations to amend similar provisions whenever they acquire the requisite number of votes for approval, regardless of the original intent. As our Supreme Court stated in *Armstrong*, "[t]his Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Armstrong*, 360 N.C. at 561, 633 S.E.2d at 89.

The trial court's final judgment and order awarding the Association attorneys' fees were based on its grant of partial summary judgment upholding the Assessment Amendment. Having determined the Assessment Amendment is unreasonable, invalid, and unenforceable, we vacate the final judgment and the order on attorneys' fees. Thus, we do not address plaintiffs' final argument regarding the sufficiency of the trial court's order on attorneys' fees.

III. Conclusion

For the reasons discussed above, we affirm the denial of the Association's motion to dismiss, reverse the grant of partial summary judgment, and vacate the final judgment and the award of attorneys' fees in favor of the Association.

Affirmed in part, reversed in part, vacated in part.

Judges McGee and GEER concur.

WEAVER INVESTMENT COMPANY AND TRAVEL CAMPS, INC., ON THEIR OWN BEHALF AND ON BEHALF OF FOURTH CREEK LANDING HOUSING LIMITED PARTNERSHIP AND FOURTH CREEK LANDING ASSOCIATES, PLAINTIFFS

v.

PRESSLY DEVELOPMENT ASSOCIATES, PRESSLY DEVELOPMENT COMPANY, INC., DAVID L. PRESSLY, AND EDWIN A. PRESSLY, DEFENDANTS

No. COA13-624

Filed 1 July 2014

1. Unfair Trade Practices—acts occurring within partnership—no in or affecting commerce

The trial court erred in part in a fraud and unfair and deceptive trade practices case by concluding that defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in trebling damages as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by trebling damages with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same trebling of damages and attorney's fees to which the independent contractor was subject.

2. Attorney Fees—fraud—unfair trade practices—acts occurring within partnership—no in or affecting commerce

The trial court erred in part in a fraud and unfair trade practices case by awarding attorney fees based on its conclusion that

defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in awarding attorney fees as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by awarding attorney's fees with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same attorney's fees to which the independent contractor was subject.

3. Costs—bookkeeping fees—testimony of court-appointed accountant—authority of trial court

The trial court did not err in a fraud and unfair trade practices case by awarding bookkeeping fees, relying on the testimony of a court-appointed accountant in setting those fees, and denying defendants the opportunity to rebut that accountant's testimony. The trial court had the authority to appoint an accountant to perform a forensic accounting of the entities and to assess the fees for the expert.

4. Evidence—outside of scope—damages—excluded

Where defendants sought to introduce evidence that was outside of the scope of the hearing on damages in a fraud and unfair trade practices case, the trial court did not abuse its discretion in excluding this evidence.

5. Costs—forensic accountants fees—recoverable by plaintiffs

The trial court did not err in a fraud and unfair trade practices case by ruling that the fees of the forensic accountants ordered to examine defendants' books were costs recoverable by plaintiffs.

6. Fraud—unfair trade practices—depreciation of value of property

The trial court did not err in a fraud and unfair trade practices case by holding defendants liable for the depreciation in value of certain property where there was evidence that defendants were responsible for depreciation in value of that property.

7. Appeal and Error—argument deemed abandoned—no legal support

Where defendants offered no legal argument as to why the trial court could not dissolve the partnership at issue, defendants' argument was deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

8. Fiduciary Relationship—breach of duty—constructive fraud —unchallenged findings of fact

The trial court did not err by finding that defendants breached a fiduciary duty and engaged in constructive fraud. Defendants did not challenge the trial court's relevant findings and the findings supported the conclusion that defendants breached their fiduciary duty and engaged in constructive fraud.

9. Statute of Limitations and Repose—fraud—unfair trade practices—statute not expired

The trial court did not err in a fraud and unfair trade practices case by holding that the statute of limitations had not expired. Defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods.

Appeal by defendants from judgment entered 18 May 2011 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 21 October 2013.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by S. Leigh Rodenbough IV and Charnanda T. Reid, for plaintiff-appellees.

Eisele Ashburn Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellants.

STEELMAN, Judge.

Where alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. The trial court erred in trebling damages and awarding attorney's fees as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court had the authority to appoint an accountant to perform a forensic accounting of the entities and to assess the fees for the expert. Where defendants sought to introduce evidence that was outside of the scope of the hearing, the trial court did not abuse its discretion in excluding this evidence. Where there was evidence that defendants were responsible for depreciation in value of certain property, the trial court did not err in holding defendants liable for the depreciation. Where defendants offer no legal argument as to why the trial court could not dissolve the partnership, defendants' argument is deemed abandoned. Where defendants do not challenge the trial court's findings regarding breach of fiduciary duty and constructive fraud, the trial court did not

err in its conclusion based upon these findings. Where defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods, the trial court did not err in holding that the statute of limitations had not expired.

