234 N.C. App.—No. 5 Pages 668-769

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 28, 2016

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF

NORTH CAROLINA

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[1] Retired 30 June 2015.

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[2] 1 January 2016.

COURT OF APPEALS

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FILED 1 JULY 2014

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SEARCH AND SEIZURE—Continued

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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.

KARLETTE D. BREWSTER, PLAINTIFF
v.
CLAUDE A. VERBAL, II, MARGIE H. VERBAL, DEFENDANTS

No. COA13-1344

Filed 1 July 2014

1. Agency—apparent authority—retention of legal counsel

Claude Verbal's retention of legal counsel on behalf of defendant Margie Verbal was within Claude's apparent agency authority, on the totality of the circumstances as presented to the attorney, particularly noting that Claude was a co-owner of the property rented to plaintiff, Claude was Margie's son, and Margie did not live in North Carolina.

2. Jurisdiction—personal—general appearance by attorney—waiver of right to challenge personal jurisdiction

An attorney's representation constituted a general appearance submitting defendant Margie Verbal to the jurisdiction of the court and she, therefore, waived her right to challenge the trial court's exercise of personal jurisdiction.

Appeal by defendant Margie H. Verbal from order entered 25 September 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 22 April 2014.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellee.

Attorney George Ligon, Jr., for defendant-appellant Margie H. Verbal.

No brief was filed for defendant Claude A. Verbal, II.

BRYANT, Judge.

Where a joint property owner acted within the scope of his apparent authority in retaining trial counsel to defend the property owners against a negligence suit, we hold that defendant property owner was bound by the acts of the joint owner and subsequently bound by the acts of trial counsel representing the owners. Therefore, we affirm the trial court order denying defendant's motion to dismiss plaintiff's complaint

for violations of Civil Procedure Rules 12(b)(2), (4), (5), and (6). We also affirm the denial of defendant's motion to set aside a default judgment.

On 16 November 2011, plaintiff Karlette Dandy Brewster filed a complaint against defendants Claude A. Verbal, II, and Margie H. Verbal in Durham County Superior Court. Margie and Claude are mother and son. Two civil summons were also filed in the Durham County Superior Court Clerk's Office stating that each summons and a copy of the complaint had been received by Pamela Verbal (Claude Verbal's wife and Margie Verbal's daughter-in-law) at the address listed for Claude A. Verbal, II, and Margie H. Verbal.

In her complaint, plaintiff alleged that defendants exercised dominion and control over a property located at 4005 Destrier Drive in Durham, which defendants rented to Brewster. On 17 April 2011, plaintiff was attempting to enter the rental property when she fell in an unlit section of a stairwell. Plaintiff asserted a claim of negligence.

On 23 January 2012, "Defendants Claude A. Verbal and Margie H. Verbal . . . by and through [counsel Jonathan Wilson II]" filed a motion to dismiss and an answer to plaintiff's complaint. Subsequently, plaintiff filed a motion to compel depositions and sanctions against defendants for failure to attend two depositions. Following a settlement between the parties as to plaintiff's motion, the trial court entered a consent order wherein Claude agreed to make himself available for depositions. In its order, the trial court noted that defendants were represented by Wilson. On 19 December 2012, plaintiff filed a motion for default, contempt and sanctions alleging that defendants failed to appear for scheduled mediation and failed to respond to discovery requests. On 16 January 2013, the trial court entered a default judgment as to defendants' liability. On 8 August 2013, defense counsel Jonathan Wilson, II, filed a motion to withdraw as counsel stating that he was "retained by the Defendants to represent them in this pending civil matter" but that "the Defendant has refused to abide or respond to counsel's means of communication." Defense counsel's motion to withdraw was granted. On 17 September 2013, Margie filed a motion to dismiss and motion to set aside the default judgment.

In her motion, Margie contended that the action against her should be dismissed pursuant to Civil Procedure Rules 12(b)(2) (lack of jurisdiction of the person), (4) (insufficiency of process), (5) (insufficiency of service of process), and (6) (failure to state claim upon which relief could be granted). Margie contended that she did not reside in North Carolina and had not resided in North Carolina in over thirty years, had

never been served with process, did not authorize or consent to representation by Jonathan Wilson or the Law Offices of John C. Fitzpatrick, and did not receive any notice to appear at a mediation conference or deposition. Further, Margie alleged that she had a meritorious defense to the negligence claim including contributory negligence and that she never leased the premises to plaintiff. In her affidavit, Margie averred that she had no knowledge of the lawsuit naming her as a defendant "until August 2013 when [she] received a letter . . . from the plaintiff's attorney."

Jonathan Wilson also filed an affidavit. Wilson averred that he was retained by Claude Verbal who represented to Wilson that Margie Verbal was physically ill and resided in the Midwestern part of the country, and that Margie was aware of Wilson's representation of her in this civil matter.

On 25 September 2013, the trial court entered an order in which it concluded that by ceding all involvement with the property to her son since at least 1997, Margie Verbal created an agency relationship with her son. In accordance with this relationship, Claude had authority to procure legal counsel to act for the benefit of both owners should the need arise; thus, Claude's retention of Wilson was within the scope of that authority. The court concluded that any defenses to personal jurisdiction based on insufficient process or service of process had been waived. Margie's motion to dismiss the action or set aside the default judgment was denied. Margie Verbal appeals.

On appeal, Margie Verbal raises the following issues: whether the trial court erred in denying her (I) motion to dismiss; and (II) motion to set aside default judgment.

I

[1] Margie first argues that the trial court erred in denying her motion to dismiss plaintiff's claim as to her on the grounds that the trial court lacked personal jurisdiction. Specifically, Margie argues that North Carolina's long-arm statute does not permit the exercise of personal jurisdiction over her and that the exercise of personal jurisdiction does not comport with due process. Margie further argues that her son Claude was not authorized to retain counsel on her behalf; that attorney Jonathan Wilson was not authorized to act on her behalf; and that she did not waive her Rule 12(b) defenses. We disagree.

> The standard of review of an order determining personal jurisdiction is whether the findings of fact by the

> trial court are supported by competent evidence in the record. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant.

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation and quotations omitted).

As an appearance by an attorney on behalf of Margie addressing the merits of plaintiff's claim prior to contesting personal jurisdiction will waive a defense to the exercise of personal jurisdiction, we first consider whether her son Claude acted as Margie's agent in retaining counsel to address plaintiff's claims and, if necessary, whether Wilson's involvement in the initial stages of the action constituted a general appearance made prior to contesting the exercise of personal jurisdiction.

"An agent is one who acts for or in the place of another by authority from him." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 213 (1954) (citation omitted). "The power of an agent, . . . to bind his principal, may include, not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted [sic] to him . . . ." *Research Corp. v. Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 418 (1965) (citation omitted).

> A principal-agent relationship arises upon two essential elements: (1) [a]uthority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent. An agency can be proved generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy....

Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) (citation and quotations omitted). Agency may also be inferred from the nature of continuous acts known to the principal such that the principal would not have allowed the agent to so act unless authorized. *See Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 359, 128 S.E.2d 835, 839-40 (1963); *see also Partin v. Power & Light Co.*, 40 N.C. App. 630, 637, 253 S.E.2d 605, 611 (1979) ("Mere relationship or family ties, unaccompanied by any other facts or circumstances, will not justify an inference of agency, but such relationship is entitled to great weight, when

considered with other circumstances, as tending to establish agency." (citations omitted)).

In its 25 September 2013 order denying Margie's motion to dismiss, the trial court found that the property plaintiff rented – located at 4005 Destrier Drive in Durham – was owned by defendants Claude Verbal and his mother Margie Verbal; Margie did not live in North Carolina but rather has resided in Michigan for the past thirty years; and per Margie's affidavit, she "[has] not had any involvement with the real property located at 405 Destrier Drive in Durham, North Carolina since 1997." The trial court reasoned that by conceding to her son Claude all involvement with the property since at least 1997, Margie Verbal "expressly or implicitly created an agency relationship with her son, whereby her son had authority to act on her behalf to, among other things, lease the property to tenants such as the Plaintiff and to receive tax notices and to pay taxes on the property." We agree. *See Partin*, 40 N.C. App. at 637, 253 S.E.2d at 611 ("relationship or family ties . . . [are] entitled to great weight, when considered with other circumstances, as tending to establish agency." (citation omitted)).

The trial court further concluded that retention of legal counsel to defend the property owners from claims such as plaintiff's was reasonably foreseeable and thus, within the scope of Claude's authority to act on behalf of Margie.

"[A]n agent may usually bind his principal as to all acts within the scope of his agency including not only the authority actually conferred, but such as is usually confided to an agent employed to transact the business which is given him to do, and it is held that, as to third persons, this real and apparent authority is one and the same . . . ." *Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 418 (citation omitted). "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (1990) (citation omitted). "The principal may be estopped to deny that a person is his agent or that his agent has acted within the scope of his authority." *Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 419 (citations omitted). "Under the doctrine of apparent authority, a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Munn v. Haymount Rehab. & Nursing Ctr.*, 208 N.C. App. 632, 639, 704 S.E.2d 290, 295 (2010) (citation omitted).

The trial court found that per Jonathan Wilson's affidavit,

> he had been retained by Claude A. Verbal, II and that based upon conversations with Claude A. Verbal, II he was led to believe that his mother, Margie H. Verbal was physically ill and resided in the Midwest. Mr. Wilson further asserted that based upon conversations with Claude A. Verbal, II, he was led to believe that Margie H. Verbal was aware of the civil matter and his representation of them . . . .

On the totality of the circumstances as presented to Wilson, particularly noting that Claude was a co-owner of the property rented to plaintiff, Claude was Margie's son, and Margie did not live in North Carolina, we hold that Claude Verbal's retention of Wilson as legal counsel on behalf of Margie was within Claude's apparent authority. *See id.; see also Parsons v. Bailey*, 30 N.C. App. 497, 502, 227 S.E.2d 166, 168 (1976) ("It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority."); *compare Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 533, 463 S.E.2d 397, 400 (1995) (holding an attorney had no right to appear on behalf of the defendant where the attorney had no authority granted by the party for whom he was appearing).

[2] We next consider whether Wilson, appearing on behalf of Margie, appeared before the trial court in a manner consistent with a general appearance.

"A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action . . . ." N.C. Gen. Stat. § 1-75.7(1) (2013). "In G.S. § 1-75.7 the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons." *Simms v. Stores, Inc.*, 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974).

> A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance.

Judkins v. Judkins, 113 N.C. App. 734, 737, 441 S.E.2d 139, 140 (1994) (citations and quotations omitted). "A party may appear either in person or by attorney in actions or proceedings in which he is interested." N.C. Gen. Stat. § 1-11 (2013). "[A] court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 336, 714 S.E.2d 770, 774 (2011) (citation omitted).

The record reflects that following the filing of plaintiff's complaint, Wilson filed an answer on behalf of Claude and Margie answering the allegations of the complaint and raising defenses of contributory negligence, no proximate cause, failure to mitigate, and unclean hands. The answer also included a motion to dismiss the complaint pursuant to Rule 12(b)(6). Moreover, Wilson represented defendants on plaintiff's motion to compel depositions and for sanctions. The parties entered into a settlement which led to the trial court's entry of a consent order. Clearly, the trial court had jurisdiction over the subject matter, a fact that Margie does not contest. Wilson's representation constituted a general appearance submitting Margie to the jurisdiction of the court. Therefore, Margie has waived her right to challenge the trial court's exercise of personal jurisdiction. *See* N.C.G.S. § 1-75.7(1); *see also Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 ("[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance.") *on reh'g*, 303 N.C. 367, 279 S.E.2d 840 (1981).

Due to our holding affirming the trial court's exercise of personal jurisdiction based on an agency relationship, we need not address Margie's additional arguments challenging the trial court's exercise of personal jurisdiction.

II

Next, Margie argues that the trial court erred in denying her motion to set aside the default judgment. Specifically, she argues that because "the procedural manner by which [personal] jurisdiction could have been exercised over her was never legally accomplished . . . the Default Judgment entered against her is void."

As we have determined that Wilson's representation of Margie before the trial court was proper and constituted a general appearance submitting Margie to the jurisdiction of the court, we overrule this argument.

Affirmed.

Judges HUNTER, Robert C. and STEELMAN concur.

DAVID R. COX, PLAINTIFF
v.
TOWN OF ORIENTAL AND BOARD OF COMMISSIONERS OF THE TOWN OF ORIENTAL, DEFENDANTS

No. COA13-1222

Filed 1 July 2014

1. Appeal and Error—reply brief—surreply brief

The Court of Appeals declined to consider plaintiff's reply brief, and thus, had no reason to consider defendants' surreply brief.

2. Jurisdiction—standing—not an aggrieved person

The trial court did not err by dismissing plaintiff's appeal and action for declaratory judgment based on lack of standing. Plaintiff provided no factual basis to support the argument that he was an aggrieved person.

Appeal by Plaintiff from Orders entered 10 April 2013 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 23 April 2014.

McCotter Ashton, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for Plaintiff.

Davis Hartman Wright, PLLC, by Michael Scott Davis and I. Clark Wright, Jr., for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This case arises from the decision of the Town of Oriental and its Board of Commissioners (collectively, "Defendants") to permanently close Avenue A and a portion of South Avenue, public rights of way in the Town. On 2 August 2012, Plaintiff David R. Cox filed an appeal from

the Town ordinance vacating Avenue A and an action for declaratory judgment in Pamlico County Superior Court.[1] In his appeal and action, Plaintiff alleged the following relevant facts:

The Town sits on the Neuse River. On 13 January 2012, the Board met to consider "the possibilities of sale or exchange of property in the vicinity of the [W]est end terminus of South Avenue and Avenue A." South Avenue and Avenue A are situated on a peninsula that borders the Neuse River on the South and a tributary called Raccoon Creek on the West. Raccoon Creek is the location of the Town's harbor.

Chris Fulcher wrote to the Town Manager on 23 January 2012 and proposed to exchange a portion of his property on the Raccoon Creek side of the peninsula ("the Raccoon Creek property") for the Town's interest in Avenue A and the South Avenue terminus. Fulcher owns all property on either side of Avenue A and the South Avenue terminus. The Board voted to accept the proposal on 10 February 2012 and executed a contract on 23 May 2012. The contract indicated that the transfer would not occur if the Board determined that it was not in the Town's best interests. On 3 July 2012, the Board voted to close Avenue A. The Board declined to vacate the South Avenue terminus at that time.

Plaintiff is a "taxpaying resident[] of the Town" and owns property approximately three blocks North of Avenue A and the South Avenue terminus. Plaintiff's property does not touch Avenue A, South Avenue, or the Raccoon Creek property. On 2 August 2012, Plaintiff appealed the Board's decision to close Avenue A and sought a declaratory judgment regarding the Town's authority to close either Avenue A or the South Avenue terminus. Plaintiff filed an amendment to that action on 4 September 2012, seeking to add the Board as a party to the action and seeking "injunctive and/or declaratory relief" for a number of alleged open meetings and public records violations. Defendants responded with an answer and affirmative defenses on 2 October 2012. Four months later, on 11 February 2013, Defendants filed motions to dismiss Plaintiff's "appeal, action for declaratory judgment, and amendment," or, in the alternative, for judgment on the pleadings.

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1. According to Plaintiff's 2 August 2012 appeal and action, the ordinance operated to vacate only Avenue A, not the relevant portion of South Avenue. Plaintiff alleges that he was required to file this action before the Town completed the closing process, however, because of certain procedural restrictions. Thus, this appeal is effective only as it relates to the Town's closure of Avenue A, not the relevant portion of South Avenue.

A hearing on the motions was held on 4 March 2013. During the hearing, Defendants argued that Plaintiff lacked standing to bring his suit. Afterward, on 10 April 2013, the trial court entered orders dismissing Plaintiff's appeal of the Board's decision to close Avenue A and granting Defendants' motions to dismiss the declaratory action and for judgment on the pleadings.[2] Plaintiff appeals to this Court from those orders.

Discussion

On appeal, Plaintiff argues that he (1) stated grounds to support a declaratory judgment in his action, (2) had a statutory right to appeal the Town's decision to vacate Avenue A, and (3) had a right to have his open meetings and public records claims heard. In response, Defendants argue that the trial court properly dismissed Plaintiff's action because Plaintiff lacked standing to file suit and failed to state a claim upon which relief could be granted. We affirm the trial court's orders.

I. Plaintiff's Reply Brief

[1] As a preliminary matter, we address the propriety of Plaintiff's reply brief, filed 20 March 2014. On 3 April 2014, Defendants moved this Court for leave to file a surreply brief or, in the alternative, for oral argument, contending that Plaintiff's reply brief was improper. A proposed surreply brief was attached. Plaintiff filed a response on 8 April 2014, objecting to the motion. On 16 April 2014, we granted Defendants' motion for leave to file a surreply brief, accepting the proposed surreply brief for that purpose, and denied the motion for oral argument. No additional documents have been filed with this Court.

Plaintiff asserts that his reply brief is submitted pursuant to Rule 28(h) and "limited to a concise rebuttal of the arguments . . . contained in [Defendants' b]rief." In his reply brief, Plaintiff seeks to rebut Defendants' contentions that he (1) lacked standing to file suit and (2) failed to state a claim upon which relief could be granted. Given the contents of Plaintiff's principal brief, this discussion violates Rule 28(h) of the North Carolina Rules of Appellate Procedure.

Rule 28(h) states, in pertinent part, that:

> . . . Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in

2. The Town closed the South Avenue terminus on 8 July 2013. As a result, Plaintiff filed a second lawsuit against the Town and the Board, appealing the closure of the South Avenue terminus. That suit has not been appealed to this Court. Rather, the trial court stayed the proceedings on that action until this appeal could be resolved.

> the appellee's brief and *shall not reiterate arguments set forth in the appellant's principal brief*. . . .

N.C.R. App. P. 28(h) (emphasis added). In his principal brief, Plaintiff argues that he stated a claim for which relief could be granted under Rule 12(b)(6). He also argues that he had standing to appeal the Town's decision as a "person aggrieved" under N.C. Gen. Stat. § 160A-299 and as a successor in interest to "these public rights of way." Plaintiff's standing argument is less detailed than his 12(b)(6) argument, but clearly supported by authority and reason nonetheless.

As we have previously noted, "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *State v. Greene*, __ N.C. App. __, 753 S.E.2d 397 (2013) (unpublished opinion), *available at* 2013 WL 5947337 (striking the defendant's reply brief under amended Rule 28(h) because he "merely expand[ed] upon the alleged error raised in his principal brief").[3] Plaintiff addressed Rule 12(b)(6) and the standing issue in his principal brief. In addition, standing was raised numerous times by Defendants' counsel during the 4 March 2013 hearing on Defendants' motions to dismiss. If Plaintiff wished to address these issues in greater detail, he should have done so in his principal brief. Accordingly, we decline to consider Plaintiff's reply brief and, thus, have no reason to consider Defendants' surreply brief.

II. Standing

[2] Defendants contend that the trial court properly dismissed Plaintiff's appeal and action for declaratory judgment because Plaintiff lacked standing to bring those actions. Because standing is jurisdictional, we address Defendants' argument as a threshold matter. *See, e.g.*, *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) ("Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved.") (citations, internal quotation marks, and brackets omitted). After a thorough review of the record, we conclude that the trial court properly dismissed Plaintiff's actions for lack of standing.

Section 160A-299 provides in pertinent part that:

> (b) Any person aggrieved by the closing of any street or alley . . . may appeal the . . . order to the General Court of Justice within 30 days after its adoption. . . .

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3. *Greene* is an unpublished opinion and, therefore, lacks precedential value. N.C.R. App. P. 30(e)(1). Nonetheless, its discussion is well-reasoned and one of the only opinions to address Rule 28(h) as amended (effective 15 April 2013). We find it persuasive.

N.C. Gen. Stat. § 160A-299(b) (2013). The term "person aggrieved" as it applies to section 160A-299 is not defined in the statute or by our courts. *See id.* Nonetheless, this Court has defined an "aggrieved party" under section 160A and in the context of a zoning ordinance as "one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property." *In re Granting of Variance by Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 843 (1998) (citation omitted) (noting that the petitioner, an adjoining property owner, "clearly established" that she was an aggrieved party when the town granted a variance from the setback requirements to a group called "Carriage Park Villas"). We believe the same definition is applicable here. *See generally In re Hayes*, 199 N.C. App. 69, 78–79, 681 S.E.2d 395, 401 (2009) ("The primary rule of [statutory] construction is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. To effectuate that intent, statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each.") (citations, internal quotation marks, elipses, and brackets omitted), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 694 (2010).

In his appeal from the Town's decision and action for a declaratory judgment, Plaintiff alleged that he "is a member of the public[] and a taxpaying resident[] of the Town . . . ." He also stated that he owns property in "Block No. 13," which is approximately three blocks away from Avenue A, and asserted that he "is aggrieved" by the Town's decision. Lastly, Plaintiff alleged that he is a "successor in interest to the dominant tract owner and offeror of dedication to public uses for use as rights of way all such land as is depicted as rights-of-way on the 1900 Town Map, including any subsequent modifications of such rights of ways[.]" On appeal to this Court, Plaintiff argues that he is an aggrieved person due to his status as a "citizen and resident of the Town" and "because he is a successor in interest to these public rights of way, which were designed and dedicated to provide access to the citizens of [the Town] to the public trust waters of the Neuse River, when the Town . . . was laid out [in the year 1900]."[4] We are unpersuaded.

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4. Plaintiff asserts that these allegations "must be accepted by this [C]ourt as being true" under the standard of review applied on appeal from the grant of a motion to dismiss under Rule 12(b)(6). This is incorrect. As Defendants note in their brief, that standard is only applicable to allegations of fact, not law. *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) ("For the purpose of the motion [to dismiss under Rule 12(b)(6)], the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.").

