235 N.C. App.—No. 1 Pages 1-221

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 9, 2016

MAILING ADDRESS: The Judicial Department
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OF

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 15 JULY 2014 AND 29 JULY 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

CHILD CUSTODY AND SUPPORT

Pre-birth non-medical expenses—not allowed—In an action to establish paternity, custody, and support, an award for nursery expenses and maternity clothes incurred prior to the child's birth was reversed. The legal obligation arises when the child is born and expenses incurred prior to the child's birth cannot be considered as retroactive child support, with the only exception being medical expenses as allowed by statute. While it is reasonable to incur expenses in preparation for the birth of a baby, there is no evidence or argument that nursery expenses and maternity clothes could qualify as "medical expenses" under even the most generous definition. **Loosvelt v. Brown, 88.**

Retroactive support—ability to pay—relevant time period—An award of retroactive child support for post-birth expense for daycare, child care, and the child's birth was remanded for findings as to plaintiff's ability to pay during the time period for which reimbursement was sought. **Loosvelt v. Brown, 88.**

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Retroactive support—post-birth expenses—date incurred—insufficient evidence—A retroactive child support award for nursery expenses and basic needs incurred after the child's birth was reversed for insufficient evidence that the expenses were incurred prior to filing the complaint. **Loosvelt v. Brown, 88.**

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FRAUD

JURISDICTION

NEGLIGENCE

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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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRIAN THOMAS ATKINSON AND MYERS PARK HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFFS

v.

CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE, DEFENDANT AND QUEENS UNIVERSITY OF CHARLOTTE AND JOHNSON C. SMITH UNIVERSITY, NORTH CAROLINA NON-PROFIT CORPORATIONS, DEFENDANT-INTERVENORS

No. COA13-1226

Filed 29 July 2014

Zoning—amendment—parking decks—statement of consistency—not sufficient

Summary judgment was erroneously granted for defendant and the intervenors in an action involving a zoning amendment for parking decks, and the matter was remanded for the entry of summary judgment in favor of plaintiffs. The undisputed facts established that the City Council failed to comply with N.C.G.S. § 160A-383 when it adopted the amendment in that it could not reasonably have been said that The Statement of Consistency included an explanation as to why the amendment was reasonable and in the public interest.

Appeal by plaintiffs from order entered 26 June 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2014.

Currin & Currin, by Robin T. Currin and George B. Currin, for plaintiff-appellants.

Senior Assistant City Attorney Terrie Hagler-Gray, for defendant-appellee.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and John H. Carmichael, for defendant-intervenor-appellees.

CALABRIA, Judge.

Brian Thomas Atkinson ("Atkinson") and Myers Park Homeowners Association, Inc. ("the Association") (collectively "plaintiffs") appeal from the trial court's order granting summary judgment in favor of the City of Charlotte ("the City") and intervenors Queens University of Charlotte ("Queens") and Johnson C. Smith University ("Smith") (collectively "intervenors"). We reverse and remand.

In late 2009, representatives from Queens and other Charlotte residents initiated an amendment ("the amendment") to the text of the City of Charlotte Zoning Ordinance ("the Zoning Ordinance"). The purpose of the proposed amendment was to exempt certain parking decks from floor area ratio requirements imposed by the Zoning Ordinance.

The City's Planning Commission ("the Planning Commission") reviewed the proposed amendment and Planning Commission staff made a written recommendation to the Charlotte City Council ("the City Council") and to the seven members of the Planning Commission serving on the Department's Zoning Committee {"the Zoning Committee") that the amendment should be adopted. After a public hearing, the Zoning Committee voted unanimously to recommend the amendment's approval to the City Council on 26 May 2010. As part of that recommendation, the Zoning Committee included a statement which found the proposed amendment was consistent with the City's adopted policies and was reasonable and in the public interest.

On 21 June 2010, the City Council considered the proposed amendment. Mayor Anthony Foxx informed the Council that the Zoning Committee had found the amendment as proposed was consistent with the City's adopted policies, reasonable, and in the public interest ("the Statement of Consistency"). The City Council voted to approve the Statement of Consistency and the amendment unanimously. Under the terms of the newly-passed amendment, parking decks which were constructed as "an accessory use to an institutional use" were now exempt for the floor area ratio standards of the Zoning Ordinance when the decks were located in single family and multifamily zoning districts.

Atkinson is a property owner in the Myers Park residential area, which is located adjacent to Queens. On 10 December 2012, Atkinson and the Association, on behalf of other Myers Park residents, initiated

a declaratory judgment action in Mecklenburg County Superior Court seeking to have the amendment invalidated. Plaintiffs alleged that the City Council failed to comply with the requirements of N.C. Gen. Stat. § 160A-383 when it adopted the amendment.

After the City filed its answer to plaintiffs' complaint, Queens and Smith filed a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24 (2013). The trial court granted this motion on 22 March 2013, and intervenors filed their responsive pleading that same day. Subsequently, all parties filed motions for summary judgment. The motions were heard on 24 June 2013. On 26 June 2013, the trial court entered an order granting summary judgment in favor of the City and intervenors. Plaintiffs appeal.

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

Plaintiffs argue that the trial court erred by granting summary judgment in favor of the City and intervenors because the undisputed facts establish that the City Council failed to comply with N.C. Gen. Stat. § 160A-383 when it adopted the amendment. Specifically, plaintiffs contend (1) that the "Statement of Consistency" adopted by the City Council did not meet the requirements of a "statement" pursuant to that statute; and (2) that the Zoning Committee did not include the entire Planning Commission and thus the Zoning Committee's approval of the amendment also did not meet all statutory requirements. We agree with plaintiffs' first contention and find it to be dispositive. Consequently, we do not address plaintiffs' second contention.

> When adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

N.C. Gen. Stat. § 160A-383 (2013). Thus,

> the statute requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and

> second, approve a proper statement. *Id.* The approved statement must *describe* whether the action is consistent with any controlling comprehensive plan and *explain* why the action is "reasonable and in the public interest."

Wally v. City of Kannapolis, 365 N.C. 449, 452, 722 S.E.2d 481, 483 (2012).

In *Wally*, the plaintiffs were property owners who challenged the rezoning of a nearby property because, *inter alia*, the City of Kannapolis had failed to expressly approve the consistency statement required by N.C. Gen. Stat. § 160A-383. *Id.* at 451, 722 S.E.2d at 482. The Court agreed with the plaintiffs' argument and held that the challenged zoning amendment was void for failure to comply with the statute's procedures. *Id.*

In reaching its holding, the *Wally* Court rejected three arguments made by the defendant-city in favor of upholding the amendment. First, the Court rejected the defendant-city's argument that any judicial review regarding a consistency statement was barred by N.C. Gen. Stat. § 160A-383, explaining that "the statute refers to an approved statement. While an approved statement is not subject to judicial review, the statute does not prohibit review of *whether* the City Council approved a statement, which is the issue here." *Id.* at 453, 722 S.E.2d at 483. Next, the Court rejected the defendant-city's argument that it had impliedly approved a consistency statement by virtue of having a staff report which included a consistency statement in its possession at the time the amendment was adopted because "[t]he language of section 160A-383 does not authorize an implied approval." *Id.* Finally, the Court rejected the defendant-city's argument that its adoption of a statement "announcing that it acted within the guidelines of its zoning authority" satisfied N.C. Gen. Stat. § 160A-383 because "to meet the statutory requirements, an approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description." *Id.* at 453-54, 722 S.E.2d at 484.

In the instant case, it is undisputed that the City Council formally adopted and approved the following statement proposed by the Zoning Commission:

> STATEMENT OF CONSISTENCY This petition is found to be consistent with adopted policies and to be reasonable and in the public interest . . . .

Defendant and intervenors contend that, under *Wally*, since only the issue "of *whether* the City Council approved a [consistency] statement"

is subject to judicial review, the trial court properly determined that it could not review this statement for compliance with N.C. Gen. Stat. § 160A-383. *Id.* at 453, 722 S.E.2d at 483. Defendant and intervenors are mistaken.

As the *Wally* Court's discussion of the defendant-city's third argument in that case makes clear, judicial review of compliance with N.C. Gen. Stat. § 160A-383 requires more than a cursory review of the record for a statement that could plausibly be considered a consistency statement:

> Compliance with section 160A-383 requires more than a general declaration that the action comports with relevant law. Section 160A-383 *explains that to meet the statutory requirements, an approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description.* Rather, it consists of a general declaration that in adopting the zoning amendment, the City Council acted within the guidelines of its zoning authority.

Id. at 453-54, 722 S.E.2d at 484 (emphasis added). Therefore, under *Wally,* judicial review of whether a city has adequately adopted a consistency statement as defined by N.C. Gen. Stat. § 160A-383 is limited to a court's determination of whether a city adopted a consistency statement which contains, at a minimum, both a description of whether the zoning amendment is consistent with any controlling land use plan and an explanation as to why the amendment is reasonable and in the public interest. Once it is determined that a proper statement, which includes a description and explanation, has been adopted, the content of the statement "is not subject to judicial review." N.C. Gen. Stat. § 160A-383.

The Statement of Consistency adopted by the City Council in the instant case cannot reasonably be said to include an "explanation" as to why the amendment is reasonable and in the public interest under the plain meaning of that term. Instead, the statement merely tracks the language of N.C. Gen. Stat. § 160A-383. While this statement attempts to more specifically address the requirements of N.C. Gen. Stat. § 160A-383 than the more generalized statement that the Court rejected in *Wally*, it still suffers from the same fatal flaw: "The statement adopted by the City Council provides no . . . explanation," as required by the statute. *Id.* at 454, 722 S.E.2d at 484. As a result, the City did not comply with

N.C. Gen. Stat. § 160A-383 when it failed to adopt a proper "statement" as that term is defined by the statute and interpreted by *Wally*, and its purported "Consistency Statement" does not fall within that statute's protections against judicial review. Accordingly, we reverse the trial court's order granting summary judgment in favor of defendant and intervenors and remand for the entry of summary judgment in favor of plaintiffs which declares the amendment to be void.

Reversed and remanded.

Chief Judge MARTIN and Judge McGEE concur.

ROBERT PETER DOWD, III AND JONATHAN CARTER DOWD, PLAINTIFFS
v.
CHARLES DEXTER JOHNSON, DEFENDANT

No. COA13-833

Filed 15 July 2014

Process and Service—default judgments—service by publication—improper—no general appearance

The trial court erred by denying defendant's motions to set aside default judgments because plaintiffs' service of process by publication was improper. There was no indication in the record that plaintiffs ever attempted service on defendant at his Skyview Drive address, despite having knowledge of said address. Furthermore, defendant did not make a general appearance before the entry of the default judgments and has not waived his objection to improper service of process. Because service by publication on defendant was invalid, the trial court did not possess personal jurisdiction over defendant when it entered the default judgments. As such, these default judgments were void.

Appeal by defendant from orders entered 18 October 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 11 December 2013.

Robbins May & Rich, LLP, by Neil T. Oakley, R. Palmer Sugg, and Robert M. Friesen, for plaintiffs-appellees.

Gray, Layton, Kersh, Solomon, Furr, & Smith, P.A., by William E. Moore, Jr. and Marcus R. Carpenter, for defendant-appellant.

DAVIS, Judge.

Charles Dexter Johnson ("Defendant") appeals from the trial court's 18 October 2012 orders (1) denying his motions to set aside the default judgments entered against him; and (2) awarding Robert Peter Dowd, III and Jonathan Carter Dowd (collectively "Plaintiffs") $1,500.00 in attorneys' fees. On appeal, Defendant contends that the default judgments entered against him were void because Plaintiffs failed to properly serve him with process. After careful review, we reverse the trial court's order denying Defendant's motions to set aside the default judgments, vacate its sanctions order awarding attorneys' fees to Plaintiffs, and vacate the underlying default judgments.

Factual Background

On 29 July 2008, Plaintiffs loaned Defendant $150,000.00 pursuant to a promissory note that was secured by a deed of trust. The property securing the loan was located in Moore County, North Carolina. Defendant made several payments but eventually defaulted on the loan, and Plaintiffs initiated foreclosure proceedings on the Moore County property. The trial court entered an order of sale authorizing the trustee to proceed with the foreclosure, and Defendant appealed to this Court, arguing that the trial court erred in denying his motion for a continuance. In an unpublished opinion, this Court held that the trial court did not abuse its discretion in denying Defendant's motion to continue and affirmed the court's order of sale. *See In re Foreclosure of Johnson*, ___ N.C. App. ___, 729 S.E.2d 128 (2012) (unpublished).