I. Factual and Procedural Background

Weaver Investment Company (WIC) is one of three limited partners of Fourth Creek Landing Housing Limited Partnership (Fourth Creek Limited Partnership), with an 18.75% ownership interest. The other two limited partners are Travel Camps, Inc., (Travel) with a 37.5% interest, and Pressly Development Associates, (PDA) with an 18.75% interest. The general partner of the Partnership is Fourth Creek Landing Associates (FCLA), a general partnership, which holds a 25% interest in Fourth Creek Limited Partnership. WIC and PDA are the two general partners of FCLA, each with a 50% interest. The business relationship between WIC and PDA, as general partners of FCLA, is governed by a partnership agreement dated 16 May 1985. The business relationship between the general and limited partners of Fourth Creek Limited Partnership is governed by a limited partnership agreement, dated 16 May 1985, along with several amendments thereto.

Fourth Creek Limited Partnership owns the first phase of an apartment complex known as Fourth Creek Landing Apartments (Fourth Creek Apartments I) located in Iredell County. Pressly Development Company, Inc. (PDCI) is a corporation that manages and leases the entire Fourth Creek Landing Apartments, which includes Fourth Creek Apartments I, and an additional 48 units (Fourth Creek Apartments II) owned by a separate company, Fourth Creek Landing Associates II, LLC (FCLA II). PDCI conducts the day to day business of Fourth Creek Apartments I and Fourth Creek Apartments II. PDCI charges fees to Fourth Creek Limited Partnership for its services to Fourth Creek Apartments I. David Pressly (David) and Edwin Pressly (Edwin) are brothers who are the general partners of Free Nancy Partnership (Free Nancy), which is the sole member of FCLA II. David and Edwin each hold a 50% general partnership interest in PDA, and a 50% shareholder interest in PDCI. David is also the President of PDCI and the Manager of FCLA II. Edwin is a General Partner of PDA and the Secretary of PDCI.

On 22 December 2009, WIC and Travel filed this action against PDA and PDCI. They also brought this action on behalf of Fourth Creek Limited Partnership and FCLA. FCLA II was not a party to this action. The complaint alleged that PDA had acted *ultra vires* to the partnership agreement of Fourth Creek Limited Partnership, that PDCI or

FCLA II had converted funds related to cable television services in Fourth Creek Apartments I, and that PDCI had engaged in inappropriate accounting practices with regard to its management services for Fourth Creek Limited Partnership. Plaintiffs sought monetary damages from defendants, termination of PDCI as property manager for Fourth Creek Apartments I, dissolution of FCLA, dissolution of Fourth Creek Limited Partnership, and monetary damages for breach of fiduciary duty against PDA.

On 19 August 2010, plaintiffs moved to join David and Edwin as defendants. This motion was granted 8 September 2010. On 10 September 2010, plaintiffs filed an amended complaint. The amended complaint alleged additional causes of action for fraud against all four defendants; constructive fraud by PDA, David and Edwin; aiding and abetting fraud and breach of contract by Edwin; unfair and deceptive trade practices as to all four defendants; establishment of a constructive trust with regard to the converted funds; punitive damages; and to pierce the corporate veil of PDCI under an alter ego theory. Plaintiffs further alleged that David, having volunteered to locate a real estate broker in order to sell the property of Fourth Creek Apartments I, delayed doing so in an attempt to maximize his profits for FCLA II and PDCI; that David executed and recorded a cross-easement between Fourth Creek Apartments I and Fourth Creek Apartments II without authority, and failed to disclose that action; and that David executed a management agreement, ostensibly on behalf of Fourth Creek Limited Partnership, without authorization.

On 11 October 2010, defendants filed an answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 17 December 2010, plaintiffs voluntarily dismissed their claim for dissolution of Fourth Creek Limited Partnership pursuant to Rule 41 of the Rules of Civil Procedure. All parties waived a jury trial pursuant to Rule 38(d) of the Rules of Civil Procedure.

On 18 May 2011, following a hearing, the trial court entered judgment. The trial court found that David, on his own behalf and on behalf of PDA and PDCI, had misled plaintiffs; engaged in unauthorized conduct; overcharged Fourth Creek Limited Partnership; failed to make payments owed to Fourth Creek Limited Partnership; purposefully delayed in obtaining a broker to sell the property of Fourth Creek Apartments I in order to increase revenues for PDCI and FCLA II; converted funds from Fourth Creek Limited Partnership; used PDA and PDCI as his alter ego; and engaged in unfair and deceptive trade practices. The trial court concluded that PDCI, through David, had breached its fiduciary duty

to Fourth Creek Limited Partnership, and had engaged in constructive fraud; that PDA, through David, had breached its fiduciary duty to FCLA and to Fourth Creek Limited Partnership, and had engaged in constructive fraud; that David, PDA and PDCI had engaged in fraud; that Edwin did not aid and abet in the breaches of fiduciary duty of PDA and PDCI; that David, PDA and PDCI had engaged in unfair and deceptive trade practices; that David was individually liable for the torts of PDCI; that David and Edwin, as owners of PDCI, were personally liable for the liability attributable to PDCI under a piercing the corporate veil theory; that David and Edwin, as general partners in PDA, were personally liable for the liability attributable to PDA; and that Edwin's conduct was such as to not merit treble damages, which were assessed against David, PDA and PDCI. The trial court further concluded that plaintiffs did not meet their burden of proving damages with regard to David's alleged delay in listing the property of Fourth Creek Apartments I for sale, his recordation of a cross-easement without authority, and his unauthorized execution of a management agreement, and that only nominal damages were appropriate for these claims. The trial court also concluded that David, Edwin, and Free Nancy reasonably relied on the business judgment rule with regard to unauthorized loans David had taken out as business necessities. The trial court ordered that an accounting of PDCI's books and records be conducted, the dissolution of FCLA, and held that, because defendants' actions did not cease three years before the filing of the suit against them, the continuing wrong doctrine barred defendants from asserting a statute of limitations defense.