Plaintiff has provided no factual basis to support the argument that he is an aggrieved person in this case. His property is not adjacent to Avenue A or South Avenue and was not adjacent to those roads when the Town was designed in 1900. He has not alleged any personal injury and provides no reason to believe that his turn-of-the-last-century predecessor in interest had some special connection to Avenue A or South Avenue *distinct from the rest of the community*. Rather, he couches his arguments in terms of broad, public rights flowing from the Town's inception that have no bearing on our analysis here. Indeed, Plaintiff's entire argument is rooted in his status as a member of the Town's taxpaying populace. Such status is patently insufficient to support an appeal from, or action for declaratory judgment regarding, a town's order closing a street or alley under section 160A-299. *See, e.g.*, *Shaw v. Liggett & Myers Tobacco Co.*, 226 N.C. 477, 477–78, 38 S.E.2d 313, 313 (1946) (stating, before section 160A-299 was enacted, that "[t]he action of a city or town in authorizing the closing of a street[] cannot be successfully challenged in a civil suit instituted by a private citizen whose only interest therein is that of a general taxpayer of the city or town"). Accordingly, we hold that Plaintiff lacked standing to contest the Town's decision and affirm the trial court's orders dismissing his appeal, action, and amended action.

AFFIRMED.

Judges GEER and ERVIN concur.

GEOSCIENCE GROUP, INC., PLAINTIFF
v.
WATERS CONSTRUCTION COMPANY, INC., DEFENDANT

No. 13-1375

Filed 1 July 2014

1. Appeal and Error—preservation of issues—failure to object—quantum meruit

Defendant failed to object to the trial court's jury instructions submitting a claim based upon quantum meruit, and thus, that argument was not subject to appellate review.

2. Appeal and Error—preservation of issues—failure to object—failure to request special instructions

Where defendant neither objected to the trial court's jury instructions nor requested special instructions in a breach of contract, implied contract, and unjust enrichment case, its challenges to the court's instructions were not preserved for appellate review.

3. Appeal and Error—preservation of issues—motion for judgment notwithstanding verdict—failure to identify issue—failure to cite authority

The court did not err by denying defendant's motion for judgment notwithstanding the verdict. Defendant failed to identify any issue or element for which the evidence was insufficient or cite any authority addressing the sufficiency of evidence of breach of contract or of recovery under quantum meruit.

Appeal by defendant from orders entered 28 December 2012 and 22 February 2013 by Judge Lindsay R. Davis, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 April 2014.

Keziah Gates, LLP, by Andrew S. Lasine, for plaintiff-appellee.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by Miles S. Levine, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to object to the trial court's jury instructions submitting a claim based upon *quantum meruit*, that argument is not subject to appellate review. Where defendant neither objected to the trial court's jury instructions nor requested special instructions, its challenges to the court's instructions were not preserved for appellate review. The court did not err by denying defendant's motion for judgment notwithstanding the verdict.

I. Factual and Procedural Background

Waters Construction Company, Inc., (defendant) is the owner of a tract of real estate located in Mecklenburg County known as Lost Tree. In 1986 defendant's owner, William Waters, obtained a zoning permit for Lost Tree that allowed construction of 49 houses. Defendant did not develop the land at that time. In 2008 defendant hired Frank Craig to prepare plans for Lost Tree, and in January 2009 Mr. Craig submitted

plans to the Charlotte-Mecklenburg planning department. The plans were reviewed by Steve Gucciardi, and were rejected because they did not include the required wetlands delineations and permits. After Mr. Gucciardi reviewed the plans, he and Mr. Waters walked through the property and Mr. Gucciardi showed Mr. Waters the wetlands and streams that were subject to regulation.

After the plans submitted by Mr. Craig were rejected, Mr. Waters hired Wendell Overby to perform a preliminary wetlands review of Lost Tree. In August 2009 Mr. Overby provided Mr. Waters with a preliminary report stating that in his "professional opinion that the stream features [in Lost Tree] were jurisdictional," meaning that they were subject to regulation. Mr. Overby recommended that "a detailed wetland delineation be performed and jurisdictional features be surveyed for permitting purposes if applicable[,]" and showed Mr. Waters the jurisdictional wetlands and streams.

In the fall of 2009 Mr. Waters met with Kevin Caldwell, plaintiff's senior vice president, about the possibility of Mr. Caldwell's revising the plans submitted by Mr. Craig. Mr. Waters wanted plaintiff to produce a set of plans for development of all 49 lots that were approved in 1986, although this would require two stream crossings. After Mr. Caldwell and Mr. Waters held several meetings to discuss "the layout of the subdivision" "in terms of these stream crossings and the impact of the buildable lots," they signed a contract for plaintiff to "design the roads, the water facility, [and] the storm drainage for [the] 49 lots depicted on [defendant's] rezoning petition." The parties agreed to a contract price of $24,000, with half to be paid when plaintiff submitted plans to the city and the remainder when the plans were approved. The contract provided that plaintiff was responsible for producing preliminary plans depicting the location of roads, sewage and storm drains in the subdivision, and for civil engineering plans for grading and control of erosion, and that defendant was responsible for surveying and delineating any "wetlands with jurisdictional streams" and providing plaintiff with this information. The contract stated that if "additional service work" were required, "a work order (fee addendum) will be presented to [defendant] for authorization prior to proceeding with the additional work." "Additional services" were defined in the contract as work that was "[b]eyond the scope of the basic civil services to be performed for this proposal" including "wetland delineation/investigation" and "[p]lan revisions initiated by [defendant]" after plaintiff had begun work.

The contract was signed on 29 October 2009. Mr. Caldwell met with Mr. Waters several times during November 2009, but Mr. Waters did not

provide Mr. Caldwell with Mr. Overby's report or with any documentation delineating the wetlands or stream crossings in Lost Tree. Plaintiff submitted plans in early December 2009, which were again rejected because they failed to delineate the wetlands or address related issues. After the plans were rejected, Mr. Waters told Mr. Caldwell about Mr. Overby's report and defendant hired Mr. Overby to prepare a detailed report delineating the jurisdictional streams and wetland areas, so that Mr. Caldwell could develop revised plans.

After Mr. Overby delineated the Lost Tree wetlands, plaintiff identified five alternative approaches for revised plans that addressed wetland issues, and provided defendant with a memo setting out these alternatives and indicating the effect on construction costs of each choice. After meeting to discuss which approach defendant preferred, Mr. Waters directed Mr. Caldwell to prepare plans that would allow development of all 49 building lots, and to first submit the least expensive option. When these plans were rejected, Mr. Caldwell prepared another set of plans using the second least expensive option. He also prepared new plans for the development that adjusted the road elevation, storm water drainage, and sewer pipes to accommodate the revised approach to wetlands and stream crossings. These plans were ultimately approved by "both the City and Charlotte-Mecklenburg Utility Department."

After the plans were approved, Mr. Caldwell sent Mr. Waters an invoice for the additional cost of preparing revised plans. Plaintiff had been paid $12,000 at the outset of the project, and sought an additional $38,000. Plaintiff contended that the additional work was not within the scope of the parties' contract, but constituted "additional services" as defined in the contract. Mr. Waters refused to pay the additional amount, claiming that the work performed was within the scope of their agreement.

On 26 April 2011 plaintiff filed a complaint against defendant, seeking damages based upon breach of contract, implied contract, and unjust enrichment. The case was tried before a jury at the 5 November 2012 session of Superior Court for Mecklenburg County. The trial testimony of Mr. Caldwell and Mr. Waters agreed with respect to the general sequence of events described above, but differed sharply in regards to the scope of work covered by the contract.

Mr. Caldwell testified that he had asked Mr. Waters for documentation regarding delineation of wetlands before he prepared the first set of plans, but that Mr. Waters had told him that he had "a letter" that exempted defendant from compliance with wetlands regulations, and

told him to "go ahead and submit the plans," promising that he would provide plaintiff with the letter "while the plans were being reviewed." However, Mr. Waters never showed Mr. Caldwell such a letter. Mr. Waters denied telling Mr. Caldwell that he had a letter waiving wetlands requirements.

Mr. Waters conceded that (1) after Mr. Craig's plans were rejected because they failed to delineate wetlands, he had hired Mr. Overby to produce a preliminary report; (2) Mr. Overby's preliminary report concluded that there were jurisdictional streams and wetlands areas on the Lost Tree property; (3) Mr. Overby gave him this report in August 2009; (4) Mr. Waters did not show Mr. Caldwell the report until after the first set of plans plaintiff produced were rejected for failure to delineate wetlands, and (5) Mr. Waters did not hire Mr. Overby to prepare a detailed report with the required delineation of wetlands until December 2009, after plaintiff's plans were rejected. However, Mr. Waters denied that he had withheld any information from Mr. Caldwell.

Mr. Caldwell testified that when he and Mr. Waters discussed the additional cost of revised plans, Mr. Waters told him "that money's no problem, you just get the plans approved." Mr. Caldwell considered Mr. Waters's statement to constitute "a handshake agreement" and testified that he "didn't see the need for a written agreement[.]"

> Q. . . . [D]id you ask for a written amendment to the contract or written change order for the contract?
>
> A. At that time we were going through various . . . options. I couldn't put a number on how much it would cost, but he's sitting across the table from me saying money is not a problem, you just get the plans approved, and I took the man at his word.

Mr. Waters admitted making the statement that "money is no problem," but testified that:

> A. . . . I made that comment. He asked me if money was a problem. At the time we was right in the depth of a recession and there was hardly any work going on, and I thought he meant was we going to finish the project[.] . . . I said money's not the problem. . . . I didn't even understand what he was talking about. . . .
>
> Q. So there was never a handshake agreement between you Mr. Caldwell that you were going to pay whatever additional expenses he incurred above the 24,000?

> A. I had no reason to. He was supposed to do the job for $24,000. . . . When you're contractor, that ain't the way it works. You take it for a fixed price and that's what you deliver at.

Mr. Waters testified that Mr. Caldwell "said he would finish up the plans and submit it and get it approved for $24,000, so I took the deal." He never discussed with Mr. Caldwell the procedure that would be followed if additional work was required, testifying that:

> He had a contract to do all the work for $24,000. It didn't make any difference to me what he had to do. At the time he signed the contract, I didn't know what he had to do other than get the plan finished and get it approved.

Mr. Waters admitted meeting with Mr. Caldwell in January 2010 to discuss options for addressing wetlands issues, but testified that they never discussed additional costs, and that he "didn't know anything about any additional costs" until Mr. Caldwell sent him a bill in June 2010. There was a conflict in the parties' evidence concerning the scope of their contract and whether the provision for written change orders had been abandoned.

On 8 November 2012 the jury returned verdicts finding in relevant part that:

> 1. Defendant breached its contract with plaintiff by failing to pay the full contract price.
>
> 2. Defendant owed plaintiff $12,000 for breach of contract.
>
> 3. The parties abandoned the provision of their contract requiring prior written agreement for additional services.
>
> 4. Plaintiff was entitled to recover $26,410 from defendant for additional services.

On 28 December 2012 the trial court entered judgment for plaintiff in accord with the jury's verdict. On 4 January 2013 defendant filed a motion for entry of judgment notwithstanding the verdict (JNOV), pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b). The trial court denied defendant's motion in an order entered 22 February 2013.

Defendant appeals from the judgment and the denial of its motion for JNOV.

II. Jury Instructions

A. Standard of Review

When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*. *See, e.g. Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.*, 159 N.C. App. 43, 53, 582 S.E.2d 701, 706-07 (2003) ("The trial court erred in giving the incorrect re-instruction to the jury as a matter of law. Questions of law are reviewable *de novo*.") (citing *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). However, a challenge to a matter within the court's discretion is reviewed for abuse of discretion. "The form and phraseology of issues is in the court's discretion, and there is no abuse of discretion if the issues are sufficiently comprehensive to resolve all factual controversies.." *Barbecue Inn, Inc. v. CP & L*, 88 N.C. App. 355, 361, 363 S.E.2d 362, 366 (1988) (citing *Pinner v. Southern Bell*, 60 N.C. App. 257, 263, 298 S.E. 2d 749, 753 (1983)).

B. Preservation of Defendant's Challenges to Jury Instructions

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states the general rule that "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" and must "obtain a ruling upon the party's request, objection, or motion." Rule 10(a)(2) specifically addresses challenges to jury instructions and provides that:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

As a result, a party waives appellate review of jury instructions to which no objection is made at trial:

> "Rule 10[(a)](2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory." "[W]here a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error."

Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 633, 627 S.E.2d 249, 254 (2006) (quoting Wachovia Bank v. Guthrie, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984) (internal quotation omitted), and *Madden v. Carolina Door Controls*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (internal quotation omitted).

In addition, Rule 21 of the General Rules of Practice provides in pertinent part that in every jury trial, "the trial judge shall conduct a conference on instructions with the attorneys of record[,]" that an "opportunity must be given to the attorneys . . . to request any additional instructions or to object to any of those instructions proposed by the judge[,]" and that if "special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." Rule 21 also requires that:

> At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

If the trial court complies with Rule 21, a party who fails to object to jury instructions or to submit proposed special instructions may not raise the issue on appeal:

> Defendant failed to object to the trial court's instructions [and] . . . did not object after the trial court instructed the jury. Defendant was expressly given the opportunity to object on both occasions in accordance with the provisions of Rule 21 of the General Rules of Practice for the Superior and District Courts. . . . Defendant has not properly preserved this issue for appellate review.

State v. Storm, __ N.C. App. __, __, 743 S.E.2d 713, 716 (2013).

C. Instruction on *Quantum Meruit*

[1] Defendant argues that "the trial court erroneously submitted the issue of *quantum meruit* to the jury" on the grounds that "an express contract governed the relationship of the parties and thus precluded recovery under a *quantum meruit* claim." We hold that defendant failed to preserve this issue for appellate review.

At trial, defendant objected to the admission of evidence concerning the reasonable value of the additional services provided by plaintiff,

on the grounds that recovery under a theory of *quantum meruit* was not allowed where an express contract governed the same subject matter. Following the presentation of evidence, the trial court held a conference on proposed jury instructions. The court informed the parties that it intended to instruct the jury on two issues pertaining to plaintiff's breach of contract claim. The court also informed the parties that it intended to submit three issues concerning plaintiff's *quantum meruit* claim for payment for additional services: (1) a special interrogatory asking whether the parties had abandoned the requirement in the contract that all additional work be approved in writing; (2) whether plaintiff had performed additional work; and (3) if so, the amount to which plaintiff was entitled.

Plaintiff objected to the court's submission of the "preliminary issue" of whether the parties had abandoned the contract provision requiring a written change order as a prerequisite to plaintiff's entitlement to recovery under the theory of *quantum meruit*. Plaintiff argued that under *Yates v. Body Co.*, 258 N.C. 16, 128 S.E.2d 11 (1962), it was entitled to an instruction on *quantum meruit* because there was evidence to support recovery under that theory. Defendant proffered *Keith v. Day*, 81 N.C. App. 185, 343 S.E.2d 562 (1986), directing the court's attention to its holding that the plaintiff was not entitled to recover under *quantum meruit* in the absence of a jury finding that the parties had abandoned particular provisions of their express contract. The court denied plaintiff's request to submit the issue of *quantum meruit* without predicating recovery on a finding that the parties had abandoned the written change order requirement. The trial court then asked defendant for any requests or objections, but defendant neither requested any special instructions, nor objected to the trial court's proposed instructions:

> THE COURT: Yes. And I haven't heard from [defense counsel] the things that he wants.
>
> [DEFENSE COUNSEL]: I didn't have any changes in what you had.

After the trial court instructed the jury, but before it began its deliberations, the court again offered the parties an opportunity to state specific objections to its instructions, or to request special instructions:

> THE COURT: The jury has retired, and I will hear from counsel regarding any objections or requests for additional instructions. [Your] exceptions and objections during the charge conference are already [p]reserved.

> [PLAINTIFF'S COUNSEL]: Yes, sir. Those are my objections and exceptions.
>
> [DEFENSE COUNSEL]: My objections I think were on the whole issue of *quantum meruit* with respect to both cases.
>
> THE COURT: All right. I've considered the arguments previously given on both of those issues or questions that were raised. Your objections are noted.

Because defendant had not objected to the court's proposed instructions, the reference to an objection to "the whole issue of *quantum meruit* with respect to both cases" can only refer to his objection during trial to testimony concerning the reasonable value of plaintiff's services. Defense counsel's reference to an earlier objection to the introduction of certain testimony does not constitute an objection to a specific jury instruction and does not "stat[e] distinctly that to which objection is made and the grounds of the objection" as required by Rule 10 of the Rules of Appellate Procedure. We hold that defendant failed to preserve the challenge to the trial court's instruction on *quantum meruit* for appellate review.

Moreover, even if this issue were properly preserved, we would hold that the trial court did not err. Defendant notes the general rule that "[t]here cannot be an express and an implied contract for the same thing existing at the same time." *Campbell v. Blount*, 24 N.C. App. 368, 371, 210 S.E. 2d 513, 515 (1975) (internal citation omitted). However, it is long established that "[a] written contract may be abandoned or relinquished [by] . . . conduct clearly indicating such purpose[.]" *Bixler v. Britton*, 192 N.C. 199, 201, 134 S.E. 488, 489 (1926) (citations omitted).

> The heart of defendant's argument is that plaintiff's own evidence showed an express contract, and that where there is an express contract, no implied contract can exist. We recognize the validity of defendant's argument as to this principle of contract law. [However,] . . . plaintiff's evidence clearly showed that as plaintiff's work on the project progressed, plaintiff . . . was assured that it would be paid for its work. Thus, [because the parties'] . . . conduct clearly indicat[ed] a different understanding, an implied contract could arise between them.

John D. Latimer & Assoc. v. Housing Authority of Durham, 59 N.C. App. 638, 642, 297 S.E. 2d 779, 782 (1982) (citing *Campbell v. Blount*) (other citations omitted).

Defendant does not acknowledge that even when parties have an express contract recovery based on *quantum meruit* is possible if there is evidence that the parties abandoned the contract, and does not attempt to distinguish the cases addressing this issue. Nor does defendant contest the sufficiency of the evidence on the issue of abandonment. "[T]he evidence warranted a finding . . . that the conduct of the parties clearly indicated that they were not adhering to the written provision of the contract relative to desired changes in construction. Upon abandonment of the quoted provision by the parties, it was proper for the court to allow recovery for the changes on the basis of *quantum meruit* or an implied contract." *Campbell*, 24 N.C. App. at 371, 210 S.E. 2d at 515-16. Therefore, if we were to review this issue we would hold that the trial court did not err by instructing the jury that, if it found that the parties had abandoned the contractual requirement of written change orders, it could then consider whether plaintiff was entitled to recover based on the reasonable value of its services to defendant.

D. Other Challenges to Jury Instructions

[2] In addition to challenging the trial court's instruction on *quantum meruit*, defendant contends that the court made a variety of other errors in its instructions to the jury. However, none of defendant's appellate challenges to the court's instructions were the subject of an objection or of a request for a special instruction before the trial court. "A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. Because defendant neither objected to the issue submitted to the jury nor asked for a different issue, as the record unequivocally reveals, it cannot do so on this appeal." *Hendrix v. Casualty Co.*, 44 N.C. App. 464, 467, 261 S.E.2d 270, 272-73 (1980) (citing *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731 (1961) (other citation omitted). Defendant's arguments concerning other alleged errors in the court's instructions to the jury are dismissed.

III. Judgment Notwithstanding the Verdict

[3] Finally, defendant argues that the trial court "erred in denying defendant's motion for judgment notwithstanding the verdict, when the evidence presented to the court was insufficient to support the jury's verdict." However, defendant fails to identify any issue or element for which the evidence was insufficient, or to cite any authority addressing the sufficiency of evidence of breach of contract or of recovery under

quantum meruit. Instead, defendant makes a conclusory argument that the "court's failure to properly and clearly instruct the jury on the material issues based on the pleadings, considering all evidence presented, substantially prejudiced the defendant and therefore the court's denial of defendant's judgment notwithstanding the verdict was improper."

Moreover, defendant's motion for JNOV did not allege that plaintiff's evidence was insufficient, but was based solely on defendant's contention that the existence of an express contract precluded recovery based on *quantum meruit*. "Such a shift runs contrary to our long standing admonition that parties may not present, nor prevail upon, arguments in the appellate courts that were not argued in the trial court. . . . '[T]he law does not permit parties to swap horses between courts in order to get a better mount' before an appellate court).' " *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 642-43, 652 S.E.2d 231, 239 (2007) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). This argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its judgment and order should be

AFFIRMED.

Judges HUNTER, Robert C., and BRYANT concur.

GERALDINE GRIER HOUSTON, PLAINTIFF
v.
JUANITA TILLMAN AND THE ESTATE OF CLIFFORD MEDLIN, JR., DEFENDANTS

No. COA13-1094

Filed 1 July 2014

1. Pleadings—motion to amend complaint—denial of motion to dismiss—denial of motion for summary judgment

The trial court did not err in a constructive trust case by granting plaintiff leave to amend her complaint, by denying defendants' motions to dismiss pursuant to Rule 12(b)(6), and by denying defendants' motion for summary judgment. Defendants failed to present a specific argument with respect to the motion to amend, plaintiff's amendment and restatement of the complaint rendered any argument regarding the original complaint moot, and

defendants' arguments regarding the summary judgment order could not amount to reversible error.

2. Trusts—constructive trust—wrongdoing not a requirement—quantum meruit

The trial court did not err by denying defendants' motion for a directed verdict and motion for judgment notwithstanding the verdict on plaintiff's quantum meruit and constructive trust claims. Plaintiff's quantum meruit claim was not submitted to the jury. Further, wrongdoing is not a requirement for imposing a constructive trust, and the record contained sufficient evidence to support the imposition of a constructive trust.

Appeal by defendants from judgment entered 14 May 2013 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2014.

Paul Whitfield, P.A., by Paul L. Whitfield, for plaintiff-appellee.

John F. Hanzel, P.A., by John F. Hanzel, for defendants-appellants.

GEER, Judge.