On 24 May 2010, Plaintiffs filed two separate actions in Moore County Superior Court against Defendant. The first action sought recovery of $57,500.00 based on Defendant's nonpayment of amounts due under the promissory note. The second action sought reformation of the deed of trust securing the promissory note.[1]

That same day, a civil summons was issued to Defendant listing 3574 Turnberry Circle, Fayetteville, North Carolina as his address. The

1. Plaintiffs' complaint seeking reformation of the deed of trust alleged that both parties intended for two parcels — a 7.3 acre parcel and a 1.44 acre parcel — to secure Defendant's repayment of the loan but that through a mutual mistake, the deed of trust included a description of only the 1.44 acre parcel.

Cumberland County Sheriff's Office attempted service at the Turnberry Circle address, but the summons was returned unserved with a notation that Defendant "no longer lives there." Plaintiffs also attempted to serve Defendant at that address via certified mail, but the mail was returned as undeliverable.

On 29 October 2010, a new civil summons was issued listing 2201 Skyview Drive, Fayetteville, North Carolina as Defendant's address. There is no indication in the record, however, that Plaintiffs ever attempted to actually serve Defendant at the Skyview Drive address.

Plaintiffs subsequently commenced service by publication in both actions. A Notice of Service of Process by Publication was published in *The Fayetteville Observer* on 29 November, 6 December, and 13 December 2010.

On 8 February 2011, Plaintiffs filed motions seeking default judgments regarding their claim to recover $57,500.00 under the promissory note and with respect to their claim for reformation of the deed of trust. Plaintiffs filed accompanying affidavits attesting to their service by publication efforts along with their respective motions. The trial court granted both of Plaintiffs' motions and on 17 March 2011 entered default judgments (1) awarding Plaintiffs $57,500.00 in damages and $8,625.00 in attorneys' fees; and (2) reforming the deed of trust to match the property description provided for in the plat recorded in Plat Cabinet 5, slide 109 at the Moore County Register of Deeds office.

On 21 August 2012, Defendant filed a motion for a temporary restraining order seeking to prevent the substitute trustee from commencing the foreclosure sale. On 31 August 2012, Defendant filed motions to set aside the default judgments pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Defendant argued that the default judgments were void because Plaintiffs failed to properly serve him with process such that the trial court lacked personal jurisdiction over Defendant when it entered the judgments. On 28 September 2012, Plaintiffs filed a motion for Rule 11 sanctions, alleging that Defendant's motions to set aside the judgments were not well grounded in fact or supported by existing law.

The trial court denied Defendant's Rule 60(b) motions by order entered 18 October 2012, ruling that Plaintiffs had exercised due diligence in their attempts to locate Defendant and that their service of process by publication as to Defendant was proper. The trial court further ordered that "no Notice of Appeal in this matter shall be filed with or accepted by the Clerk of Superior Court of Moore County until after such time as the Defendant shall have posted an Appeal Bond in the amount

of Eighty-Eighty Thousand Dollars ($88,000.00)." Finally, the trial court entered a separate order on 18 October 2012 granting Plaintiffs' motion for Rule 11 sanctions and ordering Defendant to pay $1,500.00 in attorneys' fees.

Defendant attempted to file a notice of appeal from the 18 October 2012 orders on 19 November 2012, but the Moore County Clerk's Office marked out the file stamp and refused to accept the notice of appeal based on his failure to comply with the trial court's requirement that he post an appeal bond in the amount of $88,000.00. On 8 May 2013, this Court granted *certiorari* to review the trial court's 18 October 2012 orders denying Defendant's motions to set aside the default judgments and granting Plaintiffs' motion for sanctions.

Analysis

I. Default Judgments

Defendant's primary argument on appeal is that the trial court erred in denying his motions to set aside the default judgments because Plaintiffs' service of process by publication was improper. We agree.

A trial court may set aside and relieve a defendant from a default judgment if the judgment entered is void. *See* N.C.R. Civ. P. 55(d) ("[I]f a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)); N.C.R. Civ. P. 60(b) ("[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . [if] [t]he judgment is void . . . .").

> A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. If a default judgment is void due to a defect in service of process, the trial court abuses its discretion if it does not grant a defendant's motion to set aside entry of default.

Jones v. Wallis, 211 N.C. App. 353, 356, 712 S.E.2d 180, 183 (2011) (citations and quotation marks omitted).

After Plaintiffs' attempts to serve Defendant at the Turnberry Circle address were unsuccessful, Plaintiffs elected to serve Defendant by publication in *The Fayetteville Observer*. Rule 4(j1) of the North Carolina Rules of Civil Procedure permits service of process by publication on a party that cannot, through due diligence, be otherwise served. *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003). Rule 4(j1) provides as follows:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served. . . .

N.C.R. Civ. P. 4(j1).

Because service by publication is in derogation of the common law, "statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980). In determining whether service of process by publication is proper, this Court first examines whether the defendant was actually subject to service by publication — meaning that the plaintiff exercised due diligence as required by Rule 4(j1) prior to serving the defendant by publication. *Jones*, 211 N.C. App. at 357, 712 S.E.2d at 183. "Due diligence dictates that plaintiff use all resources reasonably available to [him] in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Id.* (citation and quotation marks omitted).

In this case, we conclude that service of process by publication was improper because there is no indication in the record that Plaintiffs ever attempted service on Defendant at his Skyview Drive address despite having knowledge of said address. Indeed, the record shows that on 29 September 2010, approximately two months before Plaintiffs commenced service by publication, Defendant's counsel sent Plaintiffs' counsel an email stating as follows:

> One other thing I forgot to include. [Defendant] has asked me to provide you with his current mailing address, which is as follows: 2201 Skyview Dr., Fayetteville, NC 28304.
>
> Thx, steve

Although Plaintiffs caused a summons to be issued listing this address, the record is devoid of any evidence that service was ever actually attempted on Defendant at 2201 Skyview Drive. Indeed, Plaintiffs do not dispute the absence of such evidence in the record.

While the record reflects that Defendant has had numerous mailing addresses throughout this litigation, this cannot excuse Plaintiffs' failure to attempt service at the address provided by Defendant's counsel and described as Defendant's "current mailing address." Because Plaintiffs did not try to serve Defendant personally or by certified mail at the Skyview Drive address, we cannot conclude that they exercised the due diligence required before resorting to service by publication. *See Thomas v. Thomas*, 43 N.C. App. 638, 646, 260 S.E.2d 163, 169 (1979) ("[S]ervice of process by publication is void . . . if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained.").

Plaintiffs contend that Defendant nevertheless submitted to the jurisdiction of the trial court — thereby waiving any alleged defects in service of process — by (1) filing a motion for a temporary restraining order; and (2) seeking injunctive and declaratory relief in his motions to set aside the default judgments. Plaintiffs' argument is without merit.

It is well established that by making a general appearance, a defendant "waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof." *Tobe-Williams v. New Hanover Cty. Bd. of Educ.*, ___ N.C. App. ___, ___ S.E.2d ___, slip op. at 16 (No. COA13-679) (filed Jun. 17, 2014) (citation omitted). In this case, however, Defendant "did nothing that could be considered a general appearance prior to the entry of the [judgments] now challenged." *Barnes v. Wells*, 165 N.C. App. 575, 579, 599 S.E.2d 585, 588 (2004). Defendant is

challenging the validity of default judgments entered on 17 March 2011 based on improper service of process. It was not until *after* the entry of the 17 March 2011 judgments that Defendant filed his motion for a temporary restraining order (on 21 August 2012) and his motions to set aside the default judgments (on 31 August 2012).

As we have previously explained, "[i]f the trial court lacked personal jurisdiction over [the party] when it entered the order, actions subsequent to that order could not retroactively supply jurisdiction." *Id.* at 580, 599 S.E.2d at 589. Because Defendant did not make a general appearance before the entry of the default judgments, he has not waived his objection to improper service of process. *See id.* (concluding that party did not waive personal jurisdiction objection based on improper service in moving for relief from order pursuant to Rule 60(b) because party did not make any general appearances prior to entry of order being challenged).

Because service by publication on Defendant was invalid, the trial court did not possess personal jurisdiction over Defendant when it entered the 17 March 2011 default judgments. As such, these default judgments are void, and the trial court erred by denying Defendant's motions to set them aside. Consequently, we must reverse the trial court's 18 October 2012 order denying Defendant's motions to set aside and vacate the underlying default judgments. *Cotton*, 160 N.C. App. at 704, 586 S.E.2d at 808-09.

II. Sanctions Order

We must also vacate the trial court's 18 October 2012 sanctions order. In its order, the trial court granted Plaintiffs' motion to impose Rule 11 sanctions against Defendant and ordered Defendant to pay $1,500.00 in attorneys' fees "incurred in the successful defense of Defendant's most recent motions."

Rule 11 states, in pertinent part, as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification,

> or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.R. Civ. P. 11(a). If a pleading, motion, or paper is signed in violation of Rule 11, the trial court "shall impose . . . an appropriate sanction, which may include an order to pay the other party . . . reasonable expenses . . . including a reasonable attorney's fee." *Id.*

It is well established that analysis under Rule 11 is three-pronged, requiring the trial court to determine whether the pleading, motion, or paper is (1) factually sufficient; (2) legally sufficient; and (3) not filed for an improper purpose. *In re Will of Durham*, 206 N.C. App. 67, 71, 698 S.E.2d 112, 117 (2010). "A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

Here, we have already concluded that Defendant's motions to set aside the default judgments for lack of personal jurisdiction based on improper service were factually and legally meritorious. As such, Rule 11 sanctions are not appropriate based on either of the first two prongs. Accordingly, Rule 11 sanctions could only be appropriate if Defendant's motions were filed for an improper purpose. *See Durham*, 206 N.C. App. at 72, 698 S.E.2d at 118 ("The improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements. . . . Thus, even if a paper is well grounded in fact and in law, it may still violate Rule 11 if it is served or filed for an improper purpose." (citations, quotation marks, and alterations omitted)).

"An improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and quotation marks omitted). When determining whether a motion was filed for an improper purpose, the relevant inquiry is "whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Id.*

Here, we have found no evidence in the record suggesting that Defendant filed his motions to set aside the default judgments for any improper purpose. Furthermore, the trial court's sanctions order did not contain any findings indicating that Defendant filed his motions for any such improper purpose, instead relying on its determination that the motions were not well grounded in fact or law to support its conclusion

that sanctions were appropriate. *See Page v. Roscoe, LLC*, 128 N.C. App. 678, 686, 497 S.E.2d 422, 428 (1998) (concluding that improper purpose prong of Rule 11 was not violated where there was no evidence suggesting that complaint was filed for improper purpose and trial court made no such findings). As such, Rule 11 sanctions were not appropriate in this case, and we vacate the trial court's sanctions order.[2]

Conclusion

For the reasons stated above, we (1) reverse the trial court's order denying Defendant's Rule 60(b) motions; (2) vacate the order granting Plaintiffs' motion for sanctions; and (3) vacate the underlying default judgments entered 17 March 2011.

REVERSED AND VACATED.

Judges STEELMAN and STEPHENS concur.

2. Defendant also challenges the validity of the $88,000.00 appeal bond set by the trial court. The authority of a trial court to impose an appeal bond is limited by statute. Plaintiffs contend that the bond imposed was appropriate under N.C. Gen. Stat. § 1-292, which requires an appellant to execute a bond of "a sum to be fixed by a judge" in order to stay execution of a judgment "direct[ing] the sale or delivery of possession of real property." N.C. Gen. Stat. § 1-292 (2013). Because the trial court's 18 October 2012 order denying Defendant's motions to set aside the default judgments did not "direct[] the sale or delivery of possession of real property," N.C. Gen. Stat. § 1-292 does not apply. However, because we granted *certiorari* to review the trial court's 18 October 2012 orders and Defendant was not ultimately required to execute the $88,000.00 appeal bond, we need not address with specificity each of Defendant's arguments regarding the validity of the appeal bond.

EASTERN PRIDE, INC., KENNETH E. MOOREFIELD AND WIFE, LYNN B. MOOREFIELD, PLAINTIFFS
v.
GURDIAL SINGH AND WIFE, AMANDIP KAUR, DEFENDANTS

No. COA14-167

Filed 15 July 2014

Deeds—restrictive covenants—prohibition of convenience store

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiffs declaring that the construction and operation of a Family Dollar store upon plaintiffs' real property did not violate the restrictive covenant contained in a deed which prohibited the operation of a "convenience store" on that tract. The language in the deed merely prevented the type of store that could operate on the vacant tract.