The trial court awarded Fourth Creek Limited Partnership damages in the amount of $176,000.00 for defendants' concealment of revenue, $226,464.00 for defendants' concealment of losses resulting from the unauthorized housing of on-site employees at Fourth Creek Apartments I, $46,872.00 for defendants' overcharging services to Fourth Creek Limited Partnership, $1.00 nominal damages for defendants' unauthorized execution and recordation of the cross-easement, $1.00 nominal damages for defendants' unauthorized execution of a management agreement, and $1.00 nominal damages for defendants' purposeful delay in retaining a broker for the purpose of selling the property of Fourth Creek Apartments I. The trial court held that Edwin would not be subject to treble damages. The trial court also determined that Fourth Creek Limited Partnership was entitled to an award of attorney's fees from PDA, PDCI and David. The trial court held that the damages awarded were subject to adjustment based upon an accounting of the books and records of PDCI. The trial court appointed a receiver for Fourth Creek Limited Partnership and FCLA, terminated PDCI as property manager

for Fourth Creek Apartments I, and ordered a forensic accounting of PDCI's books. The trial court also ordered an accounting of the replacement cost of the amenities and facilities of Fourth Creek Apartments I, which Fourth Creek Limited Partnership would be entitled to collect as damages from defendants. The trial court also ordered that PDA's share of Fourth Creek Limited Partnership be redeemed. The trial court ordered the dissolution of FCLA, but not of Fourth Creek Limited Partnership, and the termination of the cross-easement between Fourth Creek Apartments I and Fourth Creek Apartments II. Finally, the trial court held that the unauthorized satellite television equipment installed by defendants was the property of Fourth Creek Limited Partnership, as its value was less than the unpaid rent that was owed by defendants to Fourth Creek Limited Partnership. The judgment also provided that these damages could be modified based upon the future accounting.

On 20 June 2012, the trial court entered its supplemental judgment as to damages, based upon the accounting of the books and records of PDCI. It held that the net fair market value of Fourth Creek Apartments I was $1,233,295.00; that PDA's net interest in Fourth Creek Limited Partnership was worth $385,405.00; that the total cost for site improvements to FCLA was $90,000.00; and that the total replacement damages for FCLA were $160,000.00. The trial court held that Fourth Creek Limited Partnership was entitled to recover from defendants $131,599.00 for the conversion of satellite television revenue, plus $45,249.00 interest. The court further held that the principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $394,797.00.[1]

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $13,851.00 for the assessment of management fees relating to the satellite television revenue, plus $5,015.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $41,553.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $41,385.00 for unauthorized housing of employees, plus $13,881.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $124,155.00.

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1. All damages that were trebled were pursuant to Chapter 75 of the North Carolina General Statutes.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $162,369.00 for the unauthorized income to Fourth Creek Apartments II based upon the unauthorized housing of employees, plus $62,926.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $487,107.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $32,880.00 based upon defendants' overcharging of salaries and expenses, plus $13,999.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $98,640.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $105,478.00 for the unauthorized collection of undisclosed bookkeeping fees beyond those contractually agreed upon by the parties, plus $53,998.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $316,434.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $48,000.00 for failure to pay its share of the amenities of Fourth Creek Apartments I, plus $35,531.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of $144,000.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants $1.00 in nominal damages for the unauthorized execution and recordation of the 2001 Cross-Easement, $1.00 in nominal damages for the execution of the 1996 Management Agreement, and $1.00 in nominal damages for purposeful delay in contracting with a real estate broker.

In total, the trial court held that Fourth Creek Limited Partnership was entitled to $535,562.00, plus interest of $230,599.00, for a total of $766,161.00. The principal amounts were trebled to $1,606,686.00 with respect to PDA, PDCI, and David. All of the defendants were liable for the total of $3.00 in nominal damages. The trial court credited $385,405.00 against these damages based upon PDA's redemption of its interest in Fourth Creek Limited Partnership. The trial court further held that plaintiffs were entitled to recover from defendants $306,380.34 in reasonable attorney's fees, $5,500.00 for the cost of an appraisal of the Fourth Creek Apartments I amenities, $68,854.48 for the forensic audit, and $787.50 in expert witness fees for the testimony of the court-appointed appraiser.

Defendants appeal.

II. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

Defendants have not challenged the trial court's findings of fact.[2] These findings are therefore binding upon this court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Our review is therefore limited to whether the trial court's findings support its conclusions of law.