The trial court entered judgment in favor of plaintiff Geraldine Grier Houston and against defendants Juanita Tillman and the Estate of Clifford Medlin, Jr. for the sum of $120,000.00. On appeal, defendants primarily argue that the trial court erred when it imposed a constructive trust on certain property in the absence of defendants' engaging in any wrongdoing. Because "wrongdoing" is not a requirement for imposing a constructive trust and because the record contains sufficient evidence to support the trial court's imposition of a constructive trust, we find no error.

Facts

In about 1989, plaintiff, who was married, met the decedent, Clifford Medlin. Mr. Medlin lived on Miller Avenue in Charlotte, North Carolina (the "Miller Avenue residence"). In 1997, plaintiff's husband moved out of their home on Coburg Avenue in Charlotte (the "Coburg residence"), leaving plaintiff, plaintiff's daughter, and plaintiff's two grandchildren to support themselves. Plaintiff began working, but was forced to stop sometime in 2000 due to a back injury she suffered on the job. Although disabled, plaintiff was able to maintain the mortgage on the Coburg

residence for some time with rent paid by her daughter who continued to live with her.

After her husband had left, plaintiff's relationship with Mr. Medlin became romantic. Plaintiff and Mr. Medlin sometimes stayed the night at the other's house, and starting in 2001, when Mr. Medlin began a seven-year regimen of dialysis treatments, plaintiff started providing caretaking and in-home nursing services for Mr. Medlin.

In 2004, plaintiff fell behind on her mortgage payments for the Coburg residence, and the bank foreclosed on her home. However, Mr. Medlin acquired title to the Coburg residence in his own name and plaintiff and her family then resumed living at the Coburg residence. Mr. Medlin paid the mortgage on the Coburg residence while plaintiff paid for groceries. In addition, in 2005, Mr. Medlin purchased a new Dodge Stratus and gave it to plaintiff for Mother's Day. While title to the Dodge remained in Mr. Medlin's name, plaintiff was responsible for the car's maintenance.

Mr. Medlin underwent a kidney transplant in 2008. Plaintiff stayed at the hospital for a month with Mr. Medlin while he was recovering. After Mr. Medlin was discharged, plaintiff continued to provide caretaking and in-home nursing services for him. Over the course of their relationship, plaintiff also helped Mr. Medlin when he suffered from gout, a back condition, and problems associated with asbestos in his lungs. Plaintiff also managed Mr. Medlin's finances. Plaintiff estimated that she spent six to seven hours per day for 11 years taking care of Mr. Medlin and providing in-home nursing services.

Mr. Medlin died unexpectedly of a heart attack in early 2012. The day Mr. Medlin died, Mr. Medlin's sister -- defendant Tillman -- whom plaintiff had never met, arrived at the Miller Avenue residence and declared, "I am in charge here." Ms. Tillman demanded keys to the Miller Avenue residence and the Coburg residence. Being one of Mr. Medlin's heirs, Ms. Tillman applied for and was appointed as the personal representative of Mr. Medlin's estate shortly after his death. Ms. Tillman repossessed the Dodge from plaintiff with the assistance of a uniformed police officer and evicted plaintiff from the Coburg residence, letting the house go into foreclosure. Ms. Tillman also sold the Dodge and placed the proceeds into the estate.

On 8 June 2012, plaintiff filed suit against Ms. Tillman and Mr. Medlin's estate, asserting causes of action for (1) a claim for personal services, (2) constructive trust, parole trust, and (3) parole gift. The complaint sought the sum of $582,400.00 for personal services rendered

to Mr. Medlin and the declaration of a constructive or resulting trust with respect to the Coburg residence.

On 16 August 2012, defendants filed a combined motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, motion for summary judgment, and motion for sanctions and attorneys' fees. Plaintiff responded with a motion to amend and restate her complaint.[1] On 2 October 2012, the trial court entered an order deferring ruling on the Rule 12(b)(6) motion, allowing plaintiff leave to file an amended and restated complaint, and declining to rule on defendants' remaining motions. After plaintiff filed an amended and restated complaint on 2 October 2012, defendants, on 30 October 2012, again filed a combined Rule 12(b)(6) motion to dismiss, motion for summary judgment, and motion for sanctions and attorneys' fees. On 10 December 2012, the trial court entered an order denying defendants' motions.

At trial, the trial court instructed the jury solely on plaintiff's request for a constructive trust, submitting three issues to the jury. The jury answered "[y]es" as to the issue whether the Coburg Avenue residence and the Dodge were "subject to a constructive trust in favor of the Plaintiff[.]" The jury also found that "the conduct of the Defendants, Juanita Tillman and The Estate Of Clifford Medlin, Jr., deprived the Plaintiff of a beneficial interest in [the Coburg residence] and the 2005 Dodge Stratus to which the Plaintiff is entitled[.]" Finally, with respect to "[w]hat amount is the Plaintiff . . . entitled to recover from the Defendants . . .[,]" the jury answered: $120,000.00. The trial court denied defendants' motion for judgment notwithstanding the verdict and entered judgment on 14 May 2013 in accordance with the verdict. Defendants timely appealed to this Court.

I

[1] Defendants first contend that the trial court erred when it granted plaintiff leave to amend her complaint, when it denied defendants' motions to dismiss pursuant to Rule 12(b)(6), and when it denied defendants' motion for summary judgment. However, with respect to the trial court's decision to grant plaintiff's motion for leave to amend her complaint, defendants merely asserted their contention in a heading and presented no specific argument why that ruling was in error. We, therefore, will not address that ruling. *See* N.C.R. App. P. 28(b)(6).

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1. Although the record does not explicitly disclose whether or when such a motion was made, we infer from the trial court's 2 October 2012 order that such a motion was made prior to that date.

With respect to defendants' argument that the trial court erred in denying their motion to dismiss the original complaint, plaintiff's amendment and restatement of the complaint has rendered any argument regarding the original complaint moot. *See Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) ("'A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'" (quoting *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996))); *Hyder v. Dergance*, 76 N.C. App. 317, 319-20, 332 S.E.2d 713, 714 (1985) (noting that "an amended complaint has the effect of superseding the original complaint"). *See also Coastal Chem. Corp. v. Guardian Indus., Inc.*, 63 N.C. App. 176, 178, 303 S.E.2d 642, 644 (1983) (noting trial court found defendant's motion to dismiss plaintiff's original complaint presented "'moot question'" when trial court granted plaintiff's motion to amend).

With respect to defendants' motion to dismiss the amended complaint, defendants cannot show any prejudice from the denial of their motion as to the first claim for relief based on quantum meruit since the trial court did not submit the quantum meruit claim to the jury. With respect to the constructive trust claim, defendants argue that the trial court erred in failing to dismiss the claim because the amended complaint failed "to allege wrongdoing on the part of Defendants in the acquisition of the property in question which would allow the imposition of a constructive trust." As we explain below, in discussing defendants' arguments regarding its motion for a directed verdict and motion for JNOV, defendants have mistaken the law. Because plaintiff was not required to allege wrongdoing and defendants have made no other argument regarding the sufficiency of the amended complaint, defendants have failed to demonstrate that the trial court erred in denying their motion to dismiss.

Defendants also contend that the trial court erred in denying their motion for summary judgment as to all of plaintiff's claims in the amended complaint. However, "[i]mproper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts . . . ." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Because this case was tried on the merits after denial of defendants' motion for summary judgment, under *Harris*, defendants' arguments regarding the summary judgment order cannot amount to reversible error, and we, therefore, do not address them.

II

[2] Defendants next contend that the trial court erred in denying their motion for a directed verdict and motion for JNOV as to plaintiff's quantum meruit and constructive trust claims. However, although defendants argue in their brief that plaintiff's evidence in support of her claim based on quantum meruit was insufficient, plaintiff's quantum meruit claim was not submitted to the jury. The sole issue before the jury was plaintiff's entitlement to a constructive trust. As a result, defendants' arguments regarding the quantum meruit claim cannot be a basis for reversal of the judgment below. This aspect of defendants' argument is beside the point. *See Dodd v. Wilson*, 46 N.C. App. 601, 602, 265 S.E.2d 449, 450 (1980) (holding verdict on issues submitted to jury rendered moot court's refusal to submit another issue to jury where refusal did not result in harm to defendant-appellant).

The sole remaining question is whether the trial court erred in denying defendants' motion for a directed verdict and motion for JNOV as to plaintiff's request for a constructive trust. " 'The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.' " *Springs v. City of Charlotte*, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009)).

Defendants' only contention with respect to the constructive trust claim is that "for a constructive trust to be imposed, the owner of title has to acquire the property through some sort of wrongdoing" and that, here, "[s]uch wrongdoing was neither alleged nor proven." Defendants argue that since they acquired title to the Coburg residence and the Dodge by operation of intestacy law, they could not have committed wrongdoing because they took no affirmative action to acquire title.

Our Supreme Court's decision in *Variety Wholesalers, Inc. v. Salem Logistics Servs., LLC*, 365 N.C. 520, 723 S.E.2d 744 (2012), sets out the controlling law with respect to constructive trusts. In rejecting this Court's conclusion that the existence of a fiduciary relationship was a requirement for imposition of a constructive trust, the Supreme Court explained:

> "A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty *or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.*"

Id. at 530, 723 S.E.2d at 751 (emphasis added) (quoting *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)). The Court noted further that it had "also used the phrase, 'any other unconscientious manner,' in describing situations in which a constructive trust may be imposed without a fiduciary relationship." *Id.* at 531, 723 S.E.2d at 752 (quoting *Speight v. Branch Banking & Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936)).

Accordingly, *Variety Wholesalers* holds that a trial court may impose a constructive trust, even in the absence of fraud or a breach of fiduciary duty, upon the showing of either (1) some other circumstance making it inequitable for the defendant to retain the funds against the claim of the beneficiary of the constructive trust, or (2) that the defendant acquired the funds in an unconscientious manner. *Id.* at 530-31, 723 S.E.2d at 751-52. *See also id.*, 723 S.E.2d at 752 (noting that "[i]n the absence of [a fiduciary] relationship, [plaintiff] faces the difficult task of proving 'some other circumstance making it inequitable' for [defendant] to possess the funds . . ." (quoting *Wilson*, 276 N.C. at 211, 171 S.E.2d at 882)).

Although defendants cite *Variety Wholesalers* and *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), in support of their claim that "some other circumstance" and "unconscientious manner" are synonymous with "wrongdoing," defendants have not pointed to any language in either case to support their contention.[2] Indeed, the Supreme Court's application of the constructive trust doctrine in *Variety Wholesalers* establishes that actual wrongdoing, such as fraud or breach of fiduciary duty, is not necessary for imposition of a constructive trust.

In *Variety Wholesalers*, the plaintiff had contracted with a provider of bill-payment and auditing services. 365 N.C. at 522, 723 S.E.2d at 746. When notified by the bill-payment provider of the amounts the plaintiff

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2. *Sara Lee* addressed the interaction of the constructive trust doctrine with the Workers' Compensation Act, and it is, therefore, irrelevant to our discussion here except insofar as it recites the same general test for imposition of a constructive trust articulated in *Variety Wholesalers*. 351 N.C. at 35, 519 S.E.2d at 313.

owed to freight carriers, the plaintiff, at the provider's request, would forward the amounts due to a lock-box bank account that, unbeknownst to the plaintiff, was actually owned by the defendant, the provider's lender. *Id.*, 723 S.E.2d at 746-47. The plaintiff claimed that the amounts deposited by the plaintiff were supposed to be paid to the freight carriers. *Id.*, 723 S.E.2d at 747. However, the defendant applied the funds deposited in the lock-box account -- which, according to the defendant, were supposed to be funds payable to the provider -- towards the principal and interest due on the provider's line of credit. *Id.*

In holding that issues of fact existed regarding the availability of a constructive trust, the Supreme Court did not require proof of actual wrongdoing, but instead held that if the defendant had "*constructive notice* that [the provider] did not have ownership of the funds deposited in the [lock-box] account, [the defendant's] continued acceptance of those funds could be considered unconscientious or inequitable and could thus permit the imposition of a constructive trust." *Id.* at 531, 723 S.E.2d at 752 (emphasis added). *See also Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997) (upholding constructive trust in equitable distribution action even absent any mention of fraud, breach of fiduciary duty, or wrongdoing).

In this case, defendants have argued only that "the standard for imposing a constructive trust is that [the] holder of legal title acquired the property through some wrongdoing. Such wrongdoing was neither alleged nor proven" in this case. Since under *Variety Wholesalers*, proof of wrongdoing is not a necessary prerequisite for a constructive trust and since defendants have made no argument that plaintiff's evidence was insufficient to prove, as allowed in *Variety Wholesalers*, some other circumstance making it inequitable for defendants to have retained the Coburg residence and the Dodge, defendants have failed to demonstrate that the trial court erred in denying their motion for a directed verdict and their motion for JNOV. *See also Rape v. Lyerly*, 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975) (holding constructive trust may be imposed on property received by beneficiaries of decedent's estate to enforce unfulfilled personal services agreement for decedent to devise land to plaintiff); *Rhue v. Rhue*, 189 N.C. App. 299, 307-08, 658 S.E.2d 52, 59 (2008) (upholding constructive trust on certain land parcels when parties had confidential and cohabiting relationship; plaintiff assisted defendant with day-to-day living, managed defendant's finances, cared for defendant's grandson, helped operate defendant's business, and relied on defendant's promise that parcels would be for their mutual benefit; and defendant subsequently denied plaintiff's interest in parcels).

Defendants have not challenged the trial court's jury instructions or the issues submitted to the jury and have made no other argument for reversal of the judgment below. We, therefore, hold that defendants received a trial free of prejudicial error.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

IN THE MATTER OF THE APPEAL OF BECKY KING PROPERTIES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES AT SEAWATCH, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES DEVELOPMENT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF COASTAL DEVELOPMENT & REALTY BUILDER, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF DREWMARK INVESTMENTS, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF EAGLE POINT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF EASTERN CAROLINA'S CONSTRUCTION & DEVELOPMENT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF GEORGETOWN LAND & TIMBER, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF MAS PROPERTIES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF MCDONALD DEVELOPMENT ASSOCIATES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN RE APPEAL OF BECKY KING PROPS., LLC

[234 N.C. App. 699 (2014)]

In the Matter of the Appeal of Ocean Isle Palms, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of Pointe West, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of Remuda Run, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of Rivers Edge Golf Club & Plantation, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of SeaScape at Holden Plantation, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of Seawatch at Sunset Harbor, LLC from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

In the Matter of the Appeal of William E. Saunders Jr., Trustee from the decision of the Brunswick County Board of Equalization and Review Concerning the Valuation and Taxation of Real Property for Tax Year 2012

No. COA 13-1107

Filed 1 July 2014

Appeal and Error—interlocutory orders and appeals—Property Tax Commission—no substantial right exception—subject matter jurisdiction

The County's appeal from interlocutory orders of the Property Tax Commission (Commission) were dismissed. Appeals from the Commission are not subject to a "substantial right" exception, and the County's contentions that the Commission lacked subject matter jurisdiction to enter the orders, and that the orders were therefore void, did not create a right to immediate review of the orders.

Appeal by Brunswick County from orders entered by the Property Tax Commission on 17 May 2013. Heard in the Court of Appeals 4 March 2014.

Elaine Jordan for taxpayer-appellees.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler and Office of County Attorney, by Bryan W. Batton for defendant-appellant.

STEELMAN, Judge.

Where the County appeals from interlocutory orders of the Property Tax Commission, its appeals must be dismissed. Appeals from the Commission are not subject to a "substantial right" exception, and the County's contentions that the Commission lacked subject matter jurisdiction to enter the orders, and that the orders are therefore void, do not create a right to immediate review of the orders.

I. Factual and Procedural Background

In 2012 appellant Brunswick County ("County") conducted a revaluation of real property in the county for purposes of establishing *ad valorem* property tax assessments. Following the revaluation, taxpayers Becky King Properties, LLC; Coastal Communities at Seawatch, LLC; Coastal Communities at Ocean Ridge Plantation, LLC; Coastal Communities Development, LLC; Coastal Development & Realty Builder, LLC; Drewmark Investments, LLC; Eagle Point, LLC; Eastern Carolina's Construction & Development, LLC; Georgetown Land & Timber, LLC; MAS Properties, LLC; McDonald Development Associates, LLC; Ocean Isle Palms, LLC; Pointe West, LLC; Remuda Run, LLC; Rivers Edge Golf Club & Plantation, LLC; SeaScape at Holden Plantation, LLC; Seawatch at Sunset Harbor, LLC; and William E. Saunders Jr., Trustee (collectively, Taxpayers) appealed to the Brunswick County Board of Equalization and Review. In early July 2012 the Board of Equalization and Review mailed decisions to Taxpayers, denying their appeals. On 1 August 2012 Taxpayers sent notices of appeal to the North Carolina Property Tax Commission ("Commission") via United Parcel Service Next Day Air. Commission received Taxpayers' notices of appeal on 2 August 2012.

On 13 August 2012 County filed motions to dismiss Taxpayers' appeals to Commission for failure to file their appeals in a timely manner. N.C. Gen. Stat. § 105-290(e) requires that a notice of appeal "from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner." County asserted that Taxpayers filed their notices of appeal on the 31st day and thus failed to comply with the 30 day requirement. On 19 October 2012 Commission conducted

a hearing on County's motions to dismiss. At the end of the hearing, Commission indicated that it would grant County's motions for dismissal. The record reflects that on 14 December 2012 Commission entered an order granting County's motion to dismiss the appeal of Becky King Properties. Becky King Properties filed a notice of appeal and exceptions on 11 January 2013.[1]

On 17 May 2013 Commission filed orders reversing its October 2012 dismissal of Taxpayers' appeals to Commission. The orders are identical except for the names of the taxpayers, and state that:

> During the March 12, 2013 Administrative Session of Hearings, the Property Tax Commission ("Commission"), on its own motion, reviewed the dismissal of this appeal, and for good cause shown, now deems it appropriate to deny Brunswick County's motion to dismiss the matter. It is therefore ordered and decreed that Brunswick County's motion to dismiss this appeal is denied in all respects.

On 14 June 2013 County filed notices of appeal from Commission's orders reversing its earlier rulings and denying County's motions to dismiss Taxpayers' appeals to Commission.

On 7 November 2013 the North Myrtle Liquidating Trust ("Trust") filed a motion in this Court seeking to substitute itself for certain taxpayers for purposes of this appeal. Trust asserted that five taxpayers (Coastal Communities at Ocean Ridge Plantation, LLC; Drewmark Investments, LLC; Eagle Point, LLC; McDonald Development Associates, LLC; and Ocean Isle Palms, LLC) had conveyed all of their properties to Trust, and that seven other taxpayers (Becky King Properties, LLC; Coastal Communities at Seawatch, LLC; Coastal Communities Development, LLC; Eastern Carolina's Construction & Development, LLC; MAS Properties, LLC; Rivers Edge Golf Club & Plantation, LLC;

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1. The parties stipulate that Commission also entered orders dismissing the appeals of the other seventeen taxpayers, and that these taxpayers also filed notices of appeal and exceptions. These orders and notices of appeal are not to be found in the record. As a result, we have no way to determine whether these taxpayers filed timely notices of appeal to this Court. Nor does the record include any documents indicating whether the appeals of any taxpayers (other than those whose properties were later purchased by the North Myrtle Liquidating Trust) were perfected or whether any of these taxpayers sought to withdraw their appeals. "[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it." *State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) (citing *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979) (other citations omitted). However, we have resolved this case based on the interlocutory nature of County's appeal, despite these omissions from the record.

and Seawatch at Sunset Harbor, LLC) had conveyed some but not all of their properties to Trust. On 22 November 2013 Trust's motion was allowed. On 9 December 2013 Trust filed a motion for dismissal of its appeal with respect to properties owned by Trust. The motion asserted that Trust and County had "resolved their dispute by settlement" with regard to properties owned by Trust, and that as "a condition of settlement, the Trust agreed to dismiss its challenge to the County's 2012 tax assessments of the Trust properties" and that County had "agreed to dismiss [its] appeal as it concerns the Trust Properties." This motion was granted on 11 December 2013, so the present appeal concerns only the properties that were not transferred to Trust.

II. Interlocutory Appeal

We first address Taxpayers' argument that County's appeal should be dismissed as interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Commission's orders denying County's motions to dismiss Taxpayers' appeals to Commission are interlocutory, as Taxpayers' challenges to County's revaluation of their properties remain unresolved.

Appeal from an order of Commission to this Court is governed by N.C. Gen. Stat. § 7A-29(a), which provides that "[f]rom any final order or decision of . . . the Property Tax Commission under G.S. 105-290 and G.S. 105-342 . . . appeal as of right lies directly to the Court of Appeals." The statute expressly limits the right of appeal to appeals from a "final order or decision." Moreover, N.C. Gen. Stat. § 7A-29 does not make an exception for interlocutory orders in which a substantial right of the appellant is in jeopardy. Therefore, we do not consider County's argument that it is entitled to immediate review to protect its "substantial right" to avoid the waste of "significant resources."

County asserts that after Taxpayers entered notices of appeal, Commission was divested of jurisdiction and lacked subject matter jurisdiction to enter the subsequent orders reversing its earlier dismissal of Taxpayers' appeals. However, an appellant does not obtain a right to immediate review of an interlocutory order simply by arguing that the tribunal lacked subject matter jurisdiction to enter the interlocutory order. *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) ("denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately

appealable") (citing *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982)).

County also attempts to draw a distinction between appeals from the denial of a motion to dismiss based on lack of subject matter jurisdiction and an appeal based on a party's assertion that an order was "void." However, we agree with Taxpayers that "[t]here is no such distinction" given that "a trial tribunal order issued without subject-matter jurisdiction is void — that's the very effect of lack of subject-matter jurisdiction and the most common reason for an order being void."