Appeal by Defendants from order entered 15 November 2013 by Judge Gary E. Trawick in Nash County Superior Court. Heard in the Court of Appeals on 19 May 2014.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for Plaintiffs-appellees.

Nigle B. Barrow, Jr., for Defendants-appellants.

DILLON, Judge.

Gurdial Singh and Amandip Kaur ("Defendants") appeal from a trial court's ruling granting summary judgment in favor of Eastern Pride, Inc., Kenneth E. Moorefield, and Lynn B. Moorefield ("Plaintiffs") declaring that the construction and operation of a Family Dollar store upon Plaintiffs' real property does not violate the restrictive covenant contained in a deed, which prevents certain uses of said property. For the following reasons, we affirm the trial court's order.

I. Background

Plaintiffs commenced this action, seeking a declaratory judgment that a restrictive covenant prohibiting the use of their real property "as a convenience store" would not be violated by the construction and operation of a Family Dollar store. Defendants filed their responsive

pleading seeking, *inter alia*, injunctive relief to prevent the construction and operation of a Family Dollar store on Plaintiffs' property. The parties filed cross motions for summary judgment. The evidence presented to the trial court on these motions tended to show as follows: As of 2006, Plaintiffs Kenneth and Lynn Moorefield ("the Moorefields") owned two adjacent tracts of land in Rocky Mount. One tract was developed as a convenience store (the "Convenience Store Tract"); the other tract was undeveloped (the "Vacant Tract"). On or about 29 December 2006, the Moorefields contracted to sell the Convenience Store Tract to Defendants. As part of the agreement, the Moorefields and Defendants agreed that certain restrictive covenants would be placed on the Convenience Store Tract and the Vacant Tract. Pursuant to this agreement, the Moorefields conveyed the Convenience Store Tract to Defendants by deed (the "Deed") which was recorded in the Nash County Registry on 10 January 2007. The Deed contained the following restrictive covenant language:

> 1) The [Convenience Store Tract] shall be used solely as a convenience store with gas pumps and no portion may be used nor may there be operated thereon an adult bookstore, adult video store, or an adult entertainment facility. ***As long as Grantee operates a convenience store on the [Convenience Store Tract] the Grantor may not use [the Vacant Tract] or any portion as a convenience store.***
>
> . . . .
>
> 4) These restrictions shall be binding upon and inure to the benefit of Grantor and Grantee, their heirs, successors and assigns.

(Emphasis added.)

On 18 July 2012, the Moorefields entered an agreement to sell the Vacant Tract to Eastern Pride, Inc., who intended to construct a building thereon to be leased to Family Dollar Stores of North Carolina, Inc. for the operation of one of its stores. On 12 September 2012, Family Dollar Stores executed a "Letter of Intent" to lease the Vacant Tract from Eastern Pride at some point after Eastern Pride purchased the tract from the Moorefields. However, on 9 October 2012, Defendants' counsel sent a letter to the Moorefields contending that the restrictive covenant contained in the 2007 Deed prohibited the operation of a Family Dollar store on the Vacant Tract.

On 15 November 2013, the trial court entered an order allowing Plaintiffs' motion for summary judgment, denying Defendants' motion for summary judgment, and declaring that "[a] Family Dollar Store is not a 'convenience store' as prohibited in the Deed[,]" the construction and operation of a Family Dollar store did not violate the restrictive covenants in the deed, and a copy of the order was to be recorded in the register of deeds' office. On 10 December 2013, Defendants gave notice of appeal from the trial court's order.

II. Standard of Review

In appeals from a trial court's ruling from a party's motion for summary judgment from a declaratory judgment ruling,

> [s]ummary judgment may be granted in a declaratory judgment proceeding where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Steiner v. Windrow Estates Home Owners Ass'n, 213 N.C. App. 454, 456-57, 713 S.E.2d 518, 521-22 (2011) (citations omitted). Interpretation of the language of a restrictive covenant is generally a question of law reviewed *de novo* by this Court. *See Moss Creek Homeowners Ass'n v. Bissett*e, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (observing that "restrictive covenants are contractual in nature.") (citation omitted)), *disc. rev. denied*, 364 N.C. 242, 698 S.E.2d 402 (2010); *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (stating that contract interpretation is a matter of law, reviewed *de novo*).

III. Analysis

Defendants contend that the trial court erred in granting summary judgment in favor of Plaintiffs and declaring that the construction and operation of a Family Dollar store on the Vacant Tract did not violate the restrictive covenants prohibiting the operation of a "convenience store" on that tract. We disagree.

"In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 96 (2003) (emphasis in original). "However,

this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent." *Schwartz v. Banbury Woods Homeowners Ass'n*, 196 N.C. App. 584, 591, 675 S.E.2d 382, 388 (2009), *disc. review denied*, 363 N.C. 856, 694 S.E.2d 391 (2010). "[A]ny ambiguities in the restrictions are to be resolved in favor of the free and unrestricted use of the land." *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). That is, as our Supreme Court has explained, any doubt should be resolved in favor of "the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). This "rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 518 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013).

Applying these principles to the present case, we believe that, for the reasons stated below, the operation of a Family Dollar store does not violate the restrictive covenant in the Deed, and, therefore, hold that the trial court did not err in granting summary judgment to Plaintiffs.

The term "convenience store" is not defined in the restrictive covenant language in the Deed. We have held that "[u]nless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning." *Erthal*, ___ N.C. App. at ___, 736 S.E.2d at 522. A dictionary with the copyright date on or about the time the restrictive covenant was executed "is an appropriate place to ascertain the then customary definitions of words and terms." *Angel v. Truitt*, 108 N.C. App. 679, 683, 424 S.E.2d 660, 663 (1993) (applying a definition from the 1982 edition of *The American Heritage Dictionary* to determine the customary definition of the term "mobile home" as used in a restrictive covenant executed in 1981) (citation omitted)).

Here, the restrictive covenants were entered into in 2006. "[C]onvenience store" is defined as "[a] small retail store that is open long hours and that typically sells staple groceries, snacks, and sometimes gasoline." The American Heritage Dictionary of the English Language, 401 (4th. ed. 2000). The Merriam-Webster's Collegiate Dictionary, also defines "convenience store" as "a small often franchised market that is open long hours." *Id.* at 272 (11th. ed. 2003). Using these accepted

definitions, the ordinary meaning of the words show that a key feature of a "convenience store" is its small size, long store hours, and it sells some groceries, snacks, and sometimes gasoline.

A Family Dollar store, however, is more accurately described as a discount store, rather than as a convenience store. For instance, in a Form 10-K filed with the Securities and Exchange Commission, Family Dollar Stores, Inc. states that its "stores are generally open seven days a week and operate between the hours of 8:00 a.m. and 9:00 p.m."; that its store size is typically between 7,500 and 9,500 square feet; and that it sells "quality merchandise at everyday low prices" with the majority of products priced at $10 or less and offering "a focused assortment of merchandise . . . such as health and beauty aids, packaged food and refrigerated products, home cleaning supplies, housewares, stationery, seasonal goods, apparel, and home fashions." The Family Dollar letter of intent with Eastern Pride states that the proposed building for the Vacant Tract would be 8,320 square feet.

Looking at the dictionary definitions for "convenience store" cited above, we do not believe a retail store occupying a 8,320 square-foot space is a "small retail store"; and, further, it is at best ambiguous whether a store which is open only 13 hours per day constitutes being open for "long hours." We further note that none of above definitions for a convenience store state that it typically sells products at discount prices, like a Family Dollar store. We further note that the code assigned to a Family Dollar store under the North American Industrial Classification System ("NAICS")[1] is not the code assigned by NAICS to convenience stores generally. Specifically, the NAICS code assigned to Family Dollar stores is 452990, whereas the NAICS code generally assigned to convenience stores selling gas is 447110 and the NAICS code generally assigned to convenience stores not selling gas is 445120. Accordingly, we do not believe that a Family Dollar Store falls within the ordinary definition of a "convenience store."

It is apparent that Defendants do not want an establishment operating on the Vacant Tract which sells products which they sell in their convenience store on their Convenience Store Tract. Defendants could have negotiated that the restrictive covenant contain language prohibiting

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1. The NAICS is a number system used by businesses and governmental agencies throughout North America. For instance, the United States Department of Labor's Bureau of Labor Statistics utilizes the NAICS, describing it as a "framework to group establishments into industries based on the activity in which they are primarily engaged." http://www.bls.gov/bls/naics.htm.

certain types of goods from being sold from a store operating on the Vacant Tract; however, such language limiting the type of products that can be sold on the Vacant Tract is not in the Deed. Rather, the language in the Deed merely prevents the *type of store* that can operate on the Vacant Tract. Certainly, the restrictive covenant at issue would not prevent a Food Lion grocery store or a Wal-Mart store from operating on the Vacant Tract since they are clearly not "convenience store[s]," even though they sell many of the same products that are sold in convenience stores.

We have reviewed the other arguments raised by Defendants in their brief and find them unpersuasive. Accordingly, we affirm the trial court's order.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

JONATHAN RUSSEL FOLMAR AND MARGARET FOLMAR, PLAINTIFFS
v.
SAMUEL DAVID KESIAH AND LOUIE KESIAH, SARAH HARRIS AND COOKE REALTY, INC., DEFENDANTS

No. COA13-1297

Filed 15 July 2014

1. Appeal and Error—appealability—appropriate court for filing notice of appeal

Because the summary judgment order entered in Union County was final as to plaintiffs' claims against the Kesiah defendants and the proceedings that occurred in Brunswick County subsequent to the entry of summary judgment had no impact on the summary judgment order in favor of the Kesiah defendants, it was not error for the plaintiffs to file their notice of appeal in the "appropriate court" in Union County.

2. Fraud—misrepresentation—no reasonable reliance—due diligence

The trial court did not err by granting summary judgment in favor of the Kesiah defendants on plaintiffs' claims of fraud and misrepresentation where the evidence failed to establish reasonable

reliance by plaintiffs. Any reliance would have been unreasonable in light of plaintiffs' independent home inspection report. Plaintiffs neither alleged nor produced any evidence that the alleged defects were not discoverable in the exercise of due diligence.

3. Pleadings—summary judgment—ripeness—affidavit required

Although plaintiffs argue that the forecast of evidence demonstrated that summary judgment was not ripe for hearing and that summary judgment should have been denied or the hearing continued, N.C.G.S. § 1A-1, Rule 56(f) required an affidavit by the opposing party stating the reasons why they were unable to present the necessary opposing material and the record revealed that plaintiffs failed to do so.

Appeal by plaintiffs from order entered 26 April 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 9 April 2014.

DeVore Acton & Stafford, PA, by F. William DeVore, IV and Fred W. DeVore, III for plaintiff-appellants.

Perry, Bundy, Plyler, Long & Cox, LLP, by H. Ligon Bundy and Natalie J. Broadway for defendant-appellees.

McCULLOUGH, Judge.

Plaintiff-homebuyers appeal from a summary judgment entered in favor of defendant-homeowners for their claims of fraud and misrepresentation, breach of contract, and punitive damages. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 15 October 2012, plaintiffs Jonathan Russel Folmar and Margaret Folmar filed a complaint against defendants Samuel David Kesiah and Louis Kesiah (collectively the "Kesiah defendants"), as well as against Sarah Harris and Cooke Realty, Inc. Sarah Harris ("Harris") and Cooke Realty, Inc. ("Cooke Realty") are not parties to this appeal.

The complaint alleged that on 30 March 2012, plaintiffs entered into a purchase agreement ("agreement") with the Kesiah defendants regarding real property located on Private Drive in Ocean Isle Beach, North Carolina ("the property"). Harris, a real estate agent, and Cooke Realty served as dual agents for both plaintiffs and the Kesiah defendants. Prior

to closing, Harris went to the property with Darryl Moffett, a contractor hired by plaintiffs. Moffett was originally hired to paint and complete minor repair work for plaintiffs after closing but had arranged to meet Harris in order to determine the "scope of the work involved." While on the property, Moffett noticed a "deteriorated section of wall cladding on the front elevation next to the entry door." Moffett "pressed his hand against the wall, and a piece of wall cladding fell off, exposing rotted oriented strand board ("OSB") sheathing." Plaintiffs alleged that other defects were also discovered by Moffett in direct view of Harris. Plaintiffs alleged that despite the fiduciary and contractual obligations of Harris to plaintiffs, Harris never informed plaintiffs of the defects found at the property.