III. Unfair and Deceptive Trade Practices

[1] In their first argument, defendants contend that the trial court erred in concluding that defendants' acts were "in or affecting commerce" in North Carolina. We agree in part.

Pursuant to N.C. Gen. Stat. § 75-1.1, "[i]n order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

Our Supreme Court has held that N.C. Gen. Stat. § 75-1.1 does not apply within the confines of a partnership. *See White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010). In *White*, the defendant, a partner in the Ace Fabrication and Welding entity, diverted work from the partnership prior to his departure from the business, and improperly maintained accounts. Plaintiffs brought action against defendant, alleging breach of fiduciary duty. The trial court ruled in favor of plaintiffs, and granted plaintiffs treble damages. *Id.* at 47-51, 691 S.E.2d at 676-78. On appeal, a majority of this Court reversed the treble damages, holding that defendant's usurpation of partnership opportunities was not "in or affecting

2. Defendants mischaracterize the court's conclusions of law that defendants breached their fiduciary duty and engaged in constructive fraud as findings of fact; they are not findings of fact, but conclusions of law.

commerce" under our Unfair and Deceptive Trade Practices statute. The majority otherwise affirmed the trial court's decision. *Id.* at 51, 691 S.E.2d at 678-79. The Supreme Court held that "[o]ur prior decisions have determined that the General Assembly did not intend for the Act's protections to extend to a business's internal operations." *Id.* at 53, 691 S.E.2d at 680. It affirmed the decision of the Court of Appeals, concluding that defendant's conduct within the partnership was not "in or affecting commerce."

The facts of the instant case show that PDA was a member of Fourth Creek Limited Partnership; that David and Edwin were the general partners of PDA; that defendants, through PDCI, were engaged by Fourth Creek Limited Partnership to operate Fourth Creek Apartments I; and that defendants engaged in various acts inconsistent with their obligations to Fourth Creek Limited Partnership.

We hold that, while the evidence in the record supports the trial court's findings that defendants committed fraud, delayed in the sale of real property, and had a duty to provide an accounting to plaintiffs, it also clearly shows the status of David, Edwin, and PDA as partners within the Fourth Creek Limited Partnership joint enterprise. Pursuant to the Supreme Court's decision in *White v. Thompson*, defendants' misconduct within the confines of the partnership was not "in or affecting commerce," and therefore does not invoke N.C. Gen. Stat. § 75-1.1 or its trebling provisions. We hold that, while the trial court did not err in imposing damages against David, Edwin, and PDA for their misconduct, it erred in trebling the damages against David and PDA with regard to satellite revenue, employee housing, bookkeeping, salaries and expenses, and failure to maintain amenities, pursuant to North Carolina's Unfair and Deceptive Trade Practices statute, specifically N.C. Gen. Stat. § 75-16. Additionally, because the award of attorney's fees was made pursuant to N.C. Gen. Stat. § 75-16.1, based upon defendants' alleged violations of the Unfair and Deceptive Trade Practices statute, we hold that the trial court erred in awarding attorney's fees to plaintiffs, with regard to David, Edwin and PDA.

PDCI, however, was not a member of the Fourth Creek Limited Partnership. The trial court found that PDCI "has served as the property manager and leasing manager . . . for the entire Fourth Creek Landing Apartments . . . [and] controls the day to day affairs of the Fourth Creek Landing Apartments[.]" Although the conduct of David, Edwin, and PDA was within the partnership context, and thus was not "in or affecting commerce," PDCI was a separate entity hired by Fourth Creek Limited Partnership.

Our Supreme Court has held that an employee's fraudulent self-dealing misconduct "[did] not preclude applicability of N.C.G.S. § 75–1.1 to [his] case." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999). In *Sara Lee*, plaintiff Sara Lee hired defendant to "develop[] and maintain[] relationships with vendors to provide [Sara Lee Knit Products] with the best possible pricing, availability, and support of hardware and services." *Id.* at 29, 519 S.E.2d at 309. Defendant was "authorized and entrusted to order and purchase computer parts at the lowest possible prices[,]" and was "responsible for the maintenance and repair of personal computers." *Id.* During his employment with Sara Lee, defendant "developed four separate businesses . . . through which he engaged in self-dealing by supplying Sara Lee with computer parts and services at allegedly excessive cost while concealing his interest in these businesses. Sara Lee paid a total of $495,431.54 to defendant's businesses for parts and services." *Id.*

When Sara Lee brought action against defendant for this fraud, the trial court ruled in favor of Sara Lee, holding that "[t]he transactions between Sara Lee and the Carter Enterprises were not open, fair and honest. In fact, the clear, cogent, and convincing evidence is, to the contrary, that [defendant] used his position of trust at Sara Lee to make profits on transactions involving the Carter Enterprises without disclosing his financial interest in the Carter Enterprises to his superiors at Sara Lee." *Id.* at 30, 519 S.E.2d at 310. This Court agreed, holding that "[d]efendant breached his fiduciary duty by selling computer parts to Sara Lee without disclosing his interest in the companies supplying these parts." *Id.* (quoting *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 471, 500 S.E.2d 732, 737 (1998)). However, this Court then held that the defendant did not violate § 75-1.1, because he was employed by Sara Lee at the time of the fraud.