County argues that "[v]oid orders are not analyzed as 'final' or 'interlocutory' on appeal[.]" None of the cases that County cites in support of this position hold that an unappealable interlocutory order will be reviewed by this Court merely because an appellant raises the argument that the underlying order was "void."[2] For example, County relies heavily upon *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E.2d 434 (1981), and asserts that in *Stroupe*, our Supreme Court "noted that the judgment appealed from was interlocutory, then analyzed whether a direct or indirect attack was permissible without requiring the order to be final" and that *Stroupe* found "an interlocutory order void on appeal." However, although the order at issue in *Stroupe* had been interlocutory when it was originally entered, the appeal was taken from a final judgment. *Stroupe* did not address the appeal from an interlocutory order, and did not hold that if a party asserts that an order is void, this argument confers upon the party a right of immediate review of an interlocutory order. Similarly, County contends that in *In re Officials of Kill Devil Hills Police Dep't*, __ N.C. App. __, 733 S.E.2d 582 (2012), this Court "vacat[ed an] interlocutory order . . . without requiring the order to have been final." However, as discussed above, an "interlocutory order is one made during the pendency of an action[.]" *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. In *Kill Devil Hills*, the trial court had entered an order *sua sponte*, although there was no case before it. Therefore, the order was not "interlocutory" because there was no action during the "pendency" of which an order could be entered. County has also quoted selected excerpts from a number of other cases, discussing the general nature of a void order. None of the cited cases suggest that an immediate appeal lies from an interlocutory order based on the fact that the appellant has contended the challenged order was void. Moreover, we have previously dismissed

2. If an interlocutory appeal were subject to immediate review whenever an appellant asserted that the interlocutory order was "void," this exception would be likely to swallow the rule.

interlocutory appeals in which the appellant argued that the trial court's order was void. *See Johnson v. Lucas*, 168 N.C. App. 515, 517, 608 S.E.2d 336, 338 (noting that the appellant had raised several issues, including whether "the prior judgment was void" but holding that "in light of our conclusion that this appeal should be dismissed as interlocutory, we do not reach any of the remaining issues"), *aff'd per curium*, 360 N.C. 53, 619 S.E.2d 502 (2005), and *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989) (dismissing the plaintiff's first appeal as interlocutory and later holding, after final judgment was entered, that the challenged order was void).

The issue before us is not whether County is correct that Commission lacked subject matter jurisdiction and thus entered void orders, or whether Taxpayers are correct that Commission had authority to enter the challenged orders under N.C. Gen. Stat. § 105-345(c). Nor does the resolution of this case depend upon the extent of this Court's "inherent authority to set aside void orders," the right to collaterally attack a void order, or the legal effect of the determination that an order is void. Rather, the question is whether the validity of Commission's orders – which are clearly interlocutory – is properly before us at this time. We hold that County has attempted to appeal from interlocutory orders that are not subject to immediate review, that the "substantial right" exception is not applicable to an appeal from Commission, and that County's argument that Commission's orders are void for lack of subject matter jurisdiction does not confer a right of immediate appeal on County.

This appeal must be dismissed.

DISMISSED.

Judges McGEE and ERVIN concur.

IN RE B.S.O.

[234 N.C. App. 706 (2014)]

IN THE MATTER OF B.S.O., V.S.O., R.S.O., A.S.O., Y.S.O.

No. COA14-186

Filed 1 July 2014

1. Termination of Parental Rights—grounds—abandonment—notice—deportation

The trial court did not err by terminating respondent father's parental rights. The allegation of abandonment was sufficient to put respondent on notice of a potential adjudication under N.C.G.S. § 7B-1111(a)(7). Respondent's arrest and subsequent deportation did not prevent him from communicating with his children and Mecklenburg County Youth and Family Services.

2. Termination of Parental Rights—grounds—neglect

The trial court did not err by terminating respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). The evidence and the court's evidentiary findings were sufficient to show a probability of a repetition of neglect. Respondent failed to address her mental health issues and emotional instability, and respondent had not resolved the issues of improper supervision and domestic violence that led to the children's removal from her home.

Appeal by respondents from order entered 12 November 2013 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 11 June 2014.

Twyla Hollingsworth-Richardson for petitioner-appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.

Smith Moore Leatherwood LLP, by Carrie A. Hanger, for guardian ad litem.

Appellate Defender Staples Hughes by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.

Rebekah W. Davis for respondent-appellant father.

STROUD, Judge.

Respondent-parents appeal from an order terminating their parental rights to the minor children B.S.O. ("Brandy," born April 2009), V.S.O. ("Vincent," born May 2006), R.S.O. ("Ronald," born May 2005), A.S.O. ("Adam," born January 2004), and Y.S.O. ("Yvonne," born April 2010).[1] Because respondent-father is not the father of Adam or Yvonne, his appeal does not involve these children. We note that the district court also terminated the parental rights of Yvonne's father, Jose S., and Adam's putative father, Orlando V., neither of whom are parties to this appeal.

I. Procedural History

Mecklenburg County Youth and Family Services ("YFS") obtained non-secure custody of Brandy, Vincent, Ronald and Adam on 14 October 2009, and of Yvonne on 9 April 2010. The district court adjudicated the four elder children neglected and dependent juveniles on 10 December 2009, and entered adjudications of neglect and dependency as to Yvonne on 5 May 2010. As we noted in respondents' previous appeal, YFS "first became involved with the family in February of 2006 based on reports of inappropriate discipline and domestic violence. YFS remained involved with the family over the course of the next several years." *In re B.S.O.*, ___ N.C. App. ___, ___, 740 S.E.2d 483, 484 (2013).

YFS filed petitions to terminate respondents' parental rights on 9 May 2011. The district court held its initial hearing on the petitions between 5 January and 16 March 2012 and entered an order terminating respondents' parental rights on 18 April 2012. On appeal, we reversed the order and remanded to the district court for consideration of respondent-mother's motion to re-open the evidence, which she filed prior to entry of the termination order. *In re B.S.O.*, ___ N.C. App. at ___, 740 S.E.2d at 486-87. The court allowed respondent-mother's motion and received additional evidence in the cause on 18 July and 30 September 2013. By order entered 12 November 2013, the court again concluded that grounds existed to terminate respondents' parental rights and determined that termination was in the best interests of the minor children. Respondents filed timely notices of appeal.

II. Standard of Review

Respondents challenge the district court's adjudication of grounds to terminate their parental rights under N.C. Gen. Stat. § 7B-1111(a) (2013). In reviewing the trial court's decision, we must determine whether the

1. We will refer to the juveniles by pseudonym to protect their privacy.

findings of fact are supported by clear, cogent and convincing evidence, and whether the findings support the court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). "If there is competent evidence, the findings of the trial court are binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). An appellant is bound by any unchallenged findings of fact. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where the adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). We review conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

Respondents challenge each of the grounds for termination found by the district court. However, it is well established that any "single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W.*, 179 N.C. App. 788, 789, 635 S.E.2d 916, 917 (2006). Therefore, if we determine that the court properly found one ground for termination under N.C. Gen. Stat. § 7B-1111(a), we need not review the remaining grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003).

III. Respondent-father's Appeal

[1] Respondent-father argues the district court erred in terminating his parental rights based on an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2013). Respondent-father contends that he was not afforded notice of his need to defend this ground at the termination hearing because the petitions filed by YFS did not specifically allege willful abandonment under subpart (a)(7). *See In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007). We disagree.

The Juvenile Code requires a motion or petition for termination of parental rights to allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [in N.C. Gen. Stat. § 7B-1111(a)] exist." N.C. Gen. Stat. § 7B-1104(6) (2013). While the allegations "need not be exhaustive or extensive[,]" this Court has held that "they must be sufficient to put a party on notice as to what acts, omission or conditions are at issue." *In re T.J.F.*, ___ N.C. App. ___, ___, 750 S.E.2d 568, 569 (2013) (citation and quotation marks omitted). Moreover,

> [w]hen the petition alleges the existence of a particular statutory ground and the court finds the existence of a

> ground not cited in the petition, termination of parental rights on that ground may not stand unless the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground.

Id.

Under N.C. Gen. Stat. § 7B-1111(a)(7), parental rights may be terminated if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

The petitions filed by YFS on 9 May 2011 alleged that respondent-father, *inter alia*, "*abandoned said juvenile*[*s*] in that . . . [he] was deported to Mexico . . . after being incarcerated on September 3, 2010. [His] current whereabouts are unknown." (emphasis added). The petitions further alleged that respondent-father, "for a continuous period of more than (6) months next preceding the filing of the petition[s], ha[d] willfully failed for such period to pay a reasonable portion of the cost of care for said juvenile[s.]"[2] Although YFS referred to respondent-father's abandonment of the children in the context of alleging that he "neglected said juvenile[s] as defined in G.S. Section 7B-101(15)[,]" the petitions explicitly asserted that respondent-father had, in fact, "abandoned" his children. Coupled with allegations that his whereabouts were unknown since his incarceration and deportation in September 2010 – approximately eight months before the petitions were filed – we believe the allegation of abandonment was sufficient to put respondent-father on notice of a potential adjudication under N.C. Gen. Stat. § 7B-1111(a)(7). *Cf. In re T.J.F.*, ___ N.C. App. at ___, 750 S.E.2d at 569 ("While the better practice would have been to specifically plead termination pursuant to section 7B-1111(a)(7), we conclude the petition here sufficiently alleged facts to place respondent-father on notice that his parental rights may be terminated on the basis that he abandoned his child.").

Respondent-father also argues that the evidence and the district court's findings of fact are insufficient to establish that he willfully abandoned the minor children in the six months immediately preceding

2. *See* N.C. Gen. Stat. § 7B-1111(a)(3) (2013).

YFS's filing of the petition, as required by N.C. Gen. Stat. § 7B-1111(a)(7). He contends that "neither the findings nor the evidence address[es his] intent or the six month time period prior to the filing of the termination petition."

To establish grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(7), YFS was required to show that respondent-father had willfully abandoned his children during the "determinative period" from 9 November 2010 to 9 May 2011, the date it filed its petitions. *In re S.R.G.*, 195 N.C. App. 79, 84-85, 671 S.E.2d 47, 51-52 (2009). "Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "[T]he findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53.

Rearranged for clarity, the district court's findings reflect the following facts regarding respondent-father's conduct during the six months that preceded the filing of the termination petitions in May 2011:

> 59. [Respondent-father] was incarcerated for no operator license offense on 3 September 2010 and deported [to Mexico].
>
> 60. He returned to Charlotte at some point in March 2012. . . .
>
> . . . .
>
> 47. While in Mexico, [respondent-father] was in contact with the social worker on at least one occasion. During the time [respondent-father] was in Mexico, he did not seek to have his three children . . . come live with him in Mexico. He did not offer any other relative placements for the juveniles.
>
> 48. While in Mexico, [respondent-father] did not provide any child support for his children. [He] did not provide or offer any financial assistance for the care of his three children. [He] has not provided any or offered any child support for his children since his return to the United States.
>
> . . . .

> 52. . . . [Respondent-father] has made no efforts to keep updated on the children while they have remained in custody.
>
> . . . .
>
> 30. Neither the respondent-mother nor the respondent[-] father[has] provided any financial support for the children although they have the ability to do so. [They] have no known disabilities.

Based on these findings, the court concluded that respondent-father "willfully abandoned the juveniles for at least six (6) consecutive months immediately preceding the filing of the petition[.]" *See* N.C. Gen. Stat. § 7B-1111(a)(7). Although the willfulness of a parent's conduct "is a question of fact to be determined from the evidence[,]" *In re Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514, it is immaterial that the court labeled its finding of willfulness by respondent-father a conclusion of law. *See State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) (reviewing a mislabeled "conclusion of law" as a finding of fact).

We conclude that these findings support the trial court's conclusion that respondent-father willfully abandoned his children under N.C. Gen. Stat. § 7B-1111(a)(7). They show that, during the relevant six-month period, respondent-father "made no effort" to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support. Although respondent-father was jailed and deported to Mexico in September 2010, this Court has repeatedly held that "a respondent's incarceration, standing alone, neither precludes nor requires a finding of willfulness" under N.C. Gen. Stat. § 7B-1111(a)(7). *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 510-11 (2000). Similarly, a parent's deportation should serve as "neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Although incarceration and deportation are not exactly the same, we find the cases dealing with incarcerated parents to be instructive. In both situations, a parent has been removed from his home by law enforcement action, presumably against his will. The cases recognize that a parent's opportunities to care for or associate with a child while incarcerated are different than those of a parent who is not incarcerated. The opportunities of an incarcerated parent are even more limited than those of a deported parent, in that once the deported parent has

been removed from this country, he would be free to work, send funds to support a child, or communicate with a child by phone, internet, or mail from his own country. His opportunities to see the child personally would be limited, but he would be free to pursue legal action to attempt to have the child returned to his custody in his own country. In any event, respondent-father here failed to take advantage of most of these opportunities after deportation to Mexico.

The evidence showed that respondent-father had the ability to remain in contact with his children while in Mexico but failed to do so. YFS social worker Lynda Peperak testified that she provided respondent-father with her telephone number in February 2010. Respondent-father was arrested on 3 September 2010 and left Mecklenburg County Jail on 14 September 2010. Ms. Peperak spoke with respondent-father by telephone on 6 and 26 May 2011, having "obtained his phone number from one of the foster parents[,]"[3] and confirmed that he still had Ms. Peperak's phone number. Nevertheless, respondent-father did not contact YFS to inquire about his children following his deportation. Ms. Peperak further testified that respondent-father had never "provided any cards, gifts, letters, or anything" for his three children; nor had he ever paid any support for them before or after YFS filed the petitions to terminate his parental rights in May 2011.

YFS social worker assistant Karen Logan-Rudisill, who supervised respondent-mother's visitation with the children, testified that respondent-father "called during one of the visits . . . to speak with the boys" approximately four or five months prior to the 15 March 2012 termination hearing. He never contacted Ms. Logan-Rudisill regarding the children.

At the hearing held on remand on 18 July 2013, respondent-father testified that he re-entered the United States without documentation in April 2012, and obtained employment and leased an apartment in Charlotte in May 2012. He confirmed that he had been deported in September 2010 and had spoken with respondent-mother and the children "[o]ne time" while in Mexico. Respondent-father claimed he did not contact YFS or the foster parents from Mexico because he "lost the number[.]" He also acknowledged that he had not "provided any monies in support of [the] children since they've been in foster care for nearly four years[.]"

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3. The record reflects that respondent-father telephoned the children's foster parents from Mexico on or about 21 March 2011 and gave them his phone number.

Respondent-father specifically objects to the district court's finding that he "made no efforts to keep updated on the children while they have remained in custody." To the extent the evidence showed that he contacted respondent-mother and spoke to the children on one occasion while he was in Mexico, we agree that finding of fact 52 is not strictly accurate. "However, to obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). As set forth above, the evidence showed that a single phone call to respondent-mother represented respondent-father's only effort to contact or keep apprised of his children during the relevant time period.[4] Therefore, the court's error is harmless. *Cf. In re Estate of Mullins*, 182 N.C. App. 667, 670-71, 643 S.E.2d 599, 601 ("In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions.") (quotation marks and citation omitted), *disc. rev. denied*, 361 N.C. 693, 652 S.E.2d 262 (2007).

This Court has found willful abandonment "where a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance." *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33 (2005) (citation, quotation marks, and brackets omitted). We have further held that a parent's single attempt to contact a child during a period of incarceration does not preclude a finding of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). *In re McLemore*, 139 N.C. App. at 431, 533 S.E.2d at 511 (citing *In re Harris*, 87 N.C. App. 179, 184, 360 S.E.2d 485, 488 (1987)). Both the evidence and the court's findings reflect that respondent-father's arrest and subsequent deportation did not prevent him from communicating with his children and YFS. In light of respondent-father's single phone call to respondent-mother and his children during the six months immediately preceding 9 May 2011, the district court did not err in finding that he willfully abandoned the children. *See id.*; *In re Searle*, 82 N.C. App. at 276-77, 346 S.E.2d at 514.

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4. To the extent that respondent-father claims "close contact" with YFS and the children prior to September 2010, we note this evidence falls outside the six-month period at issue under N.C. Gen. Stat. § 7B-1111(a)(7).

Having upheld the adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), we need not address the remaining grounds found by the district court for terminating respondent-father's parental rights. *See In re P.L.P.*, 173 N.C. App. at 9, 618 S.E.2d at 246.

IV. Respondent-mother's Appeal

[2] Respondent-mother challenges the court's conclusion that she neglected the minor children under N.C. Gen. Stat. § 7B-1111(a)(1) (2013). A neglected juvenile is one who, *inter alia*, "does not receive proper care, supervision, or discipline . . .; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2013). In order to support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1), "[n]eglect must exist at the time of the termination hearing[.]" *In re C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 729. Where "the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future." *Id.* The determination that a child is neglected is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

In support of its conclusion under N.C. Gen. Stat. § 7B-1111(a)(1), the district court found as follows:

> 7. . . . The primary issues which led to these children being placed in YFS custody were the mother's housing instability, domestic violence between the respondent-mother and [respondent-father]. Lack of appropriate supervision of the children and inappropriate discipline of the children were primary issues as well.
>
> 8. [Brandy, Vincent, Ronald, and Adam] were adjudicated neglected and dependent on December 10, 2009 . . . .
>
> 9. . . . Yvonne was adjudicated neglected and dependent on 5 May 2010.
>
> 10. . . . The respondent-mother was to engage in mental health treatment, obtain substance abuse assessment, obtain domestic violence assessment, participate in parenting education, visit with the children, maintain contact with YFS social worker, attend the children's appointments, maintain stable housing, and obtain employment in order to provide for the children.

. . . .

14. The respondent-mother was required to obtain therapy to establish that she could independently care for the children. The mother has suffered significant trauma in her life. The respondent-mother has not been able to complete therapy in more than 22 months that the children have been in YFS custody.

15. The respondent-mother has been inconsistent with her mental health treatment and psychotherapy. The respondent-mother attended psychotherapy sessions with Dr. Alicia Ceballos through September 2010. The respondent-mother did not attend her psychotherapy sessions consistently in October and November 2010. The respondent-mother did not see Dr. Ceballos between November 2010 and March 2011. The respondent-mother has not been consistent in reporting to Dr. Castro for mental health medication and management.

16. The respondent-mother was ordered to complete the NOVA domestic violence program pursuant to this Court's order of 9 June 2010. The mother completed two sessions of NOVA, but was terminated on 10 October 2010 for non-compliance. The YFS social worker obtained the respondent-mother's reinstatement in NOVA on 20 October 2010. The respondent-mother was terminated from NOVA for a second time on 7 December 2010 for non-compliance.

17. The respondent-mother was ordered by the Court on 9 June 2010 to complete [an] adult literacy program. The respondent-mother has not completed [an] adult literacy program.

18. The respondent-mother used corporal punishment with the children when they were in her care.

19. The respondent-mother completed parenting education through family sessions conducted by Traci Withrow; however, the respondent-mother only attended and participated in one shared-parenting visit, although [she] was offered several shared-parenting visits. The respondent-mother was provided with unsupervised visitation in December 2010, but these visits were discontinued after [she] lost the apartment she was living in due to lack of income.

. . . .

25. The respondent-mother has not attended the children's education and medical appointments although offered by the department.

. . . .

31. [Respondent-mother] has been . . . earning $300 per weekend per her own testimony for the past five months. [She] has not provided any monies for the support of the children to YFS or to the foster parents.

32. The mother has provided some small amounts of money to the children on occasion during visits. . . . These funds could be considered gifts and are not signs of actively supporting the children financially.

. . . .

46. Nothing has changed [since this Court's opinion in *In re B.S.O.*] other than [respondent-father] has [reentered] the country illegally.

. . . .

49. Upon [respondent-father]'s return to the United States in March 2012, [he] resumed his relationship with [respondent-mother].

50. [Respondent-father] has been providing [respondent-mother] with a stable place to stay since his return to Charlotte. The evidence does not establish that [he] has an emotional attachment to [respondent-mother,] and they are not married.

. . . .

55. The inconsistency of the respondent mother in complying with mental health therapy has not changed.

56. If the children were to return to the home of the respondent mother and [respondent-father], [she] would again be the primary caretaker of the children, and that would not resolve the issue of improper supervision that led to the three oldest children being placed in YFS custody approximately four years ago nor the issues of domestic violence that existed in her relationships.

> 57. The probability of the repetition of neglect is high in that the respondent mother has not addressed her mental health issues and [respondent-father] is not willing to change his level of involvement in the daily care of the children.
>
> . . . .
>
> 61. [Respondent-father] has provided a stable place to stay for [respondent-mother], but [she] has not addressed her mental health needs through consistent therapy and has not completed NOVA. Her relationship with [respondent-father] is one of convenience and is not stable.
>
> . . . .
>
> 66. The juveniles have been in YFS custody for approximately four years and the respondent mother has not addressed the issues that led to the children being placed in YFS custody. . . . .

To the extent respondent-mother does not contest these findings on appeal, they are deemed to be supported by competent evidence. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. We address respondent-mother's exceptions to the court's fact-finding below.

Challenging a portion of finding of fact 14, respondent-mother argues that there was no evidence that she was required to obtain mental health therapy "to establish that she could independently care for the children." Respondent-mother notes that no such purpose was explicitly articulated in her family services agreement ("FSA") or F.I.R.S.T.[5] assessment, or by any of her therapists.

As part of her FSA, respondent-mother agreed to submit to a F.I.R.S.T. assessment and follow its recommendations. The assessment resulted in respondent-mother's referral to CMC–Randolph for a mental health evaluation. Psychotherapist Alicia Ceballos, PhD, evaluated respondent-mother at CMC-Randolph in May 2011. Dr. Ceballos testified that the purpose of the referral was to ensure respondent-mother's compliance "with her medication regimen, and she was to acquire positive coping skills, especially emotion regulation skills in order to relate to her children and her partner."

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5. An acronym for Families in Recovery Stay Together.