Relying on the representations made by Harris, Cooke Realty and the Kesiah defendants, plaintiffs paid $349,000.00 for the property at closing. Immediately following closing, plaintiffs discovered:

> a substantial number of defects with the home, including but not limited to: interior water stains at windows and walls, delamated [sic] or missing cedar shingles, rotted wall cladding, one area on the front elevation wall exhibited previous repairs that included the installation of new beveled cedar lap siding and felt underlayment over wet and rotted wood sheathing, many areas of wood rot throughout the exterior of the building, etc.

Plaintiffs alleged that the Kesiah defendants had actual knowledge of the defects of the property, yet had checked "No" on the State of North Carolina Residential Property and Owners' Association Disclosure Statement ("the disclosure") in regards to the aforementioned areas. Plaintiffs also alleged that all defendants were aware of the defects found in the property prior to closing and were "responsible to disclose these defects to Plaintiffs prior to closing."

Plaintiffs claimed they had been damaged in excess of $10,000.00 and alleged the following claims: fraud and misrepresentation, breach of contract, and punitive damages against the Kesiah defendants; fraud and misrepresentation, breach of fiduciary duty, unfair and deceptive trade practices, and punitive damages against defendants Harris and Cooke Realty.

On 19 November 2012, the Kesiah defendants filed an answer. On 19 March 2013, the Kesiah defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Following a hearing held at the 22 April 2013 session of Union County Superior Court, the trial court entered summary judgment in favor of the Kesiah defendants and dismissed plaintiffs' action with prejudice as to the Kesiah defendants on 26 April 2013.

On 20 June 2013, defendants Harris and Cooke Realty filed an amended motion to change venue from Union County to Brunswick County. On 12 July 2013, the trial court entered an order transferring the file to the Brunswick County Clerk of Superior Court. On 1 August 2013, Union County filed an "Acknowledgement of Receipt of Transferred Case File."

On 22 August 2013, plaintiffs voluntarily dismissed their claims against Harris and Cooke Realty without prejudice.

Plaintiffs filed notice of appeal on 28 August 2014 in Union County Superior Court. Plaintiffs are appealing the entry of the 26 April 2013 order granting summary judgment in favor of the Kesiah defendants and dismissing plaintiffs' action with prejudice as to the Kesiah defendants.

II. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (citation omitted).

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

Collingwood v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

"The standard of review for a trial court's ruling on a motion for summary judgment is *de novo*. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own

judgment for that of the trial court." *Horne v. Town of Blowing Rock*, ___ N.C. App. ___, ___, 732 S.E.2d 614, 618 (2012) (citations and quotation marks omitted).

III. Discussion

On appeal, plaintiffs argue that the trial court erred by (A) granting summary judgment in favor of the Kesiah defendants where plaintiffs established a prima facie showing of fraud and misrepresentation by the Kesiah defendants and where plaintiffs exercised due diligence prior to purchasing the home and were not put on notice of the substantial defects prior to the sale of the property. Plaintiffs also argue that (B) the forecast of evidence demonstrated that summary judgment was not ripe for hearing.

[1] As a preliminary matter, we address the Kesiah defendants' argument that our Court should dismiss plaintiffs' appeal as it is not properly before us. The Kesiah defendants contend that because the trial court entered an order on 12 July 2013 transferring the present case from Union County to Brunswick County, plaintiffs should have thereafter filed notice of appeal in Brunswick County. The Kesiah defendants assert that plaintiffs' filing of notice of appeal on 28 April 2014 in Union County was not in compliance with the North Carolina Rules of Appellate Procedure and that their appeal should be dismissed for lack of jurisdiction.

We note that Rule 26(a) of the North Carolina Rules of Appellate Procedure, entitled "Filing and service" provides that "[p]apers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the *appropriate court*." N.C. R. App. P. 26(a) (2013) (emphasis added). Article II of the North Carolina Rules of Appellate Procedure governs appeals from judgments and orders of superior courts and district courts. Rule 3 of Article II, entitled "Appeal in civil cases – How and when taken" provides as follows:

> (a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court[.]

N.C. R. App. P. Rule 3(a) (2013).

In the case *sub judice*, plaintiffs' complaint was initiated in Union County Superior Court. The order granting summary judgment in favor of the Kesiah defendants was entered in Union County Superior Court

and was final as to plaintiffs' claims against the Kesiah defendants. Thereafter, the remaining defendants, Harris and Cooke Realty, filed a motion to change venue to Brunswick County. The trial court granted this motion and transferred the file to Brunswick County on 12 July 2013 for "further proceedings as may be necessary or appropriate."

Because the summary judgment order entered in Union County was final as to plaintiffs' claims against the Kesiah defendants and because the proceedings that occurred in Brunswick County subsequent to the entry of summary judgment had no impact on the summary judgment order in favor of the Kesiah defendants, we hold that it was not error for the plaintiffs to file their notice of appeal in the "appropriate court" in Union County. Accordingly, we proceed to the merits of plaintiffs' appeal.

A. Fraud and Misrepresentation

[2] First, plaintiffs argue that the trial court erred by granting summary judgment in favor of the Kesiah defendants where plaintiffs established a prima facie showing of fraud and misrepresentation by the Kesiah defendants. In the event that our Court finds that a genuine issue of material fact exists as to plaintiffs' fraud and misrepresentation claim, plaintiffs also argue that there is a genuine issue of material fact as to their contract and punitive damages claims. Based on the following reasons, we reject plaintiffs' contentions.

> The essential elements of actionable fraud are (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. Additionally, plaintiff's reliance on any misrepresentations must be reasonable.

MacFadden v. Louf, 182 N.C. App. 745, 747, 643 S.E.2d 432, 434 (2007) (citations omitted).

In the present case, plaintiffs assert that the Kesiah defendants falsely represented material facts: by marking "no" on the disclosure which stated "to your knowledge is there any problem (malfunction or defect)" with things such as the foundation, slab, floors, windows, doors, ceilings, interior and exterior walls, patio, deck, or other structural components; learning of the defects in the property sometime after 2006 and intentionally listing the property below value to "entice buyers as opposed to correcting the defects"; previously performing work on the windows, sheathing, exterior walls, etc. prior to selling

the home to plaintiffs and covering up existing rot with new materials; and having knowledge that many of the areas of the property were missing sheathing.

The Kesiah defendants argue that even assuming *arguendo* that they had knowledge of the defects of the property prior to selling the property to plaintiffs, any reliance by plaintiffs to the Kesiah defendants' alleged misrepresentations were not reasonable. We agree with the Kesiah defendants.

In *MacFadden v. Louf*, 182 N.C. App. 745, 643 S.E.2d 432 (2007), a homebuyer brought an action against the seller for alleged undisclosed defects in the subject property. *Id.* at 745, 643 S.E.2d at 433. The trial court granted summary judgment in favor of the seller and the homebuyer appealed to our Court, arguing that the trial court had erred by granting summary judgment on her claims for fraud and negligent representation. *Id.* at 746, 643 S.E.2d at 433. Our Court noted that

> [w]ith respect to the purchase of property, [r]eliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations.

Id. at 747-48, 643 S.E.2d at 434 (citations and quotation marks omitted).

Our Court held that the homebuyer failed to show "reasonable reliance" based on evidence that the homebuyer had conducted a home inspection prior to closing on the subject property. The inspection report "put her on notice of potential problems with the home" by instructing her to have a roofing contractor inspect the roof for the potential of water to pond above the kitchen/breeze-way area. *Id.* at 748, 643 S.E.2d at 434. The inspection report also noted, *inter alia*, water staining, previous water leakage, rusted and leaking gutters, and an uneven floor system which showed signs of previous moisture and pest infestation. *Id.* The homebuyer argued that "[d]espite the findings of the home inspection report, . . . she relied on the Residential Disclosure Statement completed by [the seller.]" *Id.* at 748, 643 S.E.2d at 435. However, our Court held that "any reliance on [the disclosure] would have been unreasonable in light of her own home inspection report which recommended that she have the roof evaluated by a roofing contractor and that she inquire or

monitor the other problem areas." *Id.* at 749, 643 S.E.2d at 435. Based on the foregoing reasons, the *MacFadden* Court affirmed the granting of summary judgment in favor of the seller on the claims of fraud and negligent misrepresentation. *Id.*

Upon thorough review, we find the facts in the case *sub judice* similar to the facts found in *MacFadden*. On 14 February 2012, the Kesiah defendants marked "no" on the disclosure which stated "to your knowledge is there any problem (malfunction or defect)" with things such as the foundation, slab, floors, windows, doors, ceilings, interior and exterior walls, patio, deck, or other structural components. However, plaintiffs subsequently conducted an independent home inspection on 23 February 2012, prior to closing on the property. The home inspection report noted several potential issues. In regards to the exterior of the property, the following was noted: as to the wall cladding: cedar shakes, "some of the siding is missing and there is some wood rot on the wall above front door"; "[u]pstairs door off the master has some wood rot and is very hard to open, also storm door has damaged the frame"; "[t]he window on the back left side looks to have water entering from the top of the window, staining is inside of window. Possible hidden damage may exist." In regards to the interior of the property, the inspection report noted the following: "[w]all paper in front left bathroom is peeling due to shower head leaking"; "[w]ater stains present in the family room but were tested and found no active leak." Additionally, the home inspection report made a recommendation to plaintiffs that "[e]ach issue indicated in this summary should be evaluated by a qualified contractor or specialist for corrective measures to insure proper and safe use or service of the system in question." Notwithstanding the findings and recommendations made in the home inspection report, plaintiffs proceeded to the closing on 30 March 2012.

It is clear from the record that plaintiffs were not denied the opportunity to investigate the property and that plaintiffs were not induced to forego additional investigations by the Kesiah defendants' alleged misrepresentations. Had plaintiffs heeded the recommendation of the home inspection report that the aforementioned issues be evaluated by a specialist, it is likely that plaintiffs would have discovered the alleged defects to the house prior to closing. Accordingly, we hold that the trial court did not err by granting summary judgment in favor of the Kesiah defendants on plaintiffs' claims of fraud and misrepresentation where the evidence fails to establish reasonable reliance by plaintiffs, as any reliance on the disclosure would have been unreasonable in light of plaintiffs' independent home inspection report.

Next, plaintiffs rely on *Everts v. Parkinson*, 147 N.C. App. 315, 555 S.E.2d 667 (2001), to argue that they exercised due diligence prior to purchasing the home and that the inspection report did not put plaintiffs on notice of the substantial defects of the property. Plaintiffs argue that the "majority of the numerous material defects [of the property] were not discovered until after the closing, and were concealed behind the exterior wall cladding." Because the inspection report only had a "brief description of some issues[,]" plaintiffs contend that they were not put on notice of the defects alleged in their complaint. Based upon a thorough review, we find the facts found in *Everts* to be distinguishable from the circumstances of the present case.

In *Everts*, the plaintiff-homebuyers filed a complaint against the original owners of a house – Mr. and Mrs. Parkinson, the builders, and the company that performed improvement work on the house, alleging claims of fraud, negligent misrepresentation, breach of contract, breach of express warranty, breach of implied warranty, and negligence. The complaint alleged that the plaintiffs had to undertake extensive and costly repairs to the house as a result of water intrusion and wood rot problems. *Id.* at 318, 555 S.E.2d at 670. The trial court granted summary judgment in favor of the defendants on all claims against them and the plaintiffs appealed. *Id.* Our Court noted that after the Parkinsons moved into the house, they experienced numerous problems with window lights, rotting brick mold, and a rotting window. Id. at 321-22, 555 S.E.2d at 672. Subsequently, Mr. Parkinson replaced the window lights, performed brick mold repair work on a number of windows and doors, and completed extensive repair work to the particular window at issue. *Id.* at 324, 555 S.E.2d at 673-74. In regards to the requirement of an "intent to deceive," our Court found that Mr. Parkinson had engaged in such conduct by not informing the plaintiffs about any of the repair work and testifying that he did not disclose this information to the plaintiffs because "he did not feel that he had an obligation to do so[.]" *Id.* at 324, 555 S.E.2d at 674.