Our Supreme Court reversed, concluding that defendant's conduct was "in or affecting commerce," and that,

> having already characterized defendant's conduct as buyer-seller transactions that fall squarely within the Act's intended reach, we conclude that defendant's relationship to plaintiff as an employee, under these facts, does not preclude applicability of N.C.G.S. § 75–1.1 to this case. Even though defendant was an employee, he nevertheless engaged in self-dealing conduct and "business activities." N.C.G.S. § 75–1.1(b). On these facts, defendant's mere employee status at the time he committed these acts does not safeguard him from liability under the Act.

Id. at 34, 519 S.E.2d at 312.

If an employee can be held liable under § 75-1.1, it seems clear that an independent contractor, such as PDCI, may also be held liable. Accordingly, we hold that the trial court did not err in trebling damages and awarding attorney's fees with regard to PDCI. Further, because the trial court concluded that David was individually liable for the torts committed by PDCI under a veil-piercing theory, David is subject to the same trebling of damages and attorney's fees to which PDCI is subject.

We vacate the portions of the trial court's order trebling damages and awarding attorney's fees against David, Edwin and PDA, as members of Fourth Creek Limited Partnership, pursuant to the Unfair and Deceptive Trade Practices statute, and remand for an order reducing damages accordingly. We affirm the judgment of the trial court trebling damages and awarding attorney's fees with regard to PDCI, and David individually based upon a piercing the corporate veil theory through PDCI.

IV. Awards of Fees, Costs and Damages

In their second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth arguments, defendants contend that the trial court erred in awarding attorney's fees and bookkeeping fees, in basing its damages upon the testimony of an expert witness and denying defendants the opportunity to rebut that testimony, in awarding as costs the fees of expert witnesses, in awarding damages for the depreciation in value of Fourth Creek Apartments I, in basing damages upon the fair market value of Fourth Creek Apartments I, and in removing PDCI from the Partnership.[3]

A. Attorney's Fees

[2] Defendants first contend that the trial court erred in awarding attorney's fees. We agree in part.

The trial court awarded attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1. This statute provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such

3. Defendants contend that the trial court erred in removing PDCI as a member of the partnership. However, the trial court did not remove PDCI; it removed FCLA, and its half-owner PDA, from the partnership.

> attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2013). As we held above, the trial court erred in concluding that certain defendants violated N.C. Gen. Stat. § 75-1.1. Accordingly, the trial court erred in awarding attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 against David, Edwin, and PDA, as members of Fourth Creek Limited Partnership; the trial court did not err in awarding attorney's fees against PDCI, or against David who was individually liable for the actions of PDCI under a veil-piercing theory. As described in Section III of this opinion, we vacate the award of attorney's fees with respect to David, Edwin and PDA, and find no error with respect to PDCI, and David through PDCI. As discussed in Section III of this opinion, above, we remand with instructions for the trial court to award fees only against PDCI, and David through PDCI.

B. Bookkeeping Fees

[3] Defendants next contend that the trial court erred by awarding bookkeeping fees, by relying on the testimony of Eric Lioy in setting those fees, and by denying defendants the opportunity to rebut Lioy's testimony. We disagree.

Eric Lioy is a Grant Thornton accountant who was charged by the court to provide an accounting of PDCI's expenses for "things such as satellite television revenue, employee housing, affects [sic] of the management fee and a couple other matters[.]" The trial court's judgment does not cite to his testimony, because Lioy did not testify at trial, but testified instead at a separate hearing, on 10 October 2011. Regarding Lioy's testimony, the trial court held that:

> Now, this is really just designed -- I'm not -- I'm not going to treat it as an evidentiary hearing, but I'm going to treat it as a way of this witness helping me and Mr. Eisele go through the book[s] and -- or the documents and sort of just take me through it step by step as to what it -- how it's comprised and how -- what findings were made and

> just sort of take me through it as kind of a guideline or road map.

At this hearing, Lioy testified under oath that he and his team performed the services requested by the court, which also included forensic accounting, searches of computer documents, and double-checking of accounting calculations between "January 1, 2002 through March 31, 2011." Lioy went on to testify to the contents of his report, which had been previously submitted to the trial court. At no point did defendants object to Lioy's testimony. Defendants did object, however, to "this $159,000 item[,]" referring to a $159,176.00 item in the report, which was bookkeeping fees paid by Fourth Creek Apartments I to PDCI in 1999, plus interest. Defendants contended at the hearing that this item

> was not raised in the pleadings, it was never suggested during the trial, there was no mention of it made in oral argument at any time, it was not the subject of any amendment to the pleadings made at the conclusion of the trial. I didn't know anything about it until the Grant Thornton report came down and I'm sure Mr. Rodenbough didn't know about it until the Grant Thornton report came down.

The trial court noted defendants' objection, but held that "that's something we're going to need to take up at a subsequent hearing."