Dr. Ceballos found that respondent-mother exhibited traits of borderline personality disorder, including a "very intense fear of abandonment[,]" "all or nothing thinking and functioning out of emotions[,]" "impulsivity relating to the abuse of alcohol, the intense anger and difficulty managing the anger[,] and a pattern of what appeared to be instability in her effective relationships." Dr. Ceballos developed a treatment plan for respondent-mother which included the goal of "learn[ing] skills in order to relate better with her partner and her children. In particular, improve her regulation of her anger."

Although respondent-mother's mental health treatment was not explicitly geared toward raising her children "independently[,]" abundant evidence shows that her mental health issues were inextricably linked to the conditions that led to the children's removal from her home and their adjudication as neglected and dependent. Respondent-mother's emotional instability and unregulated anger manifested themselves, *inter alia*, in her use of violence in the home with her children and respondent-father, as well as a series of unstable and volatile romantic relationships both before and after respondent-father's deportation to Mexico. In adjudicating Yvonne neglected in May 2010, the district court found that "[t]he primary issue" at the time of the four older children's adjudications "was the mother's mental health treatment." The court's orders have consistently emphasized respondent-mother's need to follow through with her mental health treatment. As the uncontested findings show—specifically, findings 15, 55, and 61—respondent-mother failed to do so. The ultimate relevance of this programming was necessarily to prepare respondent-mother to properly care for her children. Finding 14 is a reasonable short-hand summary of this evidence.

Respondent-mother next objects to finding 18 that she used corporal punishment with the minor children when they were in her care. While conceding "there is evidentiary support for the finding" as to incidents prior to the children's removal from her home in 2009, she contends there is no evidence that she used corporal punishment after YFS took custody of the children.

Finding 18 does not purport to refer to corporal punishment by respondent-mother after the children's removal from her home. The court was free to consider respondent-mother's conduct toward the children leading to their prior adjudication as neglected. *See In re Ballard*, 311 N.C. 708, 713, 319 S.E.2d 227, 231 (1984) ("[I]n ruling upon a petition for termination of parental rights for neglect, the trial court may consider neglect of the child by its parents which occurred before the entry of a previous order taking custody from them.") Such evidence

was relevant in assessing the likelihood of future neglect for purposes of N.C. Gen. Stat. 7B-1111(a)(1), particularly where respondent-mother's use of violence in the home and anger control issues were of central concern.

Respondent-mother claims the evidence does not support findings 25 and 31 that she did not attend her children's medical and educational appointments or "provide[] any monies for the support of the children to YFS or to the foster parents." Although we agree with respondent-mother that these findings vary slightly from the evidence, the discrepancies are inconsequential.

Asked about respondent-mother's attendance at the children's medical and educational appointments, Ms. Peperak testified that respondent-mother "attended one WIC appointment and one pediatrician appointment for the girls" and just one "school, an IEP meeting, for V[incent]" in December 2010. Moreover, respondent-mother "never asked [Ms. Peperak] about [the children's] appointments[.]" When queried about her own attendance, respondent-mother responded, "I remember I went to some of the medical appointments for the boys. I don't remember the exact dates of when that happened." The evidence thus showed that respondent-mother evinced little interest in the children's appointments and for the most part did not attend them.

Regarding respondent-mother's monetary contributions to YFS and the foster parents, Ms. Peperak testified that she had never "provided [YFS] with any money for the children's care[,]" despite reporting that she was earning $300 to $400 per week selling food beginning in October 2011. At a permanency planning hearing held on 15 March 2012, respondent-mother confirmed that she had paid nothing toward the support of the children, even though she was then earning at least $300 per weekend.

Ms. Logan-Rudisill testified that respondent-mother "on occasion" gave $10 to the girls' foster parents and $20 to the boys' foster parents. Respondent-mother would also occasionally give the children one-dollar bills. At the hearing held on remand on 18 July 2013, respondent-mother claimed that, within the past year, she had given the children $600 "once [when] I saw them at McDonald's." On cross-examination, however, respondent-mother explained that she "ran into" the children's foster mother, Ms. H. at a McDonald's in August 2012 and that she then bought "items for the children in August 2012 with Ms. [H.]" In response to the next question posed by counsel, respondent-mother confirmed that she "did not provide any financial support for the children between

March 2012 and May 2013[.]" We note that the court did find that respondent-mother "has provided some small amounts of money to the children on occasion during visits. . . . These funds could be considered gifts and are not signs of actively supporting the children financially."

The evidence fully supports the district court's finding that respondent-mother paid nothing to YFS toward the children's cost of care.[6] While the evidence does show her payment of occasional small sums to the foster parents, the corresponding error in finding 32 was harmless. The court's remaining findings make clear that it did not base the adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) on the absence of such payments from respondent-mother to the foster parents. *See generally In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240 (stating that "erroneous findings unnecessary to the determination do not constitute reversible error").

Respondent-mother next objects to finding 56, contending that "[t]he evidence does not show that there would be improper supervision of the children if they were returned to the home of the parents." We find no merit to this claim. The evidence shows that respondent-mother has failed to address her mental health issues and emotional instability. She also failed to complete domestic violence treatment at NOVA and was terminated three times for excessive absences. Although respondent-mother improved her parenting skills by working with child and family psychotherapist Traci Withrow between November 2009 and November 2010, Ms. Logan-Rudisill saw her skills "decline" after respondent-father was deported. Even after respondent-father's return, respondent-mother maintained a "passive" parenting style and had difficulty managing multiple children. Overall, Ms. Logan-Rudisill saw no improvement in respondent-mother's "ability to manage the five children" during her involvement in the case.

The evidence and the district court's findings further reflect the tenuous nature of respondents' relationship and respondent-mother's dependence on respondent-father. After respondent-father was deported, respondent-mother resumed her pattern of instability in her relationships and housing. In July 2011, she disclosed to Ms. Logan-Rudisill that she had been involved in a domestic violence incident with her then partner, Kelvin R., and showed Ms. Logan-Rudisill her "scratches and

6. The court found that YFS's total expenditures for the five children exceeded $315,000.

bruises." Ms. Peperak testified that respondent-mother had at least eleven different residences between December 2010 and March 2012 and "demonstrated a pattern of relationships not only with boyfriends but also with roommates and friends that have been unhealthy and have included violence." Finally, we note that respondent-mother does not contest the findings that respondent-father has "[re]entered the country illegally" and that "[h]er relationship with [him] is one of convenience and is not stable." Accordingly, the evidence amply supports the court's finding 56 that respondent-mother had not resolved the issues of improper supervision and domestic violence that led to the children's removal from her home.

Respondent-mother also challenges the court's "ultimate finding" in finding 57 that "[t]he probability of the repetition of neglect is high" in light of her failure to "address[] her mental health issues" and respondent-father's unwillingness "to change his level of involvement in the daily care of the children." We believe the evidence and the court's evidentiary findings are sufficient to show a probability of a repetition of neglect. More than three years after the children's removal from her home, respondent-mother had yet to confront the primary issues leading to their removal. Moreover, finding 57 is consistent with respondent-father's testimony "that if the children were to come back home, [respondent-mother] will be dedicated to their care and I would go out to work."

Where "different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). We conclude that the evidence and the court's evidentiary findings support a reasonable inference that neglect would likely recur if the children were returned to respondent-mother.

Respondent-mother also challenges the adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) as unsupported by the district court's findings of fact. However, the court found both a prior adjudication of neglect as to each child and a high probability of a repetition of neglect, as required. *See In re Ballard*, 311 N.C. at 714-15, 319 S.E.2d at 231-32. Therefore, this assignment of error is overruled.

Having affirmed the adjudication of grounds to terminate respondent-mother's parental rights for neglect, we do not address the remaining grounds found by the district court. *See In re P.L.P.*, 173 N.C. App. at 9, 618 S.E.2d at 246.

V. Conclusion

The petitions filed by YFS provided sufficient notice to respondent-father to allow an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). The evidence and the district court's findings support an adjudication of grounds to terminate respondent-father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), and of grounds to terminate respondent-mother's parental rights for neglect under N.C. Gen. Stat. § 7B-1111(a)(1). Therefore, we affirm the order terminating respondents' parental rights.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

IN THE MATTER OF N.T.U., MINOR CHILD

No. COA14-89

Filed 1 July 2014

1. Termination of Parental Rights—subject matter jurisdiction—temporary emergency jurisdiction—home state

The trial court had subject matter jurisdiction to terminate respondent mother's parental rights. The trial court properly entered the initial nonsecure custody orders pursuant to its temporary emergency jurisdiction based on the particular circumstances. North Carolina became the minor child's home state such that the trial court possessed jurisdiction to terminate respondent's parental rights pursuant to N.C.G.S. § 50A-201(a).

2. Termination of Parental Rights—grounds—incapable of providing care and supervision—incarceration—failure to provide viable alternative

The trial court did not err by terminating respondent's parental rights based on N.C.G.S. § 7B-1111(a)(6). Respondent was incapable of providing for the care and supervision of the minor child based on her incarceration, this incapacity would continue for the foreseeable future, and respondent failed to provide any viable alternative child care arrangements.

IN RE N.T.U.

[234 N.C. App. 722 (2014)]

Appeal by respondent from judgment entered 25 September 2013 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 11 June 2014.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Social Services.

Amanda Armstrong for guardian ad litem.

Jeffrey L. Miller for respondent-appellant.

DAVIS, Judge.

N.U. ("Respondent") appeals from the trial court's termination of her parental rights as to her son N.T.U. ("Nathan").[1] On appeal, Respondent argues that (1) the trial court lacked subject matter jurisdiction to terminate her parental rights as to Nathan; and (2) there was insufficient evidence to support either of the trial court's bases for terminating her parental rights. After careful review, we affirm.

Factual Background

Nathan was born to Respondent and Z.R.[2] in September of 2010 in Greenville, South Carolina. Nathan lived in South Carolina with Respondent until 21 September 2011.

On 21 September 2011, the Buncombe County Department of Social Services ("DSS") received a Child Protective Services report alleging that officers of the Asheville Police Department had arrested Respondent in connection with a bank robbery and homicide that had occurred in South Carolina earlier that day. Respondent was apprehended by law enforcement officers at a motel in Asheville. Nathan, who was one year old at the time, was with Respondent at the motel. Respondent was taken to the Buncombe County Jail.

The following day, DSS filed a juvenile petition alleging that Nathan was a neglected and dependent juvenile and obtained nonsecure custody of Nathan that same day. On 27 September 2011, a seven-day hearing was held on the nonsecure custody order. Following the hearing, the

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

2. Nathan's father, Z.R., did not appeal from the trial court's order terminating his parental rights and, therefore, is not a party to this appeal.

trial court entered an order on 14 October 2011 continuing nonsecure custody with DSS. In its 14 October 2011 order and in a subsequent order entered 29 November 2011 continuing nonsecure custody with DSS, the trial court acknowledged that South Carolina was Nathan's home state but that the Buncombe County District Court had "temporary emergency jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act" ("UCCJEA").

On 1 December 2011, the trial court held an adjudication hearing and, with the consent of Respondent, adjudicated Nathan to be a neglected and dependent juvenile. In its order, the trial court once again found that although South Carolina was Nathan's home state, the trial court had temporary emergency jurisdiction under the UCCJEA. The trial court ordered that Nathan remain in the custody of DSS.

The trial court conducted permanency planning review hearings during the course of the next year. By order entered 16 October 2012, the court set a permanent plan of guardianship with a concurrent plan of adoption for Nathan. On 12 April 2013, DSS filed a petition to terminate Respondent's parental rights as to Nathan. The termination of parental rights hearing was held on 24 July and 14 August 2013, and on 25 September 2013, the trial court entered an order terminating Respondent's parental rights on the grounds of neglect and incapacity to provide proper care and supervision. Respondent filed a timely notice of appeal.

Analysis

I. Subject Matter Jurisdiction

[1] Respondent first contends the Buncombe County District Court lacked subject matter jurisdiction to terminate her parental rights. We disagree.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). The issue of subject matter jurisdiction may be raised for the first time on appeal. *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Whether a court possesses jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

"In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). The jurisdictional statute governing actions

to terminate parental rights is N.C. Gen. Stat. § 7B-1101, which provides as follows:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. *The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.* . . .

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

The above-referenced statutes listed in N.C. Gen. Stat. § 7B-1101 are all provisions of the UCCJEA, which defines a "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to proceedings for the termination of parental rights. *In re N.R.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004). Pursuant to N.C. Gen. Stat. § 7B-1101, the trial court must have jurisdiction to make a child-custody determination under the provisions of N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203 in order to terminate the parental rights of a nonresident parent. *See* N.C. Gen. Stat. § 7B-1101; *K.U.-S.G.*, 208 N.C. App. at 132, 702 S.E.2d at 106.

N.C. Gen. Stat. § 50A-203 pertains only to the modification of a custody order previously entered by another state. In the present case, no other state has ever entered a custody order as to Nathan and, therefore, N.C. Gen. Stat. § 50A-203 does not apply here. Accordingly, we

must determine whether the trial court had jurisdiction to terminate Respondent's rights pursuant to N.C. Gen. Stat. § 50A-201.

N.C. Gen. Stat. § 50A-201 provides:

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

N.C. Gen. Stat. § 50A-201 (2013).

Respondent contends that the trial court could not have properly exercised jurisdiction to terminate her parental rights pursuant to N.C. Gen. Stat. § 50A-201 because it never actually possessed *any* jurisdiction over the custody of Nathan. We disagree.

The trial court noted that it was exercising temporary emergency jurisdiction over Nathan pursuant to N.C. Gen. Stat. § 50A-204(a) when it first entered the initial nonsecure custody orders. N.C. Gen. Stat. § 50A-204 allows a North Carolina court to exercise temporary emergency jurisdiction "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a) (2013).

Respondent argues that the trial court acted without proper temporary emergency jurisdiction because it failed to make findings that Nathan was abandoned or that it was necessary to exercise jurisdiction to protect Nathan from mistreatment or abuse. However, we have previously held that the statutory bases for jurisdiction set forth in the UCCJEA do *not* require a trial court to make specific findings of fact regarding jurisdiction and that N.C. Gen. Stat. § 50A-204 "states only that certain circumstances must exist, not that the court [must] specifically make findings to that effect . . . ." *In re E.X.J.*, 191 N.C. App. 34, 40, 662 S.E.2d 24, 27-28 (2008) (citation and quotation marks omitted), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

As such, we conclude that the trial court properly entered the initial nonsecure custody orders pursuant to its temporary emergency jurisdiction because the particular circumstances in this case supported emergency jurisdiction. When the trial court entered its 14 October 2011 order continuing nonsecure custody with DSS, Nathan was present in the State and — due to his mother's arrest and subsequent incarceration — left without supervision or any provision for his care. *See* N.C. Gen. Stat. § 50A-102(1) (defining "abandoned" as "left without provision for reasonable and necessary care or supervision"). Indeed, the juvenile petition alleged, and the trial court found, that DSS needed to assume custody of Nathan at that time because Respondent would be unable to provide care for him and the individual she recommended as a kinship placement had pending criminal charges, including sexual offenses against a child. Thus, we believe the trial court correctly treated Nathan as having been abandoned and that its initial assertion of jurisdiction was proper under N.C. Gen. Stat. § 50A-204.

Therefore, having determined that the trial court properly exercised temporary emergency jurisdiction over the custody of Nathan initially, the sole remaining question is whether the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201 at the time it terminated Respondent's parental rights. Neither before nor after the trial court's entry of the nonsecure custody orders have there been any custody proceedings instituted, or custody orders entered, in any state other than North Carolina. Nathan has lived in North Carolina with his foster parents since September 2011. Therefore, guided by our decision in *E.X.J.*, 191 N.C. App. 34, 662 S.E.2d 24, we conclude that North Carolina became Nathan's home state such that the trial court possessed jurisdiction to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 50A-201(a).

In *E.X.J.*, we held that the trial court properly exercised temporary emergency jurisdiction over the juveniles at issue in that case in initially placing them with the Rutherford County Department of Social Services ("the Department") because the respondent-mother had traveled from Alabama to North Carolina with the children and then left them with the Department because she felt she was unable to care for them. *Id.* at 39-40, 662 S.E.2d at 27. After the Department obtained custody, the children remained in North Carolina with a parent (or a person acting as a parent) for at least six months before the Department filed the petition to terminate parental rights and no custody orders were entered in any other state during that time. *Id.* at 43, 662 S.E.2d at 29. Consequently, this Court concluded that North Carolina had become the juveniles' home state for purposes of N.C. Gen. Stat. § 50A-201 and that jurisdiction therefore existed to terminate parental rights. *Id.*; *see* N.C. Gen. Stat. § 50A-102(7) (defining "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding").

The same is true in the present case. Nathan has resided in North Carolina with persons acting as parents (his foster parents) since September 2011. No custody proceedings have been instituted or custody orders entered in another state during this time — or, indeed, at *any* time. Accordingly, when DSS filed the petition seeking termination of Respondent's parental rights on 12 April 2013, North Carolina had become Nathan's home state and the trial court had jurisdiction under N.C. Gen. Stat. § 50-201(a) to enter its order terminating Respondent's parental rights.

II. Grounds for Termination of Parental Rights

[2] Having determined that the trial court had subject matter jurisdiction to adjudicate the issue of whether Respondent's parental rights should be terminated, we now turn to the question of whether the trial court properly terminated those rights. In order to terminate a parent's parental rights, a trial court must find — based on clear, cogent, and convincing evidence — that one or more of the statutory grounds for termination exist. N.C. Gen. Stat. § 7B-1111(a) (2013); *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). We review a court's order terminating parental rights to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). We review the trial court's conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

Here, the trial court made the following pertinent findings of fact:

> 16. On September 21, 2013 [sic], the Buncombe County Department of Social Services ("Department") received a Child Protective Services report alleging that respondent mother was being arrested for serious criminal charges, that the minor child was with her, that her proposed kinship placement was inappropriate and that the minor child would not have a caretaker after the respondent mother's arrest.
>
> 17. SW Jennie Wells initiated the investigation. SW Jennie Wells went to the Sleep Inn Hotel in Asheville, North Carolina. SW Wells found respondent mother, her friend, her brother and the minor child to be present along with law enforcement officers.
>
> 18. Respondent mother had diapers and some clothes for the minor child.
>
> 19. Respondent mother admitted that she was present when her brother shot and killed a man named Sean. The minor child was with a relative during the time Sean was killed by respondent mother's brother.
>
> 20. After the killing, respondent mother separated from her brother and reunited with the minor child.

21. Respondent mother received a text message from her brother telling her to "lay low."

22. Respondent mother later rejoined her brother, along with her friend and the minor child, and left town. Respondent mother, her brother, friend and the minor child traveled in the same car and stayed at various hotels in an attempt to evade law enforcement.

23. While on the run from law enforcement, respondent mother's brother robbed a bank and respondent mother, her friend and the minor child waited in the car while the robbery occurred.

24. Respondent mother did not contact law enforcement at any point in time to report the killing or bank robbery.

25. Respondent mother knew she would be arrested.

26. Respondent mother advised that a relative named [T.D.] was on his way to pick up the child. [T.D.] had charges pending for indecent liberties and lewd act on a child. [T.D.] was respondent mother's first choice for placement of the minor child. Placement with [T.D.] was not approved by the Department for placement [sic] due to his criminal history.

27. Respondent mother did not provide any other options for placement of the minor child.

28. Respondent mother was arrested for murder and robbery charges and was taken to jail. Respondent mother's brother and friend were also arrested.

29. The Department sought and obtained non-secure custody of the minor child and the non-secure custody order was entered on September 22, 2011. The minor child has remained in the continuous custody of the Department since that time.

30. Although respondent mother was initially jailed at the Buncombe County Jail for a period of time, respondent mother was ultimately housed at the Pickens County Jail in South Carolina.

31. In October of 2011, SW Sumner mailed respondent mother a copy of her case plan, which required respondent

mother to provide viable options for kinship placement and to abide by certain conditions for visitation if she was released from jail.

32. On November 14, 2011, SW Sumner met with respondent mother in the Pickens County Jail. The respondent mother reported that she had received letters from the social worker, copies of the case plan and the visitation plan. SW Sumner provided respondent mother with an update on the minor child, reviewed the case plan with respondent mother and reviewed the visitation plan with respondent mother. At that meeting, respondent mother did not provide any prospective kinship providers.

33. In December of 2011, the minor child was adjudicated a neglected and dependent child, as defined by N.C.G.S. §§ 7B-101(15) and (9).

34. In July of 2012, respondent mother's attorney provided the names of prospective placements for the minor child, [M.U.] and [T.U.]. Later, SW Sumner was informed that family friend, [J.M.], may also be an option for placement.

35. A request for a home study on [M.U.] was sent to South Carolina through ICPC. The home study was approved by South Carolina. However, subsequent to the approval of his home study, [M.U.] was arrested and incarcerated. Additionally, Child Protective Services became involved with his family. The Court in the underlying juvenile action did not approve [M.U.] for placement of the minor child.

36. A request for a home study on [T.U.] was sent to South Carolina through ICPC. The home study was approved by South Carolina. After the home study of [T.U.] was approved, the Department had a difficult time getting [T.U.] to visit with the minor child so that she could establish a relationship with him. [T.U.] demonstrated that she was not interested in placement with the minor child as she failed to avail herself of opportunities to visit with the minor child even though the Department offered to go to South Carolina so she could visit. [T.U.] physically disciplined a cousin in front of the social worker in a visitation room at DSS. The Court in the underlying juvenile action did not approve [T.U.] for placement of the minor child.

37. A home study was completed on family friend, [J.M.]. The home study was not approved as [J.M.] was convicted of a crime related to crack cocaine, had insufficient housing, along with other reasons. [J.M.] failed to pursue placement of the minor child after SW Sumner's visit. The Court in the underlying juvenile action did not approve [J.M.'s] home for placement of the minor child.

38. Respondent mother has not provided any other possible kinship placement options for the minor child.

39. In September of 2012, respondent mother began writing the minor child. She has sent more than ten letters to the child and/or foster parents.