In regards to the requirement of showing reasonable reliance in cases of fraud, our Court noted that a duty to disclose material facts arises "[w]here material facts are accessible to the vendor only, *and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser.*" *Id.* at 325, 555 S.E.2d 674 (citation omitted) (emphasis in original). Our Court found that there were genuine issues of material fact as to whether the alleged defects were discoverable in the exercise of the plaintiffs' "diligent attention or observation and, therefore, whether Mr. Parkinson had a duty to

disclose the defects." *Id.* at 327, 555 S.E.2d at 675. The record contained an affidavit from a licensed residential home inspector who performed an inspection on the house at issue at the request of the plaintiffs prior to purchase. He testified to the following:

> at the time of the inspection, he "did not observe any rot or water infiltration," or "any problems with the exterior windows or doors on the house." He further testified that the "decorative bands," which had been installed around the windows before his inspection, "concealed the joint where the synthetic stucco met the window brick molding" and that, as a result, he "was not able to visually observe the perimeter joints of the exterior windows." He also stated that he "was not informed by the owner or the owner's realtor of any moisture intrusion problems involving the windows or window joint perimeter prior to [his] inspection," and that such information is "crucial information that [he] would have needed to know."

Id. Based on the foregoing, our Court held that, viewing the evidence in the light most favorable to the plaintiffs, Mr. Parkinson knew of the alleged defects, knew that the defects, "of which [the] plaintiffs were unaware, were not discoverable in the exercise of [the] plaintiffs' diligent attention or observation[,]" and, therefore, had a duty to disclose the existence of the defects to the plaintiffs, which he failed to do. *Id.* at 327-28, 555 S.E.2d at 675. As to Mr. Parkinson, our Court reversed the trial court's summary judgment on the claim of fraud. *Id.* at 328, 555 S.E.2d at 676.

In the present case, plaintiffs neither alleged in their complaint nor produced any evidence that the alleged defects were not discoverable in the exercise of due diligence. Rather, as we previously stated, plaintiffs' inspection report recommended that they have a qualified contractor or specialist evaluate the noted issues. Also dissimilar to the facts found in *Everts*, both of the Kesiah defendants testified through affidavits that they "did not know of any unrepaired deterioration of the house when we signed the disclosure statement or before the closing took place." Thus, we reject plaintiffs' contentions that they exercised due diligence and were not put on notice of the alleged defects of the property.

B. Ripe for Hearing

[3] In their last argument, plaintiffs argue that the forecast of evidence demonstrated that summary judgment was not ripe for hearing and that summary judgment should have been denied or the hearing continued.

Plaintiffs assert that they intended to locate and depose Mr. Dennis Harold, the Kesiah defendants' contractor who allegedly made repairs on the property.

Rule 56(f) of the North Carolina Rules of Civil Procedure provides the following:

> When affidavits are unavailable. – Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f) (2013). Rule 56(f) "gives the trial court the discretion to refuse the motion for judgment or order a continuance, *if the opposing party states by affidavit* the reasons why he is unable to present the necessary opposing material." *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 274, 319 S.E.2d 661, 664 (1984) (emphasis added).

In the present case, while plaintiffs argue that their intent to depose Mr. Harold "could be inferred by a cursory reading" of the affidavit of their contractor, Darryl Moffett, we find this to be inadequate. Rule 56(f) requires an affidavit by the opposing party stating the reasons why they were unable to present the necessary opposing material and the record is clear that plaintiffs failed to do so. Thus, we reject plaintiffs' arguments that summary judgment was not ripe for hearing.

IV. Conclusion

Where we hold that the trial court did not err by granting summary judgment in favor of the Kesiah defendants on the claims of fraud and misrepresentation and where we reject plaintiffs' argument that summary judgment was not ripe for hearing, we affirm the 26 April 2013 order of the trial court.

Affirmed.

Judges ELMORE and DAVIS concur.

FRANKENMUTH INSURANCE, AS SUBROGEE OF CATAWBA COUNTRY CLUB, PLAINTIFF
v.
CITY OF HICKORY, A NORTH CAROLINA MUNICIPAL CORPORATION, AND MORGAN FIRE & SAFETY, INC., A NORTH CAROLINA CORPORATION D/B/A UNIFOUR FIRE & SAFETY, DEFENDANTS

No. COA14-70

Filed 15 July 2014

Negligence—professional negligence—standard of care—expert testimony

The trial court did not err in a professional negligence case arising from water leaks in the plumbing of a clubhouse by granting summary judgment against plaintiff insurance company and in favor of defendant, a municipal corporation providing water to the clubhouse insured by plaintiff. Because the negligence claims could not have been properly evaluated with the common knowledge and experience of the jury, plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held. Because plaintiff failed to carry its burden of establishing a standard of care, the trial court's order granting summary judgment in defendant's favor was affirmed. Defendant's alternative argument on appeal that plaintiff was contributorily negligent was not addressed.

Appeal by plaintiff from order entered 14 May 2013 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 6 May 2014.

Dean Gibson Hofer & Nance, PLLC, by Jeremy S. Foster, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan, for defendant-appellee City of Hickory.

HUNTER, Robert C., Judge.

Frankenmuth Insurance ("plaintiff"), as a subrogee of Catawba Country Club ("the Club"), appeals from an order granting the City of Hickory's ("defendant's") motion for summary judgment on plaintiff's negligence claim. On appeal, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant because genuine

issues of material fact existed as to whether: (1) defendant negligently operated its municipal water system, and (2) the Club was contributorily negligent in its installation of sprinkler system pipes.

After careful review, we affirm the trial court's order.

Background

On 5 July 2009, a water pipe leading to the Club's sprinkler system burst, causing damage to the clubhouse. The Club was insured by plaintiff, which filed this action against defendant as the Club's subrogee. In the complaint, plaintiff alleged that defendant's negligent care of the municipal water system, specifically in allowing unreasonably high water pressure to build up in the pipes, was the proximate cause of the damage.

In 2000, the Club hired Crawford Sprinkler Company ("Crawford") to install a sprinkler system on its grounds. Defendant sent members of its Fire Prevention Office to the site to measure the water pressure of the area. The standing water pressure was 180 pounds per square inch ("psi"). Kevin Greer ("Greer"), the Assistant Public Services Director for defendant, testified during deposition that 180 psi was not an uncommon standing water pressure in that service area. The average citywide standing water pressure was 115 to 120 psi, with some areas in the system attaining pressures of 230 to 240 psi.

It is undisputed that Crawford designed a sprinkler system that called for eight-inch ductile iron pipes to be used throughout, given the 180 psi standing water pressure at the Club. However, Crawford actually installed six-inch PVC piping instead. Greer explained in his testimony that piping comes in two forms—PVC and ductile iron. PVC piping has two different pressure ratings—Class 150 psi and Class 200 psi; ductile iron comes in Class 250 psi and Class 350 psi. The ductile iron pipes are designed to constantly withstand standing water pressures within their class range, but they can also handle pressure surges of two-and-a-half times the class rating so long as the surges are not prolonged or sustained.

Stephen Busic ("Busic"), the Club's General Manager, testified during deposition that soon after installation of the sprinkler system, the Club had continual problems with water pressure. According to Busic, the PVC pipes burst six times due to excess water pressure from 2000 through July 2009, with the sixth burst forming the basis of this action. One of these bursts occurred on 27 July 2007. Morgan Fire & Safety, doing business as Unifour Fire & Safety ("Unifour"), repaired this break

in the line and replaced a three-foot section of the PVC pipe with ductile iron. One of Unifour's employees testified during deposition that it replaced the PVC piping with ductile iron because ductile iron is stronger than PVC.

The flooding that forms the basis of this action occurred on 5 July 2009. Martin Chang ("Chang"), plaintiff's expert witness, visited the Club on 15 July 2009 to investigate the cause of the fracture. Chang was a forensic engineer; he received a bachelor's and master's degree in textile engineering but had no experience in designing or running a municipal water system. After speaking with Busic and examining the site, Chang determined that: (1) a longitudinal fracture was found on the six-inch PVC pipe, indicating stress produced by internal pressure; (2) the fire sprinkler pressure gauge failed at a pressure greater than 300 psi; and (3) the cause of the failure was excessive water pressure from defendant's water supply and potentially a sudden surge in water pressure. Chang noted triangular fractures in the ductile iron reducers, but admitted that he could not rule out mechanical mistakes made during excavation of the pipe as the cause of the fractures. Greer agreed with Chang's assessment that the longitudinal fracture was caused by internal pressure. However, he developed the opinion that the cause of the fracture was due to inferior piping material, given that the six-inch PVC pipes actually installed were of lesser strength than the minimum Class 250 psi eight-inch ductile iron pipes that were called for in Crawford's plan.

After making insurance payouts to the Club, plaintiff brought this action against defendant and Unifour. It alleged that Unifour was liable for the damages, in part, because it "[n]egligently failed to recommend removal of the six-inch PVC pipe and . . . replacement with eight-inch ductile iron pipe for the entire distance between the pit and the clubhouse." Plaintiff alleged that defendant was negligent when it: (1) "negligently failed to ensure that the water pressure in its municipal water supply did not exceed reasonable levels"; (2) "negligently failed to correct the layout of its municipal water distribution system with a 'loop' system to protect residents at the terminal ends against excess pressures, water hammer, and shock waves within the water distribution system"; and (3) "negligently failed to recommend or install a pressure-relieving device to prevent damage from excess water pressures."

Defendant and Unifour filed motions for summary judgment in April 2013. Both parties were awarded summary judgment in May 2013. Plaintiff timely appealed from both orders granting summary judgment but subsequently withdrew its appeal as to Unifour.

Discussion

I. Summary Judgment for Defendant

Plaintiff argues that summary judgment was inappropriate where genuine issues of material fact existed as to whether: (1) defendant was negligent in its operation of the municipal water system, and (2) plaintiff was contributorily negligent. Because plaintiff has failed to carry its burden of establishing a standard of care for defendant's alleged professional negligence, we affirm the trial court's order granting summary judgment in defendant's favor.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). Summary judgment is appropriate "only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). The burden of proof rests with the movant to show that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). We review the record in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Because "the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court," summary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. *Thompson v. Bradley*, 142 N.C. App. 636, 641, 544 S.E.2d 258, 261 (2001) (internal quotation marks omitted). However, summary judgment is appropriate in a cause of action for negligence where "the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law." *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, 266 S.E.2d 28, 29 (1980). "[A] [p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper." *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996) (internal quotation marks omitted).

Although the complaint states only a claim for "negligence," this cause of action is actually one for "professional negligence" because plaintiff is alleging negligent performance by defendant in its professional capacity as the operator of a municipal water system. *See Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (characterizing negligence action brought against the City of Burlington for

failure to warn, failure to investigate, and negligent misrepresentation as professional negligence where the defendant was installing a potable waterline). Defendant admitted in its answer that it "has all of the corporate powers as set forth in [the North Carolina General Statutes for municipal corporations][.]" When a municipal corporation operates a system of waterworks and sells water for private consumption and use, "it is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be." *Mosseller v. Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966).

In a professional negligence action, the plaintiff bears the burden of showing: "(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs." *Huffman Oil Co., Inc.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (emphasis and internal quotation marks omitted). "Where common knowledge and experience of the jury is [not] sufficient to evaluate compliance with a standard of care," the plaintiff is required to establish the standard of care through expert testimony. *Id.* "The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit is to see if this defendant's actions lived up to that standard[.]" *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004) (internal quotation marks omitted), *aff'd*, 359 N.C. 296, 608 S.E.2d 757 (2005). If the plaintiff fails to establish the proper standard of care through expert testimony in a professional negligence claim, summary judgment for the defendant is proper. *Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11.

This Court has previously held that the "common knowledge" exception to the requirement that the standard of care be established by expert testimony applies either when the actions are "of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Associated Indus. Contractors, Inc.*, 162 N.C. App. at 411, 590 S.E.2d at 871. In *Associated Indus. Contractors, Inc.*, this Court held that a surveyor's actions fell within the "common knowledge" exception because a trier of fact could adequately determine whether the surveyor correctly measured ninety-degree angles in its design of a rectangular building site. *Id.* at 411-12, 590 S.E.2d at 871. It noted that "where . . . the service rendered does not involve esoteric knowledge or uncertainty

that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." *Id.* (citation and quotation omitted).

Here, plaintiff asserted that defendant was negligent in three ways: (1) failing to ensure that water pressure did not exceed reasonable levels; (2) failing to install a "loop" system in its municipal water distribution system to prevent excessive pressures at the terminal ends of the water line; and (3) failing to install or recommend that the Club install a pressure-relieving device. Unlike the measuring of ninety-degree angles in *Associated Indus. Contractors, Inc.*, the alleged wrongdoing of defendant here required the exercise of professional judgment regarding a "reasonable" level of water pressure in a municipal water system, the skill needed to install a "loop" system, and the expertise to install or recommend installing a pressure-relieving device at the terminal ends of the system. Because these claims could not be properly evaluated with the "common knowledge and experience" of the jury, plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held. *See Huffman Oil Co., Inc.*, 190 N.C. App. at 271, 661 S.E.2d at 11.