The hearing was recessed, and subsequently reconvened on 2 December, 2011. At this hearing, defendants once again objected to the bookkeeping fees, asserting that "[t]he word bookkeeping fees never came up." The trial court responded, however, that "Mr. Eisele, my recollection of things and my concept of things are different from yours." The trial court overruled defendants' objection, and considered the evidence.

The trial court's order did not refer to Lioy's testimony. Instead, as defendants concede,

> there is nothing in the record except the Grant Thornton report (presented at a hearing deemed not to be "evidentiary") pertaining to bookkeeping fees, save and except (1) par. 8.7(c) of the Limited Partnership Agreement (Ps' Ex 3) allowing as Expenses "(c) legal, audit, accounting, brokerage and other fees", and (2) Defendants' Exhibit H-2, which reveals bookkeeping fees in addition to PDC's 6% commission dating back to 1999.

Defendants acknowledge the existence of evidence to support the trial court's finding that PDCI charged bookkeeping fees; the fact that the trial court may or may not have additionally relied upon Mr. Lioy's testimony is irrelevant. This evidence supports a finding that PDCI charged fees for bookkeeping, which as stated above supports an order awarding those fees as damages to plaintiffs.

The trial court found that PDCI had charged plaintiffs for bookkeeping, while PDCI used its own formulae on Fourth Creek Limited Partnership's books to conceal the treatment of particular expenses. As a result of the commingling of assets between defendants and Fourth Creek Limited Partnership, the trial court ordered that forensic investigators "inquire into . . . failures by [PDCI] to properly calculate, allocate and/or charge to [Fourth Creek Limited Partnership] any management fees, bookkeeping fees, employee reimbursements or other expense reimbursements," which the Partnership would be entitled to receive as damages. PDCI charged plaintiffs for bookkeeping services, and then fraudulently concealed expenses from plaintiffs on those books. We therefore hold that, where PDCI used its authority as bookkeeper to fraudulently conceal expenses, the trial court did not err in awarding damages to plaintiffs based upon the bookkeeping fees charged by PDCI.

This argument is without merit.

C. Defendants' Evidence on Bookkeeping Fees

[4] At the hearings before the trial court to address the amount of damages, attorney's fees and costs to be awarded to plaintiffs, defendants sought to introduce evidence that defendants were entitled to charge fees for the bookkeeping defendants performed. Defendants intended to use this evidence to rebut plaintiffs' claims that defendants' fees were fraudulent, and sought to make an offer of proof before the trial court. The trial court excluded this evidence. Defendants contend that this exclusion was error. We disagree.

We note first that the trial court's decisions to admit or exclude evidence are reviewed for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

In its 18 May 2011 order, the trial court found that defendants used accounting procedures to improperly allocate expenses to Fourth Creek Landing Partnership. Preliminary damages were awarded to plaintiffs, subject to being increased or decreased based upon a forensic accounting ordered by the court. At the hearings on the amount of damages,

defendants sought to introduce evidence as to "the propriety of charging bookkeeping expenses as a project cost to the project and not to be included in the six percent management fee . . ."

The trial court held that it had already ruled on the liability issue in its 18 May 2011 order, and that the current hearing was limited to damages. Since the evidence offered by defendants went to liability rather than damages, the trial court excluded the evidence. We discern no abuse of discretion on the part of the trial court in the exclusion of this evidence.

This argument is without merit.

D. Court-Ordered Accounting

[5] In a supplemental order and judgment on damages dated 12 June 2012, the trial court ruled that the fees of the forensic accountants ordered to examine the books of Fourth Creek Limited Partnership and PDCI were costs recoverable by plaintiffs. Defendants contend that the trial court erred in awarding these fees as costs against defendants. We disagree.

Pursuant to the North Carolina Rules of Evidence, an expert appointed by the court is "entitled to reasonable compensation in whatever sum the court may allow. . . . In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." N.C. R. Evid. 706.

Defendants contend that the forensic accountants were not court-appointed experts, but plaintiffs' experts, and thus that these fees should not have been taxed as costs. Defendants argue that the accountants never provided defendants with a copy of their findings. The testimony cited by defendants shows that the accountant, Lioy, did not provide defendants with a copy of his report. However, this same testimony indicates that defendants never sought this report, and that Lioy had discussed the contents of the report at length with defendants.

Defendants further contend that another court-appointed accountant, Nancy Tritt, engaged in extensive *ex parte* communications with plaintiffs. However, defendants merely assert that there were contacts between plaintiffs and the expert; defendants present no evidence that such contacts were improper. Defendants further concede that there are times when *ex parte* contact with a court-appointed expert is not improper. *See Point Intrepid, LLC v. Farley*, ___ N.C. App. ___, ___,

714 S.E.2d 797, 802-03 (2011). In the instant case, the record demonstrates that the trial court ordered that forensic accountants perform "a complete accounting of the books and records maintained by [PDCI] for [Fourth Creek Limited Partnership] and [Fourth Creek Apartments I][.]" There is no evidence that these experts were deposed by either party. There is no evidence that the accountants were not court-appointed experts, nor that any improper contact occurred. There is evidence to show that these were court-appointed experts, and we therefore hold that the trial court did not err in awarding their fees as costs.