40. The minor child is not old enough to read the letters from respondent mother.

41. Respondent mother's date of release from incarceration is unknown.

42. Respondent mother's trial dates for robbery and murder are unknown.

43. The minor child was taken into custody when he was one year old and he is now almost three years old.

44. The minor child has spent almost 2/3 of his life outside of the care of respondent mother.

45. The actions of respondent mother invited state intervention.

46. Respondent mother has not completed any services to improve the conditions which caused the minor child to be removed from her care.

47. There is no evidence that respondent mother understands the gravity of her past conduct and how her past conduct placed the minor child at risk of harm.

48. Respondent mother's incarceration has rendered her unable and unavailable to parent the juvenile.

The trial court ultimately found as fact and concluded as a matter of law that:

57. Pursuant to N.C.G.S. § 7B-1111(a)(1), the respondent mother has neglected the minor child, as specified above.

> There is a high likelihood of a repetition of the neglect if the minor child was returned to the care and control of the respondent mother as the respondent mother has failed to correct those conditions that led to the removal of the minor child from her care and has failed to show any understanding of the gravity of her past conduct or the danger she placed the minor child in due to her past conduct, including running from law enforcement with her brother and the minor child after witnessing her brother kill a man and waiting in the car with the minor child while her brother committed a bank robbery. The respondent mother has not completed any services.
>
> 58. Pursuant to N.C.G.S. 7B-1111(a)(6), the respondent mother is incapable of providing for the proper care and supervision of the minor child, such that the minor child is a dependent child within the meaning of G.S. 7B-101, and there is a reasonable probability that such incapacity will continue for the foreseeable future. The respondent mother's incapability is the result of incarceration. The respondent mother has no appropriate, alternative child care arrangements for the juvenile.

Respondent challenges all or portions of findings 27, 32, 34-37, 46-47, and 57-58 as unsupported by the evidence. She also contends that these findings were insufficient to support the trial court's conclusion that grounds existed to terminate her parental rights.

In termination of parental rights proceedings, the trial court's "finding of any one of the . . . enumerated grounds is sufficient to support a termination." *In re J.M.W.*, 179 N.C. App. 788, 791, 635 S.E.2d 916, 918-19 (2006) (citation and quotation marks omitted). Thus, on appeal, if we determine that any one of the statutory grounds enumerated in § 7B-1111(a) is supported by findings of fact based on competent evidence, we need not address the remaining grounds. *In re D.H.H.*, 208 N.C. App. 549, 552, 703 S.E.2d 803, 805-06 (2010).

It is well settled that findings of fact made by the trial court in a termination of parental rights proceeding are binding "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110 11, 316 S.E.2d 246, 252-53 (1984). Findings of fact are also binding if they are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, if such findings sufficiently support

one ground for termination, this Court need not address a respondent's challenges to findings of fact that support alternate grounds for termination. *See In re J.L.H.*, ___ N.C. App. ___, ___, n. 3, 741 S.E.2d 333, 335, n. 3 (2012) (noting that although respondent challenged additional findings of fact, this Court was not required to address those arguments because "they [were] not relevant" to the particular ground that supported the trial court's termination of parental rights).

In the present case, the trial court concluded that Respondent's parental rights were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(6), which permits the termination of rights if

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6).

Specifically, the trial court concluded that (1) Respondent was incapable of providing care for Nathan because of her incarceration; and (2) Respondent had "no appropriate, alternative child care arrangements for [Nathan]." We believe that the evidence presented at the hearing and the findings of fact based on that evidence support the trial court's conclusion that Respondent is incapable of providing for the care and supervision of Nathan, that this incapacity will continue for the foreseeable future, and that Respondent failed to provide any viable alternative child care arrangements.

The unchallenged findings show that Respondent has been continuously incarcerated since September 2011 awaiting trial on charges stemming from two separate incidents — a homicide and a bank robbery. During that time and due to her incarceration, Respondent has been personally incapable of providing proper care and supervision of her child, and nothing in the record indicates that she will be released from incarceration in the foreseeable future. Respondent argues that her inability to care for Nathan during her incarceration is an insufficient basis for termination of her parental rights because (1) the trial court did not

make a specific finding as to the expected duration of her incarceration; and (2) Respondent's incarceration could, in theory, end at any time. We are not persuaded.

We note that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). As such, while a parent's imprisonment is relevant to the trial court's determination of whether a statutory ground for termination exists, it is not determinative. *See id.*

Termination of parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(6) does not require that the parent's incapability be permanent or that its duration be precisely known. Instead, this ground for termination merely requires that "there is a *reasonable probability* that such incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6) (emphasis added). Given that (1) Respondent has been held on charges relating to homicide and bank robbery since September 2011 and has not yet received a trial date; and (2) no evidence was presented giving rise to any expectation of her release from incarceration in the foreseeable future, we cannot conclude that the trial court erred in determining that there is a reasonable probability that Respondent's incapability would continue for the foreseeable future.

Respondent next challenges the trial court's determination that she lacked appropriate alternative child care arrangements for Nathan. The record indicates that Respondent provided DSS with three possible placements for Nathan: her sister, T.U.; her brother, M.U.; and her friend, J.M. DSS had concerns regarding placing Nathan with T.U. after witnessing T.U. physically discipline another child in the DSS visitation room. While a home study was approved for T.U. and T.U. sought placement of Nathan with her, she was not ultimately approved for placement by the trial court based — at least in part — on the ground that she "demonstrated that she was not interested" in Nathan's placement with her by declining opportunities to get to know Nathan through visitation. M.U. was initially approved for placement, but the trial court ultimately determined that he was not an appropriate alternative caregiver because he was incarcerated following his approval by DSS, requiring the Child Protective Services division in South Carolina to become involved with his own children. Finally, Respondent's friend, J.M., was not approved for placement because of a prior crack cocaine conviction and DSS's concerns regarding her housing. As such, Respondent's three proposed caretakers for Nathan were deemed unsuitable, supporting the trial

court's determination that Respondent lacked appropriate alternative child care arrangements.

Accordingly, we affirm the trial court's order terminating Respondent's parental rights. Because we conclude that the trial court did not err in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), it is unnecessary to address her arguments regarding neglect — the other ground for termination found by the trial court. *P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." (citation and internal quotation marks omitted)).

Conclusion

For the reasons stated above, we affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
ANTHONY DUWANE COTTRELL, DEFENDANT

No. COA13-721

Filed 1 July 2014

Search and Seizure—traffic stop—no reasonable articulable suspicion

The Court of Appeals granted defendant's motion for writ of certiorari and determined that the trial court erred in a drugs case by denying defendant's motion to suppress evidence obtained after a traffic stop since defendant's consent to the search of his vehicle was given during an unlawful seizure. The officer continued to detain defendant after completing the original purpose of the stop without having reasonable articulable suspicion of criminal activity in violation of the Fourth Amendment.

Appeal by defendant from judgment entered 11 February 2013 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 21 November 2013.

Attorney General Roy Cooper, by Associate Attorney General Gayle Kemp and Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GEER, Judge.

Defendant Anthony Duwane Cottrell pled guilty to possession of a firearm by a felon, possession of a schedule II controlled substance, and possession of up to one-half ounce of marijuana. He also admitted being a habitual felon. On appeal, he contends that the trial court erred in denying his motion to suppress. He argues that he was unconstitutionally seized when the investigating officer extended a traffic stop after addressing its original purpose without (1) a reasonable and articulable suspicion of criminal activity or (2) defendant's consent to being further detained. We agree with defendant and hold that, under *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), because the officer continued to detain defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity, defendant was subjected to a seizure in violation of the Fourth Amendment. Since defendant's consent to the search of his vehicle, given during the unlawful seizure, was necessarily invalid, the trial court should have granted defendant's motion to suppress.

Facts

At 11:37 p.m. on 28 May 2012, Officer Jordan Payne of the Winston-Salem Police Department observed defendant driving a Dodge Intrepid with the car's headlights off. Officer Payne initiated a traffic stop, and defendant pulled into a nearby parking lot. The dashboard video camera on Officer Payne's patrol car recorded the subsequent stop.

Officer Payne approached defendant's car and asked defendant, who was the car's sole occupant, for his license and registration. The officer told defendant that if everything checked out, defendant would soon be cleared to go. Defendant did not smell of alcohol, he did not

have glassy eyes, he was not sweating or fidgeting, and he made no contradictory statements to Officer Payne.

Officer Payne then returned to his patrol car, ran defendant's identification, and learned that defendant's license and registration were valid. Officer Payne also checked defendant's criminal history and learned that defendant had a history of "drug charges and various felonies." Officer Payne returned to defendant's car and asked defendant to keep his music down since the officer had heard loud music coming from either defendant's car or the car in front of defendant's car as they drove down the street.

While Officer Payne spoke to defendant, he smelled an extremely strong odor coming from defendant's car that the officer described as "like a fragrance, cologne-ish," but "more like an incense than what someone would wear." Officer Payne believed the odor was a "cover scent" -- a fragrance released in a vehicle to cover the smell of drugs like marijuana. Officer Payne asked defendant about the odor, and defendant showed him a small, clear glass bottle with some liquid in it and a roll-on dispenser. Defendant stated it was an oil he put on his body. Officer Payne told defendant that fragrances were typically used to mask the odor of marijuana, but defendant claimed he was not trying to hide any odors.

Officer Payne, who still had possession of defendant's license and registration, then asked for consent to search defendant's car. When defendant refused to give consent, Officer Payne said defendant was not being honest with him and indicated he could call for a drug-detection dog to sniff defendant's car. Defendant replied that he did not want the officer to call for a dog and that he just wanted to go home. When Officer Payne insisted he was going to call for the dog, defendant then consented to a search of the car.

Officer Payne had defendant step out of the car and frisked defendant for weapons, finding none. Officer Payne began searching defendant's car at 11:41 p.m., roughly four minutes after he first observed defendant's car driving down the street. He looked first in the driver's side and then went around to the passenger's side. He removed the key from the ignition and unlocked the glove box with it. When the officer opened the glove box, a handgun and a baggy containing a white powdery substance, later determined to be cocaine, fell out. Officer Payne then placed defendant under arrest. After defendant was arrested, he admitted to

Officer Payne that he had a small baggie of marijuana in his sock. The officer never returned defendant's license and registration to defendant.

Defendant was indicted for possession of a firearm by a felon, possession of a schedule II controlled substance, possession of up to one-half ounce of marijuana, and being a habitual felon. Defendant filed a motion to suppress on 30 January 2013 and an amended motion to suppress on or about 4 February 2013.

At a 5 February 2013 hearing on the motion to suppress, the State presented the testimony of Officer Payne and the video and audio recording of the stop taken by the patrol car's dashboard camera. Defendant testified in support of his motion. After the trial court denied the motion to suppress, defendant pled guilty to the charges and admitted being a habitual felon. The trial court consolidated the charges into a single judgment and sentenced defendant to a mitigated-range term of 76 to 104 months imprisonment. After entry of the judgment, defendant gave oral notice of appeal from the denial of his motion to suppress and filed written notice of appeal.

I

We must initially address this Court's jurisdiction over this appeal. "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). Our Supreme Court has held that "when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute." *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990). Further, since "[a] Notice of Appeal is distinct from giving notice of *intent* to appeal" the denial of a motion to suppress, a defendant who has properly preserved his right to appeal the denial of a suppression motion must also properly appeal the subsequent judgment pursuant to Rule 4 of the Rules of Appellate Procedure. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 405 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

In other words, in order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final

judgment. In this case, defendant concedes that he did not properly give the required notice of his intent to appeal the denial of his motion to suppress.[1]

Defendant has, however, filed a petition for writ of certiorari with this Court to which he has attached affidavits from his trial counsel and the prosecutor, both of which indicate that defense counsel gave the prosecutor verbal notice that if the motion to suppress was denied, defendant would enter a plea of guilty and appeal the denial of the motion to suppress. In addition, during the plea colloquy, defense counsel generally advised the trial court of defendant's intent to appeal without referencing the motion to suppress.

The State has filed a motion to dismiss defendant's appeal, asserting that there is no dispute that defendant waived his right to appeal by failing to properly give notice of his intent to appeal the denial of his suppression motion. Based on defendant's concession, we grant that motion and dismiss defendant's appeal. *See McBride*, 120 N.C. App. at 625, 626, 463 S.E.2d at 405 (dismissing appeal from denial of suppression motion followed by guilty plea for failure to properly give State and trial court notice of intent to appeal denial of suppression motion). Nevertheless, because it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and because defendant has lost his appeal through no fault of his own, we exercise our discretion to grant the petition for writ of certiorari and address the merits of defendant's appeal. *See State v. Atwell*, 62 N.C. App. 643, 645, 303 S.E.2d 402, 404 (1983) (dismissing appeal but issuing writ of certiorari to reach merits of defendant's appeal from denial of suppression motion since, although record did not demonstrate proper notice of intent to appeal, "[t]here [was] at least some evidence that the district attorney's office and the Court had notice of a possible appeal of the denial of the suppression motion before the guilty plea").

II

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Defendant contends that, while the

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1. We note that the record does contain some notice of defendant's intent to appeal prior to entry of the guilty plea, but since defendant has not argued that the notice given was adequate, we do not address that issue. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

traffic stop was valid, Officer Payne violated the Fourth Amendment when he detained defendant further after determining that defendant's license and registration were valid and defendant had no outstanding warrants. Defendant argues that Officer Payne had no reasonable, articulable suspicion of criminal activity sufficient to justify detaining defendant once the purpose of the traffic stop was completed.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant does not challenge any of the trial court's findings of fact and they are, therefore, binding on this Court. *See State v. Robinson*, 187 N.C. App. 795, 797, 653 S.E.2d 889, 891 (2007) (explaining that unchallenged findings of fact are "conclusive and binding on appeal"). Defendant, however, challenges the following conclusions of law made by the trial court:

> 3. Generally, an initial stop concludes after the officer returns the detainee's license and registration. *State v. Jackson*, 199 N.C. App. 236[, 681 S.E.2d 492] (2009) [;] *State v. Kincaid*, 147 N.C. App. 94[, 555 S.E.2d 294] (2001). In this case, because the initial seizure had not concluded (no return of Defendant Cottrell's license), a [*State v.*] *McClendon*[, 350 N.C. 630, 517 S.E.2d 128 (1999)] analysis about developing reasonable, articulable suspicion that criminal activity is afoot is inapplicable. . . .
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> 5. Officer Payne was going to call for a dog to sniff Defendant Cottrell's car. This was permissible, so long as dog [sic] would get there in under five minutes. However, Defendant then consented to search.
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> 6. Defendant's consent was not coerced. Officer Payne was not threatening something (a dog sniff) he didn't have the right to do. The threat to do what an officer has a legal right to do does not constitute duress. It is

> not duress to take any measure authorized by law and the circumstances of the case. . . .

This Court has held that, " '[g]enerally, the scope of the detention must be carefully tailored to its underlying justification. Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 754 (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998)). We must, therefore, first address whether the initial purpose of the stop was completed prior to the time defendant gave consent to search.

In *Myles*, the officer conducted a traffic stop for weaving, indicating possible impaired driving. *Id.*, 654 S.E.2d at 755. The car stopped by the officer was rented by the defendant passenger. *Id.* at 43, 654 S.E.2d at 753. During the stop, the officer detected no odor of alcohol and described the driver and the defendant as cooperative. *Id.* at 45, 654 S.E.2d at 755. The officer did not find any weapons or contraband on the driver when he frisked him, and the driver had a valid driver's license. *Id.* The officer issued a warning ticket. *Id.* at 43, 654 S.E.2d at 753. The officer then proceeded to question the defendant, separately from the driver, about his travel plans and the rental car agreement. *Id.*, 654 S.E.2d at 754.

On appeal, this Court in *Myles* observed that since there was no evidence to indicate that either the driver or the defendant was impaired, the officer "considered the traffic stop 'completed' because he had 'completed all [his] enforcement action of the traffic stop.' " *Id.* at 45, 654 S.E.2d at 755. The Court, therefore, held that "in order to justify [the officer's] further detention of defendant, [the officer] must have had defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before* he questioned defendant." *Id.* (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

Here, the trial court has misapplied this Court's decisions in *Jackson* and *Kincaid*. In each of those cases, this Court held that once an officer returned the defendant's license and registration, the seizure had ended because the defendant was free to go, and any further communications between the officer and the defendant were, as a result, consensual. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497 ("Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration."); *Kincaid*, 147 N.C. App. at 100, 555 S.E.2d at 299 ("A reasonable person, under the circumstances, would have felt free to leave when [his license

and registration] were returned. Therefore, the first seizure concluded when [the officer] returned the documents to defendant.").

While *Jackson* and *Kincaid* hold that return of a person's license and registration may mean that the traffic stop has concluded, nothing in *Jackson* and *Kincaid* suggests that the officer may prolong a traffic stop, after the original purpose of the stop has been completed, simply by not returning the driver's documentation. Indeed, *Jackson* sets out the applicable rule overlooked by the trial court: "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496.

The trial court erred, therefore, in basing its decision on the premise that because the officer had not yet returned defendant's license, the underlying purpose of the stop was not yet complete, and the officer could continue to detain defendant. *See also State v. Jarrett*, 203 N.C. App. 675, 676, 682-83, 692 S.E.2d 420, 422, 426 (2010) (holding initial purpose for stop at checkpoint "was addressed when defendant produced a valid North Carolina driver's license and registration" even though that occurred "[b]efore [the officer] return[ed] defendant's documentation").

Turning to the question of when Officer Payne completed the purpose of the underlying stop in this case, the trial court found that Officer Payne had observed defendant driving without headlights and that the officer, during the stop, had told defendant to keep his music down because "he had heard loud music from either Defendant's car or the one in front of Defendant as they drove down Trade Street, and that this would violate a local noise ordinance." For the purposes of our analysis, we assume that Officer Payne stopped defendant for both the headlights infraction and the potential noise violation.

With respect to the two reasons given for the officer's stop, the trial court found that defendant had turned his headlights on before he actually stopped and that defendant told the officer he realized his headlights had not been on and apologized for having them off. The trial court found that upon taking defendant's license and registration, Officer Payne told defendant that "if everything checked out, he would be [sic] soon be cleared to go." Officer Payne then determined that defendant's license and registration were valid and defendant had no outstanding warrants. When the officer returned to defendant's car, the officer asked defendant to make sure to keep his music down because of the noise ordinance. The officer then smelled a strong fragrance, and all of the

officer's questions and statements after that point had to do with the fragrance, whether defendant had drugs in the car, whether defendant would consent to a search, and whether the officer was going to call for a drug-sniffing dog.

Given the facts found by the trial court, we hold that once Officer Payne told defendant to keep his music down, the officer had completely addressed the original purpose for the stop. Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, Officer Payne was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before*" asking defendant additional questions. *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

The trial court erred in concluding otherwise. *See also Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496-97 (holding stop was unlawfully extended beyond original purpose of determining whether driver had valid driver's license when, after officer had dispelled suspicion of invalid license, she asked driver whether there was anything illegal in vehicle).

Turning next to whether Officer Payne had a reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope, our Supreme Court has explained:

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court 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 his experience and training. Moreover, [a] court must consider the totality of the circumstances -- the whole picture in determining whether a reasonable suspicion exists.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439-40 (2008) (internal citations and quotation marks omitted). In addition, "[t]he requisite degree of suspicion must be high enough 'to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.'" *State*

v. Fields, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767 (2009) (quoting *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 208 (2008)).

Here, the trial court found that as of the time Officer Payne told defendant about the noise ordinance, the officer knew that defendant's license and registration were valid, defendant had no outstanding warrants, defendant had turned his headlights back on prior to being stopped and had apologized, defendant had no odor of alcohol or glassy eyes, defendant was not sweating or fidgeting, and defendant did not make contradictory statements. The court also found that Officer Payne knew defendant "had a history of 'drug charges and various felonies' " and the officer, upon speaking with defendant after checking defendant's documents, "noticed an extremely strong odor coming from the vehicle." The trial court found that the officer "described it as 'like a fragrance, cologne-ish, strong[,]' " and "more like an incense than what someone would wear." Officer Payne also "believed the odor was what is commonly referred to as a cover scent -- a fragrance or air freshener typically sprayed or released in a vehicle to mask or cover the smell of drugs like marijuana."

Based on these findings, the trial court noted that, "[f]or argument's sake," it "would find that Officer Payne did not have reasonable, articulable suspicion that criminal activity was afoot -- mere cologne odor and previous felony conviction aren't enough." The court further noted there was "[n]o evidence of extreme nervousness, failure to maintain eye contact, [or] conflicting stories about registration[] [or] destination," and there were "no invalid documents."

We agree with the trial court that a strong incense-like fragrance, which the officer believes to be a "cover scent," and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity. Instead, our case law tends to show that some additional evidence of criminal activity is necessary for an officer to develop a reasonable and articulable suspicion. *Compare Myles*, 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 758 (holding no reasonable suspicion existed to extend traffic stop when rental car occupants' stories did not conflict, there was no odor of alcohol, officer found no contraband or weapons upon frisking driver, and driver's license was valid, despite fact that driver's "heart was beating unusually fast" and rental car was one day overdue), *Jackson*, 199 N.C. App. at 242-43, 681 S.E.2d at 497 (holding officer did not have reasonable suspicion to extend traffic stop when "occupants of the vehicle had been cooperative with the officers throughout the stop," officer "confirmed 'there were no problems with any of these folks' " while checking validity of driver's

license, and "there were no pending warrants for any of the vehicle's occupants"), *State v. Sinclair*, 191 N.C. App. 485, 491, 663 S.E.2d 866, 871 (2008) (holding no reasonable suspicion existed where only facts tending to show criminal activity were that officers " 'received information about drug activity[,]' " "scene of the attempted stop was a known drug activity area," and officer "had made prior drug arrests in the area") *with State v. Fisher*, ___ N.C. App. ___, ___, 725 S.E.2d 40, 45 (2012) (holding reasonable suspicion present based on defendant's nervousness, "smell of air freshener, inconsistency with regard to travel plans," and "driving a car not registered to the defendant"), *cert. denied*, ___ U.S. ___, 187 L. Ed. 2d 279, 134 S. Ct. 420 (2013); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007) (holding reasonable suspicion present based on defendant's extreme nervousness, refusal to make eye contact, smell of air freshener from vehicle, and conflict in defendant's and passenger's stories about their trip), *and State v. Hernandez*, 170 N.C. App. 299, 309, 612 S.E.2d 420, 426, 427 (2005) (holding reasonable suspicion present based on defendant's acting " 'very nervous,' " defendant giving conflicting statements, and trooper's observation of several air fresheners in vehicle giving off " 'strong odor' ").