Plaintiff failed to meet this burden. Chang, plaintiff's sole expert witness, specifically testified that he had not studied defendant's facility, did not know what type of water distribution system defendant used, had no experience in designing or running a municipal water system, and did not know of anything defendant may have done to create an increase in water pressure. Busic, the Club's General Manager, testified that he had no experience or training in the field of plumbing at all. Although Chang and Busic testified that the six-inch PVC pipe installed by Crawford burst due to internal pressure, neither could identify what a reasonable municipal corporation providing water to the Club would do given the facts of this case. Nor could they identify any action taken by defendant that might have caused a sudden increase in water pressure.

Thus, plaintiff essentially argues that because defendant could have prevented the six-inch PVC piping erroneously installed into the Club's sprinkler system from bursting, they necessarily breached a duty owed to the Club by failing to do so. However, absent expert testimony establishing the standard of care that defendant owed the Club, plaintiff failed to provide a context to assess whether defendant's conduct differed from what it should have done. *See Associated Indus. Contractors, Inc.*, 162 N.C. App. at 410, 590 S.E.2d at 870. Thus, by leaving the standard of care unresolved, plaintiff failed to "offer legal evidence tending to establish beyond mere speculation or conjecture every essential

element of negligence[.]" *Fun Services-Carolina, Inc.*, 122 N.C. App. at 162, 468 S.E.2d at 263. In other words, "without evidence of the applicable standard of care, [plaintiff] [has] failed to establish a *prima facie* claim for professional negligence." *Huffman Oil Co.*, 190 N.C. App. at 272, 661 S.E.2d at 11-12. Accordingly, summary judgment for defendant was proper, and we need not address defendant's alternative argument on appeal—that plaintiff was contributorily negligent. *Id.; see also Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (holding that summary judgment in favor of the defendant City of Burlington was proper where the plaintiff failed to provide expert testimony establishing the applicable standard of care).

Conclusion

Because plaintiff failed to establish a standard of care in its professional negligence claim, we affirm the trial court's grant of summary judgment in defendant's favor.

AFFIRMED.

Judges McGEE and ELMORE concur.

JOHN E. GRAVEN, JR. AND KATHRYN L. WALL, EMPLOYEES, PLAINTIFFS
v.
N.C. DEPT. OF PUBLIC SAFETY-DIVISION OF LAW ENFORCEMENT
(FORMERLY N.C. DEPT. OF CRIME CONTROL AND PUBLIC SAFETY), EMPLOYER, DEFENDANT
AND CORVEL CORPORATION, THIRD-PARTY ADMINISTRATOR

No. COA14-6

Filed 29 July 2014

Workers' Compensation—automobile accident after holiday lunch—coming and going rule

The Industrial Commission correctly concluded that plaintiffs failed to meet their burden of proving that an automobile accident arose out of and in the course of plaintiffs employment where the accident occurred while they were returning from a holiday lunch in a car owned by defendant. None of the exceptions to the "coming and going " rule fit the situation since the vehicle was provided as an accommodation, plaintiffs were attending a social event, and the risk involved in the travel was common to the public.

Appeal by Plaintiffs from opinion and award entered 2 October 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 May 2014.

Patterson Harkavy LLP, by Narendra K. Ghosh; Baddour, Parker, & Hine, P.C., by Phillip A. Baddour, Jr.; and Narron, O'Hale & Whittington, P.A., by O. Hampton Whittington, Jr., for Plaintiffs-Appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Sharon Patrick-Wilson, for Defendant-Appellee.

DILLON, Judge.

John E. Graven, Jr. and Kathryn L. Wall ("Plaintiffs") appeal from the North Carolina Industrial Commission's opinion and award denying their claims for benefits. For the following reasons, we affirm.

I. Background

Plaintiffs filed workers' compensation claims for injuries sustained on 16 December 2010, which were subsequently denied by their employer, the North Carolina Department of Public Safety ("Defendant"). Plaintiffs' claims were consolidated for hearing before Deputy Commissioner Stephen T. Gheen, who entered an opinion and award concluding *inter alia* that Plaintiffs each sustained a compensable work-related injury by accident arising out of and in the course of their employment.

On 15 March 2013, Defendant employer appealed to the Full Commission ("the Commission"). On 2 October 2013, the Commission filed an opinion and award, reversing the deputy commissioner's decision and denying Plaintiffs workers' compensation benefits. A summary of the parties' stipulations and uncontested findings of fact in the Commission's opinion and award tended to show as follows:

Plaintiffs worked as technical support analysts in the State Highway Patrol ("SHP"), a division of Defendant, as technical support analysts with the Technical Services Unit providing software training to State Troopers and civilians in Raleigh and around the State. They worked four days per week, from 7:00 a.m. until 5:00 p.m., and were permitted to take a 30-minute paid lunch break.

In December 2010, Plaintiffs' supervisor sent out three emails over the course of several days inviting employees, including Plaintiffs, to attend a lunch (hereinafter the "holiday lunch") to be held at a particular

public restaurant on 16 December 2010 "to celebrate the department's hard work." Attendance was voluntary, and attendees were required to pay for their own meals, though they benefitted from a group discount offered by the restaurant. Plaintiffs decided to attend the holiday lunch and rode to the restaurant in a state-owned vehicle, which had been signed out by another SHP employee. Less than half of the SHP employees who were invited actually attended the holiday lunch. Attendance was not taken at the lunch. No awards were presented at the lunch. No formal speeches were given at the lunch; however, three supervisors made brief remarks, welcoming the attendees and thanking them for their service.

After the lunch, while Plaintiffs were traveling on a public street returning to the SHP office in the state-owned vehicle, the driver, who was also a SHP employee, encountered a patch of ice and lost control of the vehicle, causing it to collide with a tree. As a result of this accident, Plaintiff Graven was paralyzed from the chest down, and Plaintiff Wall sustained a concussion and some cuts and bruises. SHP employee Sergeant Taylor testified that even though Plaintiffs rode in a state-vehicle it was not authorized for use to attend the holiday lunch and if the vehicle had been requested for the purpose of attending the holiday lunch that request would have been denied.

Based on its findings, the Commission concluded that Plaintiffs' injuries did not arise out of or occurred within the course and scope of their employment. Plaintiffs appeal from the Commission's opinion and award denying them coverage.

II. Standard of Review

"[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183, 639 S.E.2d 429, 432 (2007) (citation, brackets, ellipsis, and quotation marks omitted). Unchallenged findings of fact, however, "are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

In the present case, Plaintiffs challenge certain findings made by the Commission and also the Commission's conclusion that Plaintiffs failed to show by the preponderance of the evidence that their "injuries arose out of and or occurred within the course and scope of their employment." Accordingly, our review will consist of determining whether the

challenged findings are supported by the evidence and whether the sustained challenged findings and the unchallenged findings and stipulations support the Commission's conclusion.

III. Analysis

The workers' compensation system in North Carolina is "a creature of statute enacted by our General Assembly" and codified in the Workers' Compensation Act. *Frost*, 361 N.C. at 184, 639 S.E.2d at 432. Our Supreme Court has stated as follows regarding this system:

> The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees with swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although, the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory perimeters.

Id. (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986)).

The remedies provided under the Act do not apply to all injuries that may be suffered by an employee, but only to those injuries which are caused by accidents "arising out of and in the course of the employment[.]" N.C. Gen. Stat. 97-2(6) (2013). "[W]hether an injury arose out of and in the course of employment is a mixed question of law and fact[.]" *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 643, 357 S.E.2d 167, 168 (1987) (citations and quotation marks omitted). The burden is on the employee to prove by a preponderance of the evidence that the accident causing him injury arose out of and occurred during the course of his employment. *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963); *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005). In the present case, we must determine whether the Commission erred in its conclusion that Plaintiffs failed to meet their burden of proving that their injuries sustained in the 16 December 2010 automobile accident while returning to work from a social event arose out of and occurred in the course of their employment and therefore covered under the Workers' Compensation Act.

In its opinion and award, the Commission cited two cases where our appellate courts have considered whether an accident occurring *at* a social event arises out of or is in the course of employment: *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), decided

by our Supreme Court, and *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980), decided by this Court.

In 1964, our Supreme Court stated in *Perry* as follows:

> Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does *not* arise out of the employment.

Perry, 262 N.C. at 275, 136 S.E.2d at 646 (emphasis added and citations omitted). Sixteen years later in 1980, we approved and adopted in *Chilton* a method of analysis for determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of employment. Specifically, we enumerated from 1A Larson, *Workmen's Compensation Law* § 22.23, six factors to assist a court in making this determination:

> (1) Did the employer in fact sponsor the event?
>
> (2) To what extent was attendance really voluntary?
>
> (3) Was there some degree of encouragement to attend evidenced by such factors as:
>
> a. taking a record of attendance;
>
> b. paying for the time spent;
>
> c. requiring the employee to work if he did not attend; or
>
> d. maintaining a known custom of attending?
>
> (4) Did the employer finance the occasion to a substantial extent?
>
> (5) Did the employees regard it as an employment benefit to which they were entitled as of right?
>
> (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

45 N.C. App. at 15, 262 S.E.2d at 348. More recently, in 2007, our Supreme Court in *Frost*, *supra*, stated that the factors we outlined in *Chilton*

were consistent with its 1964 holding in *Perry*. The Supreme Court in *Frost*, however, stopped short of expressly adopting the *Chilton* factors because its analysis in *Perry* was sufficient to resolve the case before it; but the Supreme Court did state that the factors adopted by this Court in *Chilton* "may serve as helpful guideposts in this inquiry[.]" 361 N.C. at 186-87, 639 S.E.2d at 433-34.

In the present case, the Commission made some findings regarding the factors considered by the Supreme Court in *Perry* as well as many of the six *Chilton* factors, answering most in the negative. For instance, the Commission found that attendance at the holiday lunch was voluntary and no attendance was taken. Further, in its finding of fact 22, the Commission stated as follows:

> 22. The Commission finds that while Plaintiffs were traveling to the holiday lunch, they were doing so for their own benefit. Although Plaintiffs testified that they attended the holiday lunch because they felt it was important for the morale of the department, less than half of the employees attended the lunch, and the undersigned find that the benefit to the employer, if any, was *de minimus*.

Plaintiffs specifically challenge the conclusion contained in finding of fact 22 that the holiday lunch was for the benefit of the employees and that the only benefit to the employer was *de minimus* at best. We believe, however, that this conclusion is supported by the Commission's findings and the evidence. Specifically, the sixth factor in *Chilton* states that for a social event to be considered a benefit to the employer in the context of determining whether an injury at the event is covered by the Workers' Compensation Act, the benefit must not be "merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards[.]" *Chilton*, 45 N.C. App. at 15, 262 S.E.2d at 350. It is undisputed that at least three SHP supervisors gave brief remarks before and during the lunch thanking employees for their dedication, but there was testimony that these remarks did not rise to the level of a speech. Also, no awards were handed out at the holiday lunch and attendees paid for their own meals.[1] [2] These findings answering some of the *Chilton* factor

1. Plaintiffs argue that Finding of Fact 26, which states that "[t]he injuries sustained by Plaintiffs on December 16, 2010 occurred during a meal break that Plaintiffs were free to use as they pleased" is not supported by the evidence because they were paid for their attendance, the holiday lunch lasted longer than their normal 30-minute paid lunch break, and they were not otherwise allowed to spend more than 30 minutes for a lunch break that day "as they pleased." We agree that the evidence conclusively establishes that Plaintiffs

questions establish that the holiday lunch did not arise out of or in the course of Plaintiffs' employment.

Further, we believe that the holiday lunch is similar to the type of event that is described in *Perry*, quoted above, which the Supreme Court stated would not arise out of the employment. Specifically, here, though the holiday lunch was not provided at Defendant's expense, Defendant did provide "an occasion" for the employees to participate in "an outing" which "was a matter of good will" in that, as the Commission determined, it was for the benefit of the employees and not Defendant. *Perry*, 262 N.C. at 275, 136 S.E.2d at 646. However, we note that Plaintiffs were not injured *at* the social event but while *traveling back* to the workplace. Neither party cites to any case where an employee was injured while traveling between their workplace and a social event occurring during the workday.