This argument is without merit.

F. Damages

[6] Defendants next contend that the trial court erred in awarding damages for the depreciated value of the amenities on Fourth Creek Apartments I as a result of PDCI's management, and awarding damages based upon the value of the property itself. Defendants contend that the only parties which caused the depreciation were FCLA II and Free Nancy, neither of which was a party to this lawsuit, and that this award was simply a means of bypassing issues of joinder. However, the trial court held that it was defendants, acting through FCLA II and Free Nancy, that caused the actions which led to the depreciation of the amenities. Accordingly, the trial court did not err in holding defendants liable for the depreciation in value caused by their actions.

This argument is without merit.

G. Dissolution

[7] Defendants also contend that the trial court erred in removing PDCI from Fourth Creek Limited Partnership. Defendants contend that, absent total dissolution of Fourth Creek Limited Partnership, there is no legal basis for the removal of PDCI. We first note that PDCI was not removed from the partnership; FCLA, and its half-owner PDA, were removed from the partnership.

Even assuming that defendants were contending that the trial court erred in removing PDA, however, defendants do not cite this Court to any authority indicating that the trial court lacked the authority to remove FCLA and PDA. Accordingly, defendants' argument on this point is deemed abandoned. *See* N.C. R. App. P. 28(b)(6).

This argument is without merit.

V. Breach of Duty and Constructive Fraud

[8] In their eleventh argument, defendants contend that the trial court erred in finding that PDCI and PDA breached fiduciary duty to Fourth Creek Limited Partnership and FCLA and engaged in constructive fraud. We disagree.

The trial court found as fact that defendants had converted funds, had engaged in unauthorized and *ultra vires* conduct, had profited without informing Fourth Creek Limited Partnership, and had delayed in taking actions beneficial to Fourth Creek Limited Partnership in order to maximize their own profits. Defendants do not challenge these findings; rather, they assert that their conduct was entirely legal. The trial court's findings support the conclusion that defendants breached their fiduciary duty and engaged in constructive fraud.

This argument is without merit.

VI. Statute of Limitations

[9] In their twelfth argument, defendants contend that the trial court erred in concluding that plaintiffs' claims were not barred by the statute of limitations. We disagree.

The trial court examined defendants' affirmative defense of the statute of limitations extensively. It concluded that (1) because defendants engaged in continuing conduct that had not ceased prior to three years before the filing of the instant lawsuit, the continuing wrong doctrine prevented the statute of limitations from running; (2) because defendants actively concealed their wrong from plaintiffs, the doctrine of equitable estoppel prevented them from relying upon their concealment to cause the statute of limitations to expire; (3) plaintiffs' claims for dissolution are not subject to the statute of limitations, since the statute would only begin to run from the time of discovery of defendants' wrongdoing; (4) plaintiffs' claim for unfair and deceptive trade practices is governed by a four-year statute of limitations, N.C. Gen. Stat. § 75-16.2, which begins to run when the fraud is discovered or should have been discovered, rather than when the act is committed, *see Nash v. Motorola Communications and Electronics. Inc.*, 96 N.C. App. 329, 331-32, 385 S.E.2d 537, 538 (1989); and (5) plaintiffs' remaining claims were governed by a ten-year statute of limitations, N.C. Gen. Stat. § 1-56, which had not expired at the time the lawsuit was filed. The trial court based these conclusions on its findings that this action was filed in 2009; that operation of the satellite television system was disclosed to Fourth Creek Limited Partnership in a meeting in 2009; that plaintiffs could

not have reasonably discovered defendants' on-site housing of employees until this information was revealed in 2009; that defendants were assessing disproportionate costs to Fourth Creek Limited Partnership as recently as October 2009; and that these costs were not revealed until late 2009. Defendants do not challenge these findings; instead, defendants contend that plaintiffs' negligence, not defendants' concealment, was the cause of plaintiffs' late discovery of defendants' conduct, and that the statute of limitations should bar plaintiffs' claims. As defendants do not challenge the trial court's findings, they are binding upon this Court on appeal. *Koufman* 330 N.C. at 97, 408 S.E.2d at 731. These findings support the trial court's conclusion that the statute of limitations did not bar plaintiffs' claims.

This argument is without merit.

VII. Conclusion

The portions of the trial court's judgment awarding trebled damages and attorney's fees pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.* against David, Edwin, and PDA, are vacated. The trial court, upon remand, shall award damages for these claims, without trebling. The portions trebling damages and awarding attorney's fees against PDCI, and David through PDCI, are affirmed. All other aspects of the trial court's order are affirmed.