Thus, the trial court correctly determined that Officer Payne did not have reasonable, articulable suspicion to extend the traffic stop after the original purposes for the stop had been completely addressed. We note that although the State does not expressly challenge the trial court's determination that Officer Payne did not have reasonable suspicion to extend the stop, the State does argue that, given the court's findings about the fragrance and the loud music, the officer's "observations . . . required investigation" and that "Officer Payne would have been remiss in his duties had he not asked questions to complete his investigation." To the extent that the State contends that the officer could, under the circumstances of this case, continue to question defendant in the absence of reasonable suspicion or consent, the State's argument is foreclosed by *Myles* and the Supreme Court's decision in *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) ("[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot.").

Since Officer Payne did not have reasonable suspicion to extend the stop, we next address whether defendant consented to further detention after Officer Payne had fully addressed the initial purpose of the stop. The trial court concluded that up until the time defendant consented to the search, he remained seized by Officer Payne. In support of its conclusion, the trial court found that Officer Payne never returned defendant's

license. The court also found that defendant denied consent to search, indicated he did not want the officer to call a drug dog, and "told the officer he just wanted to go home." Further, defendant "confirmed he didn't get his license back and never felt free to leave." The State does not contend that defendant was free to leave at any point.

"Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497. Indeed, at times, even the return of documentation is not sufficient to make further detention during a traffic stop consensual. *See id.* (" 'Furthermore, the return of documentation would render a subsequent encounter consensual *only if* a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information.' " (quoting *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299)).

Since defendant was not given his license back; defendant was not told he could leave; defendant was continuously questioned by the officer after the original purpose for the stop had been addressed until defendant ultimately consented to a search, despite defendant's statements that he wanted to go home and that he did not want a drug dog called; and defendant was told the officer was going to call a drug dog to sniff defendant's car, the trial court correctly found that defendant's detention never became consensual in this case. *See id.* ("As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration, [the officer's] continued detention and questioning of [the driver] after determining that [the driver] had a valid driver's license was not a consensual encounter.").

Recognizing that defendant remained seized throughout the encounter and that Officer Payne did not have reasonable, articulable suspicion that defendant was engaged in criminal activity, the trial court concluded, and the State argues on appeal, that this case is controlled by this Court's precedent allowing for a "*de minimis*" extension of a traffic stop for the purpose of conducting a drug dog sniff even without reasonable suspicion or consent. *See State v. Brimmer*, 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007) (adopting rule that if detention is prolonged for very short period of time in order to complete a dog sniff, intrusion is considered *de minimis*); *State v. Sellars*, ___ N.C. App. ___, ___, 730 S.E.2d 208, 212 (2012) (following *Brimmer* and applying *de minimis* rule), *appeal dismissed and disc. review denied*, 366 N.C.

395, 736 S.E.2d 489, *cert. denied*, ___ U.S. ___, 187 L. Ed. 2d 317, 134 S. Ct. 471 (2013). We disagree.

The United States Supreme Court held in *Illinois v. Caballes*, 543 U.S. 405, 410, 160 L. Ed. 2d 842, 848, 125 S. Ct. 834, 838 (2005), that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." This Court subsequently followed *Caballes* in *State v. Branch*, 177 N.C. App. 104, 108, 627 S.E.2d 506, 509 (2006) ("[B]ased on *Caballes*, once [the defendant] was detained to verify her driving privileges, [the two deputies] needed no heightened suspicion of criminal activity before walking [the drug dog] around her car.").

In *Brimmer*, this Court adopted the United States Court of Appeals for the Eighth Circuit's interpretation of *Caballes* in *United States v. Alexander*, 448 F.3d 1014 (8th Cir. 2006), and held that if a traffic stop is prolonged for only a very short period of time in order to conduct a dog sniff, the intrusion is considered "*de minimis*" such that "even if the traffic stop has been effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop." 187 N.C. App. at 455, 653 S.E.2d at 198. Since the dog sniff in *Brimmer* only extended the stop for slightly over one and a half minutes, the Court held that the extension was *de minimis*, and the officer needed no reasonable suspicion or consent in order to prolong the stop for the dog sniff. *Id.* at 457, 458, 653 S.E.2d at 199, 200. This Court again applied the *de minimis* rule in *Sellars* and held that the extension of a traffic stop for four minutes and 37 seconds for the purpose of a dog sniff was *de minimis* and did not violate the defendant's Fourth Amendment rights. ___ N.C. App. at ___, 730 S.E.2d at 213.

We do not believe that the *de minimis* analysis applied in *Brimmer* and *Sellars* should be extended to situations when, as here, a drug dog was not already on the scene. *Brimmer* was based, in part, on *Caballes*' holding that a dog sniff conducted during an otherwise lawful stop did not implicate the Fourth Amendment, 543 U.S. at 410, 160 L. Ed. 2d at 848, 125 S. Ct. at 838, and the reasoning of that holding is inapplicable in the absence of an actual dog sniff or the immediate availability of a drug dog.

As this Court noted in *Sellars*, the Court's earlier decision in *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360, held that an officer could not conduct a dog sniff after the original purpose of a traffic stop had been completed without grounds providing reasonable and articulable

suspicion. The *Sellars* Court concluded, however, that "[t]he difference between *Falana* and *Brimmer* is that *Brimmer* incorporated the analysis contained in later United States Supreme Court and federal cases that were not in existence at the time *Falana* was decided," with the "[m]ost significant" being *Caballes* and "subsequent federal District Court and Court of Appeals decisions interpreting *Caballes*." ___ N.C. App. at ___, 730 S.E.2d at 211.

In *Caballes*, the Supreme Court was addressing a dog sniff that occurred during the course of a lawful traffic stop. The Court, however, specifically noted a distinction between a dog sniff occurring during a routine traffic stop and one occurring during an "unreasonably prolonged traffic stop." 543 U.S. at 407, 160 L. Ed. 2d at 846, 125 S. Ct. at 837 (citing *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (2002)).

In addition, the federal decisions on which *Brimmer* relied in adopting the *de minimis* exception limited that exception to situations in which the officer "ha[d] at his *immediate disposal* the canine resources to employ this uniquely limited investigative procedure" of a drug sniff. *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 649 (8th Cir. 1999) (emphasis added). In that case, the canine was already on the scene at the time of the stop. *Id.* at 645-46. Likewise, in *Alexander*, 448 F.3d at 1015-16, the defendant was stopped by a canine officer who had his drug-sniffing dog in his patrol car, and the stop was prolonged by only four minutes to conduct a dog sniff after the defendant was notified that he would receive a warning ticket.

Consequently, *Brimmer* must be limited to the situation in which a drug-sniffing dog is available at the scene of the traffic stop prior to completion of the purpose of the stop. Indeed, no North Carolina appellate court has held, as the trial court ruled here, that the *de minimis* exception applies when a canine has not already been called to the scene prior to completion of the lawful stop. In *Brimmer*, 187 N.C. App. at 453, 653 S.E.2d at 197, the canine had arrived prior to completion of the lawful purpose of the stop, while in *Sellers*, ___ N.C. App. at ___, 730 S.E.2d at 209, the dog was present in the back of the patrol car during the entire stop.

Moreover, in *Williams*, the Supreme Court specifically considered the constitutionality of an officer's extending a stop after its lawful purpose was completed by (1) asking questions, (2) requesting consent to search the defendant's car, (3) subsequently calling for a drug-sniffing canine, and (4) having a drug sniff conducted. 366 N.C. at 112, 116-18, 726 S.E.2d at 164, 166-68. Although the officer's conduct only extended

the stop by 14 minutes, the Supreme Court did not conduct a *de minimis* analysis, but rather held that the extension, including the drug sniff, was *only* permissible if supported by reasonable, articulable suspicion or consent. *Id.* at 116, 726 S.E.2d at 166. In support of this holding, the Court, *id.*, 726 S.E.2d at 166-67 (emphasis added), cited *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236, 103 S. Ct. 1319, 1324 (1983), as "declaring that, absent consent to a voluntary conversation or to a search, a law enforcement officer may not detain a person '*even momentarily* without reasonable, objective grounds for doing so.' " Thus, when the dog was summoned after completion of the purpose of the traffic stop, the Supreme Court required a showing of reasonable, articulable suspicion for the stop to be prolonged in order to conduct the dog sniff.

Here, however, the State appears to be arguing that even in the absence of reasonable, articulable suspicion, defendant's consent to a search was valid because it was obtained by Officer Payne threatening to have a dog sniff defendant's car -- an action the State contends, based on the *de minimis* cases, that Officer Payne was constitutionally allowed to do. As this Court has acknowledged, " '[a]s a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case.' " *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978) (quoting 25 Am. Jur. 2d., *Duress & Undue Influence*, § 18, p. 375).

The State has not, however, shown that Officer Payne had a legal right to conduct a dog sniff at the time that defendant gave his consent to a search. " '[*A*]*t the suppression hearing*,' " the State has the burden " 'of demonstrating with particularity a constitutionally sufficient justification of the officers' search. . . .' " *State v. Crews*, 66 N.C. App. 671, 675, 311 S.E.2d 895, 897 (1984) (second emphasis added) (quoting *Cooke*, 306 N.C. at 136, 291 S.E.2d at 620).

First, Officer Payne did not have a canine at his "immediate disposal" since he had not yet called for a canine. *$404,905.00 in U.S. Currency*, 182 F.3d at 649. While in *Brimmer* and *Sellars*, the canine was already on the scene, Officer Payne testified at the suppression hearing that "[a]s a general rule, it typically takes no more than ten minutes, typically five, sometimes less" for a canine unit to arrive at the scene after it has been called. Since *Brimmer* approved extension of a stop for only slightly over one and a half minutes, 187 N.C. App. at 457, 653 S.E.2d at 199, and *Sellars* approved only an extension of four minutes and 37 seconds, ___ N.C. App. at ___, 730 S.E.2d at 213, just the projected time for arrival of

the canine, in this case, was substantially in excess of the time periods previously found to be *de minimis* by North Carolina courts.

Moreover, at the time defendant consented to a search, approximately two minutes had already elapsed since the purpose for the traffic stop had been achieved. Consequently, even if *Brimmer* and *Sellars* could apply despite the failure to summon a canine unit before the traffic stop was completed, the State's evidence indicated that the stop would have to be extended by between seven and 12 minutes in order for the canine to arrive. In other words, just waiting for the canine would have more than doubled the length of the stop. In addition, the State presented no evidence regarding how long it would take for the canine to deploy and alert.

Thus, even assuming that the *de minimis* rule could apply in the absence of immediate availability of a dog, the State did not present evidence that Officer Payne obtained defendant's consent to search by threatening to do something -- a dog sniff -- that he had a legal right to do. Based on the State's evidence, Officer Payne did not have the legal right to conduct a dog sniff because he did not have a canine at his immediate disposal and, in any event, the State did not establish that Officer Payne could have completed the dog sniff in a *de minimis* period of time. The State has cited no case suggesting that consent may properly be obtained by a threat to perform an act that might or might not be legal depending on how the threatened event hypothetically could unfold.[2] The State has, therefore, failed to prove that defendant's consent was valid.

The State nonetheless cites *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002), *State v. McMillan*, 214 N.C. App. 320, 718 S.E.2d 640 (2011), and *State v. Cummings*, 188 N.C. App. 598, 656 S.E.2d 329 (2008), in support of its argument that defendant's consent to search was valid in this case. However, in *Barden*, *McMillan*, and *Cummings*, there was no indication that the respective defendants were unconstitutionally seized when they gave consent to searches or seizures of items. *See Barden*,

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2. We also note that the State's argument requires that we review the videotape of the encounter with a stopwatch in hand calculating the minutes and seconds elapsing for each stage of the stop and then adding to the time by which the stop was actually extended estimates of the additional time that might typically be necessary for a canine unit to arrive. Then, we must determine how many additional minutes of detention are too many. Is seven minutes waiting for a dog too much? Eight minutes? Nine minutes? What is the basis for making that decision? Constitutional rights should not hinge on such arbitrary calculations and determinations. With *Brimmer* and *Sellars*, since the dog was already there and the stop was extended only by the time necessary for the dog to sniff the vehicle and alert, such arbitrariness was not present.

356 N.C. at 341, 572 S.E.2d at 125-26 (holding defendant's consent to seizure of his shoes was valid when defendant voluntarily drove to site of police interview and voluntarily gave statements concerning crime); *McMillan*, 214 N.C. App. at 331, 718 S.E.2d at 648 (holding defendant's consent to seizure of physical items was valid when defendant voluntarily went to sheriff's department, was informed he was under " 'investigative detention,' " and was told he could either consent to seizure of items or officers would detain him until they could prepare and execute search warrant for items, since officers "reasonably believed they had sufficient probable cause" to obtain search warrant); *Cummings*, 188 N.C. App. at 603-04, 656 S.E.2d at 332-33 (holding defendant's consent to search of his vehicle voluntarily given when defendant agreed to go to law enforcement headquarters for questioning and while at headquarters, signed consent form for search of vehicle). Those cases are, therefore, inapplicable here.[3]

In sum, after Officer Payne had addressed the original purpose for the traffic stop, he continued to detain defendant without either (1) defendant's valid consent or (2) reasonable, articulable suspicion of criminal activity. Accordingly, the officer's continued detention of defendant violated defendant's Fourth Amendment right against unreasonable seizures and defendant's subsequent consent to a search of his car was involuntary as a matter of law. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary.").

Because defendant's consent to search his car was the product of an unconstitutional seizure, the trial court erred in denying defendant's motion to suppress. Accordingly, we reverse and remand to the trial court for entry of an order vacating defendant's guilty pleas.

Reversed and remanded.

Judges STEPHENS and ERVIN concur.

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3. Although the State also cites *State v. Wrenn*, 316 N.C. 141, 146, 147, 340 S.E.2d 443, 447, 448 (1986), the defendant in *Wrenn* was lawfully arrested at the time his car was searched, and the search was, therefore, a valid search incident to the defendant's arrest.

STATE OF NORTH CAROLINA
v.
COREY LAMONT McCLAMB

No. COA13-996

Filed 1 July 2014

Child Abuse, Dependency, and Neglect—felony child abuse by sexual act—vaginal intercourse

The trial court did not err by denying defendant's motion to dismiss the charge of felony child abuse by a sexual act based on vaginal intercourse. Contrary to defendant's assertion, the General Assembly intended the term "sexual act," as it is used in N.C.G.S. § 14-318.4(a2) of Article 39, to include vaginal intercourse.

Appeal by Defendant from Judgments entered 11 February 2013 by Judge C. W. Bragg in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

David L. Neal for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 11 July 2011, Defendant Corey Lamont McClamb was indicted on three counts of felony child abuse by sexual act under N.C. Gen. Stat. § 14-318.4(a2); three counts of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1; one count of statutory rape or sexual offense of a person who is thirteen, fourteen, or fifteen years old when the perpetrator is at least six years older than the victim under N.C. Gen. Stat. § 14-27.7A(a); and two counts of intercourse and sexual offense with a child under N.C. Gen. Stat. § 14-27.7(a). The first count of felony child abuse by sexual act was based on vaginal intercourse, the second count was based on cunnilingus, and the third count was based on fellatio. On 6 February 2012, Defendant was indicted under section 14-27.7A(a) on one additional count of statutory rape or sexual offense of a person who is thirteen, fourteen, or fifteen years old when the perpetrator is at least six years older than the victim and two counts of intercourse and sexual offense with a child under section 14-27.7(a). The case came on for trial

on 4 February 2013. At trial, the State's relevant evidence tended to show the following:

"Jane,"[1] Defendant's biological daughter, began living with Defendant at his residence in Alabama when she was eight years old and Defendant was approximately thirty-three years old. While Jane was there, Defendant made her perform oral sex on him. According to Jane, this occurred four or five times a month. Additionally, Defendant once kissed Jane by putting his tongue in her mouth when she was "around [nine] or [ten]." When Jane "turned [ten], [Defendant also] tried to put his penis in [Jane's] vagina, but it hurt, and he stopped."

When Jane was eleven or twelve, Defendant sent her to live with his great aunt in Georgia. At the end of the school year, Defendant retrieved Jane from Georgia and brought her back to his residence in Alabama. When Jane returned, Defendant made her perform oral sex on him roughly "four times a month." Approximately six months after arriving in Alabama, when Jane was "around . . . [thirteen]," Defendant sent Jane to Winston-Salem, North Carolina to live with his friend. About a year later, Defendant joined Jane in Winston-Salem, and they moved to a homeless shelter. Roughly six months after that, "around [June of 2009]," when Jane was fourteen years old, Defendant and Jane moved into an apartment in Winston-Salem.

Jane testified that "many times . . . at night [in the new Winston-Salem residence, Defendant] came into [her] room, and [Defendant] made [her] perform oral sex on [him]. [Defendant would also perform] oral sex on [her]." Defendant engaged in vaginal intercourse with Jane. This occurred for the first time when Jane was fourteen years old. Defendant came into Jane's bedroom, made her perform oral sex on him, performed oral sex on her, and "put his penis in [Jane's] vagina." Defendant would force Jane to have vaginal intercourse with him "[s]ix times a month." The vaginal intercourse took place in Jane's bedroom, in Defendant's bedroom, and once in the living room. A forensics expert for the State testified that Defendant's semen was found on Jane's comforter. The sexual assault nurse examiner testified that Jane's vagina exhibited a tear, swelling, and redness that was consistent with Jane's testimony.

Defendant denied molesting or raping Jane. He testified that his semen was likely on Jane's comforter because Jane left it in the

1. A pseudonym is used to protect the juvenile's identity.

living room, where Defendant "probably used [it] one time" with one of his girlfriends.

At the close of all the evidence, Defendant moved to dismiss the charges against him, including the three counts of felony child abuse by sexual act. The trial court denied the motion. After closing arguments, the trial court instructed the jury on felonious child abuse by sexual act and defined sexual act to include vaginal intercourse. Following deliberations, the jury found Defendant guilty on eleven of the twelve charges and returned no verdict on one count of statutory rape. Except for the three charges of felony child abuse by a sexual act, the jury also found that Defendant abused a position of trust or confidence in the commission of these crimes. On 11 February 2013, Defendant was sentenced to three consecutive terms of 456 months to 557 months incarceration. Defendant gave notice of appeal in open court.

Discussion

The sole issue on appeal is whether the trial court erred in denying Defendant's motion to dismiss as it pertains to the single charge of felony child abuse by a sexual act based on vaginal intercourse. Defendant argues that the court erred because he could not "legally be convicted" of the charge under the trial court's definition of sexual act. We disagree.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C.R. App. P. 10(a)(3). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> Upon [the] defendant's motion for dismissal, the question for the [appellate c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Defendant argues that the trial court erred in denying his motion to dismiss because the term "sexual act" does not include vaginal intercourse under N.C. Gen. Stat. § 14-318.4(a2). Specifically, Defendant asserts that we are bound by our determination in *State v. Stokes*, 216 N.C. App. 529, 532, 718 S.E.2d 174, 176-77 (2011), that the definition of sexual act in Article 7A, section 14-27.1(4), which explicitly excludes vaginal intercourse as a sexual act, "control[s] in the felony child abuse by sexual act cases [under Article 39]." We disagree.

The relevant statutory provisions are as follows:

> ARTICLE 7A. RAPE AND OTHER SEX OFFENSES
>
> § 14-27.1. Definitions.
>
> As used in this Article, unless the context requires otherwise:
>
> . . . .
>
> (4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse.
>
> . . . .
>
> § 14-27.2. First-degree rape.
>
> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> > (1) With a victim who is a child under the age of [thirteen] years and the defendant is at least [twelve] years old and is at least four years older than the victim; or
> >
> > (2) With another person by force and against the will of the other person, and:
> >
> > > a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
> > >
> > > b. Inflicts serious personal injury upon the victim or another person; or
> > >
> > > c. The person commits the offense aided and abetted by one or more other persons.
>
> . . . .

§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of [thirteen] years and the defendant is at least [twelve] years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

. . . .

ARTICLE 39. PROTECTION OF MINORS.

. . . .

§ 14-318.4. Child abuse a felony.

. . . .

(a2) Any parent or legal guardian of a child less than [sixteen] years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.

N.C. Gen. Stat. §§ 14-27.1(4), -27.2(a), -27.4(a), -318.4(a2) (2013).

In response to Defendant's argument, the State asserts that vaginal intercourse is a part of the definition of "sexual act" for the purposes of section 14-318.4(a2) because our holding in *Stokes* "[does] not specifically address the issue of whether . . . the statutory definition of ['sexual act'] in [section] 14-27.1(4) applies to Article 39 offenses." To support its assertion, the State makes the following three arguments:

First, the "legislature clearly indicated that the definition of the term 'sexual act' under [section] 14-27.1(4) applies solely to offenses . . .

within Article 7[A] by including the language, 'as used in this Article,' at the beginning of the statutory section defining terms for Article 7[A]." Second, incorporation of an Article 7A definition into Article 39 is contrary to legislative intent because the reason to distinguish sexual act from vaginal intercourse in Article 7A is "to distinguish rape from first and second degree sexual offense and other sexual offense references within Article 7[A]." As the State points out, "[t]he usage of the two terms indicates that the [General Assembly] intended such a distinction under Article 7[A] to reduce the possibility of confusion between vaginal intercourse for rape and a sexual act for a sexual offense." *See generally State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981) ("The only sexual act excluded from the statutory definition [in Article 7A] relates to vaginal intercourse, a necessary omission because vaginal intercourse is an element of the crimes of first and second degree rape . . . ."). The State contends that while the need to distinguish between a "sexual act" and vaginal intercourse exists when punishing rape and other sexual offenses differently, the distinction is not necessary where one statute is designed to punish the sexual abuse of children in its entirety. Third, the State points to Article 27A's definition of "aggravated offense" to show the legislature's intention to include vaginal intercourse within the meaning of "sexual act" for non-Article 7A offenses. That definition provides that an aggravated offense includes "engaging in a sexual act involving vaginal, anal, or oral penetration." We fully agree with the State's position.