In North Carolina, the general rule is that "[i]njuries received by an employee while traveling to or from his place of employment are usually not covered by the [Workers' Compensation] Act unless the employer furnishes the means of transportation as an incident of the contract of employment" or if such injuries are sustained while the employee is "on premises owned or controlled by the employer[.]" *Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). This general rule has been referred to as the "coming and going" rule by our Supreme Court. *See, e.g.*, *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). Our Courts have explained that "the question of *arising out of* is not satisfied . . . where the injury is due to the hazards of the public highway – risks common to the general public." *Harless v. Flynn*, 1 N.C. App. 448, 458, 162 S.E.2d 47, 54 (1968) (emphasis in original). *See Roberts v. Burlington Industries*, 321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988); *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 401, 637 S.E.2d 251, 257 (2006), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007).

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were not free to spend *more than 30 minutes* on the day of 16 December 2010 for a lunch break any way they pleased. Notwithstanding, we believe that the fact that SHP employees attending the holiday lunch were compensated for the long lunch break further supports the conclusion that the lunch was for the benefit of the employees. *See Smith v. Decotah Cotton Mills*, 31 N.C. App. 687, 690, 230 S.E.2d 772, 774 (1976) (stating that "[t]he fact that plaintiff was being paid during the break is not sufficient to cause [an] accident to arise out of her employment").

2. Plaintiffs also challenge finding of fact 23 that "Plaintiffs exposure to the risk of highway travel is a risk to which the general public is equally exposed," arguing that this finding is a conclusion of law. In either case, we address this issue of causation below in this opinion.

The "going and coming" rule, however, is subject to a number of exceptions. For instance, there is "the 'traveling salesman' exception, the 'contractual duty' exception, the 'special errand' exception, and the 'dual purpose' exception." *Dunn v. Marconi*, 161 N.C. App. 606, 611, 589 S.E.2d 150, 154 (2003).

The "traveling salesman" exception applies where an employee's "work entails travel away from the employer's premises [and does not involve] . . . a distinct departure [to make] . . . a personal errand." *Id.* at 612, 589 S.E.2d at 155 (citation omitted). The "special errand" exception applies where the employee is "engaged in a special duty or errand for his employer." *Id.* (citation omitted). The "contractual duty" exception applies where "the employer furnishes the means of transportation *as an incident of the contract of employment.*" *Id.* (citation omitted and emphasis added). However, this "contractual duty" exception does not generally apply where the transportation is "provided permissively, gratuitously, or as an accommodation[.]" *Hunt v. Tender Loving Care*, 153 N.C. App. 266, 270, 569 S.E.2d 675, 679 (citation omitted), *disc. rev. denied*, 356 N.C. 436, 572 S.E.2d 784 (2002). The "dual purpose" exception applies in certain circumstances where a trip serves "both business and personal purposes" and where it involves a "service to be performed for the employer [that] would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey." *Dunn*, 161 N.C. App. at 612-13, 589 S.E.2d at 155 (citation omitted).

In the present case, the fact that Plaintiffs were riding in an automobile provided by SHP does not bring the accident within the "contractual duty" exception since the transportation to the holiday lunch was not "an incident of the contract of" their employment but, as found by the Commission, was provided as an accommodation, as testified by SHP employee Sergeant Taylor. *See Hunt*, *supra*. None of the other exceptions neatly fit the present situation since Plaintiffs were not traveling to perform work for their employer but were attending a social event.

Plaintiffs argue that the "coming and going" rule does not apply because "[i]n selecting the location and date of the holiday lunch, [D]efendant increased [P]laintiffs' risk of having a motor vehicle accident as they did[,]" noting that the location was a 20-30 minute drive from the workplace and that SHP employees would not ever travel such a distance during their lunch break since they only receive 30 minutes for lunch. Essentially, Plaintiffs are arguing that the accident arose out of their employment under the "increased risk" analysis that has been applied by our Supreme Court. *See Roberts v. Burlington Industries*,

321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988). Our Supreme Court in *Roberts* described the "increased risk" approach as follows:

> Under [an "increased risk analysis], the injury arises out of the employment if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood."

Id. (citations, brackets, and quotation marks omitted). We believe, however, that the "increased risk" analysis does not apply where an employee voluntarily attends a social event which, itself, does not arise out of his employment and is injured due to a risk that is common to the public while traveling on a public road to that event. Therefore, this argument is overruled.

We believe that the Commission's consideration of *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), and *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980) was appropriate as it first established that the social event itself did not arise out of or in the course of Plaintiffs' employment. Further, the application of the "going and coming" rule shows that Plaintiffs' injuries were not covered under the Workers' Compensation Act where they were the result of an accident caused by a risk that is common to the public occurring while they were traveling on a public road while returning to their workplace from that social event.

For the reasons stated above, we hold that the Commission's conclusion that Plaintiffs failed to meet their burden of proving that the accident causing their injuries arose out of and occurred in the course of their employment is supported by the Commission's findings; and, accordingly, the opinion and award of the Commission is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

IN RE APPEAL OF VILLAS AT PEACEHAVEN, LLC

[235 N.C. App. 46 (2014)]

IN THE MATTER OF APPEAL OF
VILLAS AT PEACEHAVEN, LLC FROM THE DECISIONS OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATIONS OF CERTAIN REAL PROPERTY FOR TAX YEAR 2009

No. COA13-1224

Filed 15 July 2014

Taxation—property tax valuation—assessment—presumption of correctness

The taxpayer presented sufficient evidence to rebut the presumption that a property tax assessment was correct and the North Carolina Property Tax Commission erred in dismissing the taxpayer's appeal. Given that the burden on the aggrieved taxpayer was one of production and not persuasion, the taxpayer produced competent, material, and substantial evidence that the assessor's valuation was arbitrary or illegal and substantially exceeded the true value of the property.

Appeal by taxpayer from final decision entered 16 May 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 5 March 2014.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by S. Leigh Rodenbough, IV, Robert W. Saunders, and Craig D. Schauer, for taxpayer-appellant.

Assistant County Attorney B. Gordon Watkins, III, for Forsyth County.

McCULLOUGH, Judge.

Villas at Peacehaven, LLC, ("taxpayer") appeals from the Final Decision of the North Carolina Property Tax Commission (the "Commission") dismissing its appeal from the decision of the Forsyth County Board of Equalization and Review (the "Board"). For the following reasons, we reverse.

I. Background

This case concerns the revaluation of property in Winston-Salem that taxpayer owns and operates as a rental community known as Villas at Peacehaven. The property at issue is comprised of 121 adjacent tax parcels spanning approximately 25 acres. Of the 121 separate tax

parcels, 120 are residential lots, each improved with a detached single-family residence. The remaining lot is improved with a clubhouse and amenities for tenants, including a pool and a tennis court.

During the revaluation, effective as of 1 January 2009, a Forsyth County Tax Assessor ("the Assessor") determined the aggregate value of all 121 lots to be $16,945,800.[1] Taxpayer appealed the Assessor's valuation to the Board, which heard taxpayer's appeal on 10 December 2009 and notified taxpayer in writing of its decision to affirm the Assessor's valuation on 15 December 2009. Taxpayer then initiated an appeal of the Board's decision by submitting an Application For Hearing to the Commission on 12 February 2010. The Commission held a final pre-hearing conference on 31 August 2012 and filed an Order On Final Pre-hearing Conference on 4 September 2012. On 13 September 2012, taxpayer's appeal came on for hearing before the Commission, sitting as the State Board of Equalization and Review.

At the hearing, taxpayer framed the issue as follows: "[W]hether or not separately platted lots with single-family residential homes constructed on them that are held by a common owner and have continuously been owned, operated, financed and managed as a single, income-producing rental property should be assessed as an income-producing property and assessed using the direct capitalization approach . . . ." Taxpayer then referred to the approach as an income approach as a unified whole rather than on an individual basis and argued for its use. Taxpayer further contended the method of valuation employed by the Assessor, in which the Assessor determined the value of each parcel separately on a cost basis using the County's schedule of values and totaled the values assigned to each parcel to reach the aggregate value, was an arbitrary and illegal method of valuation that resulted in value far in excess of the true value of the property. In support of its argument, taxpayer relied on a South Carolina Supreme Court case and the testimony of two witnesses, its managing member, and an appraiser who performed a valuation of the property using the income approach.

At the close of taxpayer's evidence, the County moved to dismiss taxpayer's appeal on the ground that taxpayer failed to carry its burden of production. Upon considering both sides' arguments, the Commission granted the County's motion in open court. A Final Decision was later entered on 16 May 2013.

Taxpayer filed Notice of Appeal and Exceptions from the Final Decision on 13 June 2013.

1. The County later stipulated to a reduced value of $16,647,200.

II. Standard of Review

This Court's standard of review of a decision by the Commission is governed by statute. When reviewing a decision of the Commission:

> the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2013). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c).

> The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

In re Parkdale Mills, __ N.C. App. __, __, 741 S.E.2d 416, 419 (2013) (citation omitted).

III. Discussion

"It is . . . a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). Yet, "the presumption is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E.2d at 762.

> [I]n order for the taxpayer to rebut the presumption he must produce competent, material and substantial evidence that tends to show that: (1) [e]ither the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*.

Id. (quotation marks and citations omitted) (emphasis in original). "In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer 'is one of production and not persuasion.' " *In re Blue Ridge Mall LLC*, 214 N.C. App. 263, 267, 713 S.E.2d 779, 782 (2011) (quoting *In re IBM Credit Corp.*, 186 N.C. App. 223, 226, 650 S.E.2d 828, 830 (2007), *aff'd. per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008)).

> [If] the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values. The critical inquiry in such instances is whether the County's appraisal methodology "is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value." To determine the appropriate appraisal methodology under the given circumstances, the Commission must " 'hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.' "

In re Parkdale Mills, __ N.C. App. at __, 741 S.E.2d at 420 (citations omitted).

In the present case, the Commission granted the County's motion to dismiss taxpayers' appeal "for failure of [taxpayer] to rebut the initial presumption of correctness as to the county's tax assessments . . . ." Specifically, the Commission found the following:

> 15. In this appeal, Appellant argued that Forsyth County overvalued the units because it used an arbitrary method to value the property by not estimating a value for all of the parcels taken as a whole. When granting Forsyth County's motion to dismiss at the conclusion of Appellant's evidence, the Commission determines that Forsyth County did not use an arbitrary method to value the subject individual parcels when our Supreme Court has noted that "[a]n act is arbitrary when it is done without adequate determining principle." *In re Hous. Auth. Of City of Salisbury, Project NC 16-2*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). When Appellant did not provide competent, material, and substantial evidence as to the individual values of all the parcels, then there was no evidence tending to show that the Forsyth County Assessor used an arbitrary method regarding his values for the subject parcels when his values were determined during the revaluation process and were not substantially higher than the values called for by the statutory formula.

The Commission then issued the following pertinent conclusions:

> 3. Since Appellant failed to rebut the presumptive validity of the County's individual assessments of the subject residential parcels, then the burden did not shift back to the County and no further analysis is necessary as to the County's appraisal methodology (i.e. the county is not required to demonstrate that its method produce[d] true values).
>
> 4. For that reason, the Commission granted Forsyth County's motion to dismiss this appeal at the conclusion of Appellant's evidence; by ruling that Appellant failed to rebut the presumptive validity of the County's individual assessments of the subject residential parcels. When granting Forsyth County's motion to

> dismiss, no further analysis was necessary as to the County's appraisal methodology (i.e. the Commission was not required to "hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inference, and to appraise conflicting and circumstantial evidence, all in order to determine whether the County met its burden.")

Now on appeal, taxpayer argues the Commission erred in dismissing its appeal because it presented sufficient evidence to rebut the presumption of correctness. We agree.

North Carolina's uniform appraisal standards provide the following:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (2013). Thus, this Court has recognized that "[a]n important factor in determining the property's market value is its highest and best use." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996).

At the hearing before the Commission, taxpayer first called its managing member, Mr. Barry Siegal, to testify. Siegal testified concerning the nature of the property and how it was purchased and developed with the intent that it be a rental complex. Siegal further testified about how the property was managed as a rental complex with taxpayer responsible for the maintenance of the interior and exterior of the residences, common areas, and amenities.

Following Siegal's testimony, taxpayer called Mr. Dick Foster, who the County stipulated was an expert in appraisal, as a witness. Foster testified that he determined the income approach was the most appropriate valuation approach to employ in this case. Foster testified that this determination was based on the use of property as a rental complex, which Foster found to be the highest and best use given the history

of taxpayer's economic success with the property. Foster further stated that "[he] thought the income approach was basically the best way to go because it was an investment-grade property, and the value of it is dictated about [sic] how much income you bring in." After explaining why he believed the income approach was the most appropriate valuation approach, Foster described how he employed the income approach to calculate the value of the property. Foster then testified that his application of the income approach produced a value of $10,905,000 for the property.