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

Chief Judge MARTIN and Judge DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 JULY 2014)

ARMSTRONG v. HUTCHENS No. 13-1225	Guilford (00CVS3986)	Affirmed
BOTTOMS v. STRUM No. 14-75	Nash (11CVD1697)	Affirmed
BRADLEY v. DOE No. 13-1392	Nash (12CVS1638)	Affirmed
BRUNS v. NC FARM BUREAU MUT. INS. CO., INC. No. 14-52	Craven (12CVS1495)	Vacated in Part, Dismissed in Part
COTTEN v. WORRELLS No. 14-155	Johnston (13CVD2741)	Affirmed
DYKES v. LONG No. 14-148	Lee (12CVS867)	Affirmed
ELJ, INC. v. JEFFERYS No. 13-1420	Onslow (13CVS2383)	Affirmed
GRIFFITH v. NC PRISONER LEGAL SERVS., INC. No. 13-1194	Bertie (13CVS235)	Affirmed
HARRISON v. GEMMA POWER SYS., LLC No. 13-1358	N.C. Industrial Commission (167921)	Affirmed in part, Vacated and Remanded in part
IN RE J.M. No. 14-24	Iredell (10JA213) (11JA208)	Affirmed
IN RE K.G.A.W. No. 14-137	Cleveland (08JT183-184)	Affirmed
IN RE K.M.S. No. 14-170	Haywood (12JT95-96)	Affirmed
IN RE K.T. No. 14-95	Onslow (13JA153-154)	Affirmed

IN RE S.C.R. No. 14-80	Rockingham (13JA82-84)	Affirmed
KYPRIANIDES v. MARTIN No. 14-78	Hertford (11CVS250)	Reversed, in part; dismissed, in part.
LATAK v. LATAK No. 14-131	Buncombe (10CVD917)	Affirmed
LIPE v. STARR DAVIS CO., INC. No. 14-90	N.C. Industrial Commission (429068)	Affirmed
McKINNEY v. GREATER GETHSEMANE AME ZION CHURCH OF CHARLOTTE, N.C., INC. No. 13-1448	Mecklenburg (13CVS2506)	Affirmed
OLAVARRIA v. WAKE CNTY. HUMAN SERVS. No. 13-1215	Wake (13CVS491)	Affirmed
POWE v. CENTERPOINT HUMAN SERVS. No. 13-1410	N.C. Industrial Commission (150598)	Affirmed
STATE v. BOGGS No. 14-163	Mecklenburg (12CRS206454-55)	Dismissed
STATE v. BUCK No. 13-1044	Burke (11CRS2390)	No Error
STATE v. CASE No. 13-1269	Transylvania (11CRS50979) (12CRS50115) (12CRS52184)	No Error
STATE v. DAVIS No. 13-1201	Mecklenburg (12CRS211387) (12CRS27326)	Reversed and Remanded
STATE v. EDWARDS No. 14-49	Wake (11CRS211595) (13CRS300)	No Error

STATE v. ELLER No. 13-1433	Iredell (08CRS59811) (08CRS59812) (08CRS59813) (08CRS59814) (08CRS59815) (08CRS59893) (08CRS59894) (08CRS59895) (08CRS59896) (08CRS7500) (09CRS7498) (09CRS7499) (12CRS51941) (12CRS51942) (12CRS51943)	No prejudicial error in part; vacated and remanded in part
STATE v. FRIERSON No. 13-1415	Buncombe (11CRS60559)	Dismissed
STATE v. GALAVIZ-TORRES No. 13-1318	Mecklenburg (12CRS213245) (12CRS213246)	New Trial
STATE v. GILL No. 13-1256	Buncombe (12CRS50549-550)	Affirmed
STATE v. HALL No. 14-40	Johnston (12CRS2813)	No Error
STATE v. HIGGINS No. 13-1315	Buncombe (11CRS63843)	No Error
STATE v. HINTON No. 13-1335	Nash (11CRS50675)	No Error
STATE v. MARTINEZ No. 14-83	Davidson (13CRS728)	No Error
STATE v. McKENZIE No. 13-1366	Cumberland (09CRS58449)	No Error
STATE v. McNEILL No. 14-64	Cumberland (01CRS53303)	Affirmed
STATE v. MERRELL No. 14-66	Watauga (13CRS50053)	No error, in part; dismissed, in part.

STATE v. NEAL No. 13-1418	Stokes (12CRS51512-24) (12CRS51668) (13CRS185)	No Error
STATE v. OSBORNE No. 13-1372	Ashe (10CRS51166)	Vacated
STATE v. POWELL No. 13-1109	Burke (10CRS52989)	No Error
STATE v. ROSALES No. 13-1373	Burke (11CRS2419) (11CRS52565)	No Error
STATE v. SCALES No. 13-1462	Guilford (12CRS67263)	No Error
STATE v. SHOATS No. 14-9	Cleveland (11CRS51589-90)	No Error
STATE v. SPELLMAN No. 13-1192	Edgecombe (12CRS51319-21) (12IFS450)	No Error
STATE v. VAZQUEZ No. 13-1257	Mecklenburg (09CRS246322) (09CRS250051)	No Error
STATE v. WILLIAMS No. 13-1327	New Hanover (12CRS59892) (13CRS40)	Vacated
STATE v. WOOD No. 14-154	Durham (12CRS59532)	Affirmed
TIMBER INTEGRATED INVS., LLC v. WELCH No. 13-1034	Haywood (06CVS905)	Reversed and Remanded
WHEELESS v. MARIA PARHAM MED. CTR., INC. No. 13-1063	Vance (11CVS859)	Reversed

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