We conclude that our holding in *Stokes* is controlling with respect to the meaning of the term "sexual act" as used in section 14-318.4(a2) only in light of the narrow factual circumstances and legal issue raised therein. The defendant in *Stokes* was charged with violating section 14-318.4(a2) of Article 39. 216 N.C. App. at 532, 718 S.E.2d at 176-77. On appeal, we addressed whether the State presented sufficient evidence that the defendant violated section 14-318.4(a2) when he digitally penetrated the victim's vagina. *Id.* Citing the Article 7A definition of "sexual act," which includes penetration by any object into the genital opening of another person's body, we concluded that digital vaginal penetration constitutes a sexual act. *See id.* We did not hold, however, that the Article 7A definition of sexual act applies to exclude vaginal intercourse as a sexual act under Article 39. That question simply was not present in *Stokes*.[2]

2. This Court's discussion in *State v. Lark*, 198 N.C. App. 82, 88–89, 678 S.E.2d 693, 698–99 (2009), is similarly limited to an analysis of fellatio as a sexual act under the Article 7A definition when applied to an Article 39 prosecution. *Lark* likewise does not address whether vaginal intercourse constitutes a sexual act under Article 39.

Article 7A prefaces its list of definitions by clarifying that such definitions are specific to Article 7A "unless context requires otherwise." N.C. Gen. Stat. § 14-27.1. In that article, a criminal "sexual act" is distinct from criminal "vaginal intercourse" because vaginal intercourse is separately addressed in the context of rape. No such distinction exists in Article 39. There is no separate provision involving vaginal intercourse and, thus, no need for any such distinction. Moreover, it would be absurd to conclude — as Defendant's interpretation of *Stokes* would have us do — that a parent or guardian who engaged in *anal* intercourse with a child less than 16 years old, for example, would be guilty of felony child abuse under section 14-318.4(a2) while a parent or guardian who engaged in *vaginal* intercourse would not be guilty. Therefore, we hold that the General Assembly intended the term "sexual act," as it is used in section 14-318.4(a2) of Article 39, to include vaginal intercourse. Accordingly, we find no error.

NO ERROR.

Judges BRYANT and DILLON concur.

LAKISHA WIGGINS AND G. ELVIN SMALL, AS GUARDIAN AD LITEM FOR ROY LEE BROTHERS, A MINOR, PLAINTIFFS
v.
EAST CAROLINA HEALTH-CHOWAN, INC. D/B/A CHOWAN HOSPITAL AND MICHAEL DAVID GAVIGAN, M.D., DEFENDANTS

No. COA13-1428

Filed 1 July 2014

Medical Malpractice—medical negligence—sudden emergency doctrine inapplicable

The trial court erred by instructing the jury on the sudden emergency doctrine because the doctrine is not applicable in medical negligence actions and was therefore misleading and likely affected the outcome of the trial.

Appeal by plaintiffs from judgment entered 15 April 2013 by Judge Gary E. Trawick in Chowan County Superior Court. Heard in the Court of Appeals 22 April 2014.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for plaintiffs-appellants.

Harris, Creech, Ward and Blackerby, P.A., by Charles E. Simpson, Jr. and Thomas E. Harris, for defendant-appellee.

HUNTER, Robert C., Judge.

Lakisha Wiggins ("Ms. Wiggins") and G. Elvin Small, guardian ad litem for Ms. Wiggins's son, Roy Lee Brothers, ("Roy") (collectively "plaintiffs") appeal from judgment entered on 15 April 2013 in favor of East Carolina Health-Chowan, Inc. d/b/a Chowan Hospital ("Chowan Hospital" or "defendant") on plaintiffs' medical negligence claim.[1] On appeal, plaintiffs argue that the trial court erred by: (1) instructing the jury on the sudden emergency doctrine; and (2) failing to instruct the jury on defendant's liability for unsuccessful or harmful subsequent medical treatment necessitated by defendant's negligence.

After careful review, we hold that the trial court erred by instructing the jury on the sudden emergency doctrine and remand for a new trial.

BACKGROUND

The evidence presented at trial established the following facts: On Friday, 8 July 2005, Ms. Wiggins was admitted to Chowan Hospital for labor and delivery of her son, Roy. Labor was induced on Friday night but was discontinued until the following morning. Prior to Ms. Wiggins's arrival at Chowan Hospital, there was no indication that anything was wrong with Roy or that he had suffered any injury. After a brief pause the night before, induction resumed at 8:08 a.m. on 9 July 2005 with the administration of the drug Pitocin. Though required by hospital protocols, no vaginal exam was conducted at this time. At around 12:54 p.m., a nurse performed a vaginal exam on Ms. Wiggins and discovered an umbilical cord prolapse.

A cord prolapse is a condition where the umbilical cord protrudes from the vagina. The baby's blood supply and oxygen may become compromised if the cord is compressed. Low blood flow and low oxygen can cause damage to a baby's brain. Standards of practice require a baby to be delivered as soon and as safely as possible by emergency cesarean section ("C-section") in the event of a cord prolapse.

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1. Dr. Michael Gavigan ("Dr. Gavigan") was also named as a defendant in plaintiffs' complaint. He is no longer a defendant to this suit and is not a party in this appeal.

After discovering the cord prolapse, the nurses immediately called the attending physician, Dr. Gavigan, and preparations were made for an emergency C-section. It took sixteen minutes to move Ms. Wiggins into the operating room. Dr. Gavigan proceeded with the C-section under local anesthetic.

Roy was delivered at 1:30 p.m. with APGAR scores of 0 at one minute after birth, 3 at five minutes, and 7 at ten minutes. An APGAR score is a test designed to evaluate a newborn's physical condition using a score of 0-10 and to determine whether any immediate additional or emergency care is needed. Dr. Charles O. Harris, a practicing obstetrician, testified at trial that an APGAR score of 0 means the baby had no heart rate, no respiratory rate, and no muscle tone. He further testified that "[Roy's] ten minute APGAR was seven which is normal" and stated that Roy's initial resuscitation by the pediatric team "went well."

Following delivery, Roy was transferred to The Children's Hospital of the King's Daughters in Norfolk, Virginia ("The Children's Hospital") for further treatment. At the time, The Children's Hospital was a participant in clinical trials for an experimental cooling procedure that is used on newborns who suffer brain damage due to low oxygen or blood flow at birth. The cooling is meant to reduce the metabolic needs of a newborn's brain tissue to help prevent long-term damage. This procedure was performed on Roy when the transport team arrived. However, the procedure was discontinued after Roy experienced a second episode of low oxygen while being cooled.

Plaintiffs filed a complaint against Chowan Hospital and Dr. Gavigan on 27 June 2008 alleging that Roy sustained severe brain injury as a proximate result of defendants' failure to perform a C-section in a timely manner. According to the complaint, Roy has permanent cognitive impairments and loss of motor control due to the complications with his birth. At trial, plaintiffs presented testimony of liability expert Dr. Fred Duboe ("Dr. Duboe"), who testified that Chowan Hospital's nurses were negligent by failing to: (1) perform a vaginal exam immediately before administering Pitocin as required by the applicable standards of practice and the hospital's own protocols; (2) notify Dr. Gavigan of the results of the vaginal exam that should have been performed; (3) give Terbutaline to slow or stop Ms. Wiggins's contractions after the cord prolapse occurred; and (4) move Ms. Wiggins to the operating room expediently before Roy's delivery by emergency C-section.

Several expert witnesses at trial testified that a cord prolapse is uncommon and qualifies as a medical emergency. All of the healthcare

providers and experts who testified at trial agreed that Ms. Wiggins did not have any risk factors for a cord prolapse.

During the charge conference, defendants requested and the trial court agreed to give an instruction regarding the sudden emergency doctrine, which lessens the standard of care for a defendant in certain emergency situations; plaintiffs preserved their objections to the instruction. The jury returned a verdict in favor of defendants on 20 March 2013, and judgment was filed 15 April 2013. Plaintiffs timely filed and served notice of appeal.

DISCUSSION

I. Jury Instruction on the Sudden Emergency Doctrine

Plaintiffs argue that the trial court erred by instructing the jury on the sudden emergency doctrine because the doctrine is not applicable in medical negligence actions and was therefore misleading and likely affected the outcome of the trial. We agree.

The trial court is responsible for ensuring that the jury is properly instructed before deliberations begin. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987) ("It [is] the duty of the [trial] court to instruct the jury upon the law with respect to every substantial feature of the case."). A trial court's primary purpose in instructing the jury is "the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Littleton v. Willis*, 205 N.C. App. 224, 228, 695 S.E.2d 468, 471 (2010). In considering whether to give a requested jury instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006). On appeal, this Court should consider the jury charge contextually and in its entirety. *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006).

> The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (citations and quotation marks omitted).

The North Carolina Pattern Jury Instruction for the standard of care in a medical negligence case is based on the duties enunciated in *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), and later codified into N.C. Gen. Stat. § 90-21.12 (2013).[2] It provides that a plaintiff needs to prove that the defendant was negligent in providing medical care by establishing a violation of any one of the following duties:

> (1) The duty to use their best judgment in the treatment and care of their patient;
>
> (2) The duty to use reasonable care and diligence in the application of their knowledge and skill to their patient's care; and
>
> (3) The duty to provide healthcare in accordance with the standards of practice among members of the same healthcare profession with similar training and experience situated in the same or similar communities at the time the healthcare is rendered.

N.C.P.I. —Civ. 809.00A (2013).

Here, in addition to giving the pattern instruction for the healthcare professional standard in N.C.P.I.-Civ. 809.00A, the trial court also used the following pattern jury instruction requested by defendants on the sudden emergency doctrine:

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2. We note that the General Assembly recently amended section 90.21-12 to address the precise issue raised in this appeal. Subsection (b) provides:

> (b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. § 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

N.C. Gen. Stat. § 90-21.12(b). Thus, rather than lowering the applicable standard of care, as with the sudden emergency doctrine, the General Assembly elected to raise the burden of proof for medical negligence actions arising from treatment of emergency medical conditions. However, because this amendment altered rather than clarified the law, and the facts which form the basis of this cause of action occurred prior to the amended statute's effective date of 1 October 2011, we cannot apply this provision here. *See Ray v. N.C. Dep't. of Transp.*, 366 N.C. 1, 8-10, 727 S.E.2d 675, 681-82 (2012) ("In the event that the amendment is a substantive change in the law, the effective date will apply."); *see also* 2011 Sess. Laws 400 § 11 (noting that section 90-21.12(b) "become[s] effective October 1, 2011, and appl[ies] to causes of actions arising on or after that date").

> A person who, through no negligence of his own, is suddenly and unexpectedly confronted with imminent danger to himself and others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, in a moment of such emergency, a person makes a decision that a reasonable and prudent person would make under the same or similar conditions, he does all that the law requires, even if in hindsight some different decision would have been better or safer.

N.C.P.I.—Civ. 102.15 (2013).

The applicability of the sudden emergency doctrine in medical negligence actions is an issue of first impression in North Carolina. Plaintiffs argue that the sudden emergency doctrine does not apply in medical negligence actions because medical emergencies are already contemplated and built-in to the standard of care for medical professionals; thus, plaintiffs argue that the trial court's charge to consider a what a "reasonable and prudent person" would do in a medical emergency was misleading to the jury, where they were also instructed to consider defendant's actions "in accordance with the standards of practice among members of the same healthcare profession." Defendant argues that the sudden emergency doctrine is equally applicable in medical negligence cases as it is in ordinary negligence cases. Defendant further contends that the instruction regarding the sudden emergency doctrine was not misleading when considered contextually in light of the entire jury charge.

In a general negligence action in North Carolina, the sudden emergency instruction can be requested when a party presents substantial evidence showing that a party (1) perceived an emergency situation and reacted to it, and (2) the emergency was not created by that party's own negligence. *Carrington*, 179 N.C. App. at 829-30, 635 S.E.2d at 534. "The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Marshall v. Williams*, 153 N.C. App. 128, 131, 574 S.E.2d 1, 3 (2002) (citation and quotation marks omitted).

> The state of the law on the doctrine of sudden emergency has been thoroughly stated by our courts. One who is

> required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated would have been.

Masciulli v. Tucker, 82 N.C. App. 200, 205-06, 346 S.E.2d 305, 308 (1986) (citation and quotation marks omitted).

Because our Courts have yet to address whether this doctrine applies to medical negligence cases, defendant relies on cases from Tennessee, New Mexico, and Massachusetts in which the appellate courts in those jurisdictions have affirmed application of the sudden emergency doctrine in the medical negligence context. In *Olinger v. Univ. Med. Ctr.*, 269 S.W.3d 560 (Tenn. Ct. App. 2008), the Tennessee Court of Appeals affirmed the trial court's jury instruction on the sudden emergency doctrine in a case involving labor and delivery that left the newborn baby with brachial plexus palsy. *Olinger*, 269 S.W.3d at 561. The doctor attempted two different maneuvers to resolve the shoulder dystrocia and it was found that the failure of those maneuvers was extremely rare. *Id.* at 565. Experts testified at trial that the failure of a doctor to resolve shoulder dystrocia with two typical maneuvers should be considered a medical emergency. *Id.* at 566. The court stated:

> We agree with [p]laintiffs' argument that because of a physician's training and background, the sudden emergency doctrine has a limited application in medical malpractice cases. Simply because there is a medical complication does not necessarily mean that there is a sudden emergency. We are not, however, willing to go as far as argued by [p]laintiffs and hold that the sudden emergency doctrine never is applicable in a medical emergency situation.

Id. at 568-69.

In another case, the Tennessee Court of Appeals found material evidence of a sudden emergency when an individual with a minor cut on her finger subsequently experienced a vasovagal reaction after an emergency room doctor administered a numbing shot, and she subsequently fell off the gurney bed and developed a traumatic brain injury as a result of her fall. *See Ross v. Vanderbilt Uni. Med. Ctr.*, 27 S.W.3d 523, 525-26 (Tenn. Ct. App. 2000). The plaintiffs argued that the doctor was negligent because he left the bedside without putting up the bedrails, *id.* at 526, and "that the sudden emergency doctrine is not applicable in a medical malpractice case to lower the standard of acceptable professional practice required of an emergency room physician."

Ross, 27 S.W.3d at 526, 529. The appellate court disagreed and held that "under the appropriate facts," the sudden emergency doctrine may be applied in assessing an emergency room doctor's fault. *Id.* at 530. In so holding, the court emphasized the importance of the sudden emergency doctrine in a comparative fault jurisdiction, while noting there may also be instances where the doctrine may come into play when no comparative fault is alleged. *Id.* at 527-28. The court also noted that the doctrine does not constitute a defense "as a matter of law," and does not negate the defendant's liability, but must be considered as a factor in the comparative fault analysis. *Id.*

Defendant also cites *Sutherlin v. Fenenga*, 810 P.2d 353, 356 (N.M. Ct. App. 1991), where a 16-year-old boy who came into the emergency room with a sports injury to his knee died after an anesthesia machine malfunctioned during surgery, causing a rupture to his right lung. The New Mexico Court of Appeals held the defendant was entitled to an instruction on sudden medical emergency, which would have lowered the healthcare professionals' standard of care. *Sutherlin*, 810 P.2d at 360.

Finally, defendant cites *Linhares v. Hall*, 257 N.E.2d 429 (Mass. 1970), a case involving a medical negligence suit against an anesthesiologist after a minor plaintiff suffered a cardiac arrest during a routine tonsillectomy. The plaintiffs argued that cardiac arrest is always a possible complication during surgery and it should not be assumed to be "an emergency within the meaning of the emergency doctrine." *Linhares*, 257 N.E.2d at 430. The appellate court disagreed and held "if an emergency did exist, a fact left to the determination of the jury, the defendant then and in that event was held to the exercise of a certain standard of care." *Id.*

Based on these cases, defendant argues that the sudden emergency doctrine is equally applicable to healthcare providers in North Carolina as it is to a layperson, and thus the trial court's instruction on the sudden emergency doctrine here was without error. For the following reasons, we disagree.

In North Carolina, the sudden emergency doctrine has been applied only to ordinary negligence claims, mostly those arising out of motor vehicle collisions, and has never been utilized in a medical negligence case. *See, e.g.*, *McDevitt v. Stacy*, 148 N.C. App. 448, 458, 559 S.E.2d 201, 209 (2002); *Ligon v. Matthew Allen Strickland*, 176 N.C. App. 132, 141, 625 S.E.2d 824, 831 (2006); *Long v. Harris*, 137 N.C. App 461, 467, 528 S.E.2d 633, 637 (2000). Even in cases where the facts giving rise to suit could presumably be categorized as sudden medical emergencies, the

general standard of care for healthcare professionals has been sufficient to assess liability. *See O'Mara v. Wake Forest Univ. Health Services*, 184 N.C. App 428, 434, 646 S.E.2d 400, 404 (2007) (utilizing the healthcare professional standard where the plaintiff alleged that a child's spastic quadriparetic cerebral palsy was caused by oxygen deprivation during the final thirty minutes of birth); *Lentz v. Thompson*, 269 N.C. 188, 192, 152 S.E.2d 107, 110 (1967) (applying the standard of "professional knowledge and skill ordinarily had by those who practice that branch of the medical art or science" where the plaintiff's spinal accessory nerve was severed during surgery).

The application of the healthcare professional standard of care to a wide range of factual scenarios is not accidental. Our Supreme Court has described the standard for medical professionals as "*completely unitary in nature*, combining in one test the exercise of 'best judgment,' 'reasonable care and diligence' and compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.' " *Wall v. Stout*, 310 N.C. 184, 193, 311 S.E.2d 571, 577 (1984) (emphasis added) (holding that the passage of section 90-21.12 did not abrogate the duties of healthcare professionals created at common law). Part of the standard developed at common law is to examine a healthcare professional's conduct in light of the factual circumstances of the case. In *Brawley v. Heymann*, a semiconscious patient fell off of a narrow examining table to which he was not secured. *Brawley v. Heymann*, 16 N.C. App 125, 128, 191 S.E.2d 366, 367-368 (1972). This Court held that "[a] jury could reasonably conclude from such findings that defendant failed to give, or see that plaintiff was given, such care as a reasonably prudent *physician in the same or similar circumstances would have provided*[.]" *Id.* (emphasis added).

Thus, the standard of care for healthcare professionals, both at common law and as enunciated in section 90-21.12, is designed to accommodate the factual exigencies of any given case, including those that may be characterized as medical emergencies. Therefore, we hold that the sudden emergency doctrine is unnecessary and inapplicable in such cases, and the trial court's instruction on the sudden emergency doctrine here was "likely, in light of the entire charge, to mislead the jury." *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177. Because this erroneous instruction likely misled the jury, we remand for a new trial.

Even if we were to hold that that the sudden emergency doctrine is applicable in medical negligence cases, the trial court's specific instructions here would still require a new trial. The trial court instructed the

jury that it should assess defendant's actions in light of what a reasonable and prudent *person* would do when faced with the same emergency. However, even in cases from other jurisdictions where the sudden emergency doctrine was applied in medical negligence actions, the language used by those trial courts limited the standard to a reasonable healthcare professional, not a reasonable person. For example, the sudden emergency instruction as given in *Olinger* was as follows:

> A *physician/nurse* who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy or judgment as a person acting under normal circumstances who has time to think and reflect before acting. *A physician/nurse faced with a sudden emergency is required to act within the recognized standard of care applicable to that physician or nurse.* A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.

Olinger, 269 S.W.3d at 564 (emphasis added). The sudden emergency instruction given in *Ross* reads:

> A *physician* who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy *of judgment as a physician* acting under normal circumstances . . . .

Ross, 27 S.W.3d at 526-27 (emphasis added). Finally, the instruction that the defendant requested in *Sutherlin*, UJI Civ. 13–1113, was specifically designed for use in medical cases. *Sutherlin*, 810 P.2d at 360. UJI Civ. 13-1113 provided that:

> A *doctor* who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger *to the patient*, is not expected nor required to use the same judgment and prudence that is required *of the doctor in the exercise of ordinary care* in calmer and more deliberate moments.

Id. (emphasis added).

Thus, when compared to the instructions in the cases cited favorably by defendant, the trial court's specific language here was far too general to be considered a sound application of the law. The charge instructs the jury to simultaneously apply the "standards of practice among *members of the same healthcare profession* with similar training and experience

situated in the same or similar communities at the time the health care is rendered" in addition to the duty to "use that degree of care which *a reasonable and prudent person* would use under the same or similar circumstances." These duties are incompatible. Healthcare professionals are held to a higher standard of care than laypersons. *See Leatherwood v. Ehlinger*, 151 N.C. App. 15, 20, 564 S.E.2d 883, 886 (2002) ("[B]ecause the practice of medicine involves a specialized knowledge beyond that of the average person, the applicable standard of care in a medical malpractice action must be established through expert testimony"), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003); *see also* N.C. Gen. Stat. 90-21.12(a) (emphasizing that medical professionals, to avoid liability, must uphold a level of care in accordance with "the standards of practice among members of the same health care profession with similar training and experience").

CONCLUSION

After careful review, we hold that the trial court erred by instructing the jury on the sudden emergency doctrine. Because this error likely misled the jury, we reverse the underlying judgment and remand for a new trial.

NEW TRIAL.

Judges BRYANT and STEELMAN concur.

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