Despite the testimony elicited by taxpayer supporting use of the income approach, the County contends taxpayer did not produce sufficient evidence that the method employed by the Assessor was arbitrary or illegal. Yet, this Court has explained that:

> [a]n illegal appraisal method is one which will not result in "true value" as that term is used in [N.C.G.S.] § [105–]283. Since [a]n illegal appraisal method is one which will not result in true value as that term is used in [N.C.G.S. § 105–283], it follows that such method is also arbitrary.

In re Blue Ridge Mall LLC, 214 N.C. App. at 269, 713 S.E.2d at 784 (quotation marks and citations omitted).

Keeping in mind the burden on the aggrieved taxpayer is one of production and not persuasion, *see Id.* at 267, 713 S.E.2d at 782, we hold the taxpayer produced competent, material, and substantial evidence tending to show that the Assessor's valuation was arbitrary or illegal and substantially exceeded the true value of the property.

Although we determine taxpayer rebutted the presumption of correctness, we take no position on the proper valuation method in this case and explicitly decline taxpayer's invitation to provide guidance to the Commission. We determine only that taxpayer produced sufficient evidence to rebut the presumption of correctness afforded ad valorem tax assessments. Because the Commission held otherwise and dismissed taxpayer's appeal, we reverse the Commission's Final Decision and remand the case for the Commission to determine the appropriate valuation method. Whether it is necessary for the Commission to hear evidence beyond that already elicited from taxpayer's witnesses during direct- and cross-examinations is for the Commission to decide. We simply hold taxpayer produced sufficient evidence to require the Commission to address the valuation issue raised by taxpayer.

IV. Conclusion

For the reasons discussed above, we reverse the Final Decision of the Commission and remand for further proceedings.

Reversed and remanded.

Judges HUNTER, Robert C. and GEER concur.

IN THE MATTER OF THE ESTATE OF PETER HEIMAN

No. COA13-1339

Filed 15 July 2014

Wills—elective share rights—waiver—fair and reasonable disclosure of property

The superior court erred in a wills case by concluding that an agreement between decedent's daughter (and executrix of the estate) and wife was not an enforceable waiver of the wife's elective share rights. Decedent's wife was provided fair and reasonable disclosure of the property and obligations of decedent's estate. The existence of a lawsuit filed by the estate against Fidelity was not material because it had no relevance to the calculation of the share of the decedent's total net assets to which decedent's wife was entitled.

Appeal by Executrix from Order entered 28 June 2013 by Judge Robert H. Hobgood in Superior Court, Orange County. Heard in the Court of Appeals 10 April 2014.

Richard Bircher and Russell J. Hollers III, for petitioner-appellee.

Levine & Stewart, by James E. Tanner III, for respondent-appellant.

STROUD, Judge.

Heidi Venier, executrix of Peter Heiman's estate, appeals from an order entered 28 June 2013 by the superior court affirming an order of the Orange County Clerk of Superior Court and concluding that Audrey Layden, Mr. Heiman's wife, was entitled to an elective share of $25,970.35 from the estate. We reverse.

I. Background

Peter Heiman ("decedent") passed away on 7 July 2009. Prior to his death, he had executed a will naming Heidi Venier, his only child, the sole beneficiary and executrix of his estate. Mr. Heiman was survived by his wife, Ms. Layden, and Ms. Venier, his daughter from a prior marriage. Ms. Venier applied for and received letters testamentary on 3 August 2009. As the surviving spouse, Ms. Layden petitioned for a year's allowance of $10,000 and an elective share of Mr. Heiman's assets.

On 20 October 2009, Ms. Venier, as executrix, filed a complaint for declaratory judgment against Fidelity Investments. She sought to have the estate designated as beneficiary for two accounts, an individual retirement account (IRA) and another investment account. Mr. Heiman had designated as beneficiary for these accounts a trust which was mentioned in a previously revoked will but never created.[1] On or about 1 December 2009, Ms. Venier filed an inventory for decedent's estate. The inventory listed $377,795.45 in total assets. That amount included the IRA, which was valued at $38,908.99.

Before Ms. Layden's petition for elective share was heard by the Clerk of Superior Court, the parties voluntarily attended mediation in an effort to resolve the matter and entered into a settlement agreement, executed by Ms. Layden on 18 May 2010 and by Ms. Venier, as executrix, on 19 May 2010. The agreement stated that in consideration for the payment of $65,000 from the assets owned by decedent, "the parties accept full compromise, settlement and satisfaction of, and the final release and discharge of all actions, claims and demands whatsoever that each party may have against the other . . . ." Under the agreement, both parties released any claims against the other and the estate agreed that Fidelity Investments would distribute the IRA, then worth approximately $40,000.00, directly to Ms. Layden, and that she would receive approximately $25,000.00 from another Fidelity account.

After the agreement was signed, Ms. Venier dismissed her declaratory judgment action against Fidelity. But Ms. Layden refused to dismiss her petition for an elective share. She argued that "the alleged 'settlement' was procured by a material misrepresentation in the estate file." On 9 August 2012, the Orange County Clerk of Superior Court noticed

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1. According to the brief filed by the Estate in the appeal to the superior court, due to the "the lapse of the Heiman Trust as the designated beneficiary," the "default beneficiary designation" for the IRA was the surviving spouse, Ms. Layden. We are unable to discern from the record how or why the "default beneficiary" of the IRA was not included as a party to the declaratory judgment action regarding disposition of the IRA, but she was not.

his intent to rule on the elective share petition and heard the case on 4 December 2012.

The Clerk found that the existence of the Fidelity declaratory judgment lawsuit was not disclosed to Ms. Layden. He therefore concluded that the settlement agreement was unenforceable as a waiver of Ms. Layden's elective share rights. The Clerk found that the total net assets of decedent were valued at $363,851.50. It concluded that Ms. Layden was entitled to a one-quarter share, $90,962.88. It further found that Ms. Layden had already been paid $64,947.62 (the amount she had already received under the settlement agreement). It therefore awarded $25,970.35 to Ms. Layden.

Ms. Venier appealed to the superior court on 27 December 2012. By order entered 28 June 2013, the superior court fully adopted the findings of fact made by the Clerk of Superior Court and affirmed the order. Ms. Venier filed written notice of appeal to this Court on 24 July 2013.

II. Standard of Review

Ms. Venier appeals from the superior court's order affirming the Clerk's order regarding Ms. Layden's elective share petition. The superior court fully adopted the clerk's findings of fact. Ms. Venier does not contest any of these findings on appeal. She only challenges the trial court's conclusion that Ms. Layden was not provided fair and reasonable disclosure of the property and obligations of decedent and that the settlement agreement was therefore unenforceable.

Thus, the only issue on appeal is one of law, which we review *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re Estate of Pope*, 192 N.C. App. 321, 331, 666 S.E.2d 140, 148 (2008) (citation, quotation marks, and brackets omitted), *disc. rev. denied*, 363 N.C. 126, 673 S.E.2d 129 (2009).

III. Full and Fair Disclosure

The issue for us to consider is a narrow one, but one of first impression in North Carolina: what does it mean for a surviving spouse to be "provided a fair and reasonable disclosure of the property and financial obligations of the decedent" for purposes of waiver under N.C. Gen. Stat. § 30-3.6 (b)(2) (2009)?

Ms. Layden urges us to consider the required disclosure in light of the fiduciary duty she contends that Ms. Venier owed her as executrix

of the decedent's estate. Ms. Venier denies that she owed Ms. Layden any such duty because Ms. Venier is a surviving spouse who has filed a claim for an elective share, not a beneficiary under the will. We need not decide this issue because even assuming that Ms. Venier owed Ms. Layden a fiduciary duty, the existence of the Fidelity lawsuit was not a material fact and failure to disclose it was not a breach of any duty owed—fiduciary or statutory.

A. Elective Share Statutes

The elective share statutes are quite detailed and the calculation of an elective share is highly fact-dependent. In deciding what information Ms. Layden was required to disclose, it is necessary to understand the context. Therefore, before addressing the issue of waiver, we will lay out the calculation of elective share as applicable to this case.

Under N.C. Gen. Stat. § 30-3.1, *et seq.*, a wife who survives her husband[2] may choose to take an "elective share" of the decedent's assets rather than taking under the decedent's will. The "applicable share" of the decedent's assets to which a surviving spouse is entitled depends on whether the decedent had a prior spouse and whether the decedent is survived by children or other lineal descendants. N.C. Gen. Stat. § 30-3.1(a) (2009). A second or successive spouse of a decedent survived by one or more lineal descendants is entitled to a reduced share. N.C. Gen. Stat. § 30-3.1(b). Where the decedent is survived by a second spouse and one child, the applicable share is one-quarter of the decedent's total net assets. *See id.*

The term "total net assets" is defined by N.C. Gen. Stat. § 30-3.2(4) (2009) as the decedent's total assets reduced by any year's allowances "to persons other than the surviving spouse and claims." "Total assets" is in turn defined as the sum of the values listed in N.C. Gen. Stat. § 30-3.2(3f), which includes *inter alia* "[b]enefits payable by reason of the decedent's death under any policy, plan contract, or other arrangement." N.C. Gen. Stat. § 30-3.2(3f)(d). Such benefits include "[i]ndividual retirement accounts." N.C. Gen. Stat. § 30-3.2(3f)(d)(5).

The surviving spouse is entitled to her share of the total net assets reduced by the value of the net property passing to the surviving spouse. N.C. Gen. Stat. § 30-3.1(a). The "net property passing to the surviving spouse" includes any property that passes by "beneficiary designation" (except federal social security) reduced by the amount of any death taxes or claims payable out of such assets. N.C. Gen. Stat. § 30-3.2(2c),(3c)(a).

2. Or vice-versa.

Taking these statutes as a whole, if the decedent owns an individual retirement account at the time of his death, it is included in the decedent's total net assets for purposes of calculation of the elective share. If someone other than the surviving spouse is the IRA beneficiary, then the elective share to which the surviving spouse is entitled will be her share of the total net assets—including the IRA—without any reduction in value. If, however, an individual retirement account owned by the decedent passes by beneficiary designation to the surviving spouse, her elective share will be reduced by the value of the IRA. In either case, the total value of the decedent's assets to which a surviving spouse is entitled is simply the applicable share of the total net assets of the decedent.

A surviving spouse entitled to an elective share may waive her right in writing. N.C. Gen. Stat. § 30-3.6(a). However, "[a] waiver is not enforceable if the surviving spouse proves that: (1) The waiver was not executed voluntarily; or (2) The surviving spouse or the surviving spouse's representative making the waiver was not provided a fair and reasonable disclosure of the property and financial obligations of the decedent . . . ." N.C. Gen. Stat. § 30-3.6(b).

B. "Fair and Reasonable Disclosure"

Here, Ms. Layden does not truly argue that the settlement agreement was not a waiver of her elective share rights nor that the waiver was involuntary. Indeed, it is clear that the agreement was intended by all parties to fully settle Ms. Layden's elective share claim. The agreement between Ms. Venier, as executrix of the Heiman Estate, and Ms. Layden stated that it was intended to be the "final release and discharge of all actions, claims and demands whatsoever that each party may have against the other." Such "claims and demands" include Ms. Layden's claim for elective share.

Nevertheless, Ms. Layden contends that the agreement is unenforceable because Ms. Venier failed to provide "fair and reasonable disclosure" of decedent's assets under N.C. Gen. Stat. § 30-3.6(b). Ms. Layden further asserts that she relied, to her detriment, on the "misrepresentations" of Ms. Venier and that therefore the waiver was unenforceable as a contract induced by fraud. Specifically, she contends that Ms. Venier concealed the existence of the estate's lawsuit against Fidelity. Regardless of whether the issue is considered as a matter of common law fraud or statutory application, if the fact Ms. Venier failed to disclose was immaterial, then the agreement would remain enforceable. *See Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 ("A cause of action for fraud [may be] based on . . . a failure to disclose a

material fact relating to a transaction which the parties had a duty to disclose." (citations omitted) (emphasis added)), *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

"A fact is material[] if[,] had it been known to the party, would have influenced that party's decision in making the contract at all." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 176-77, 684 S.E.2d 41, 53 (2009). As in any other settlement negotiation, the material facts are those that allow the party to calculate her best alternative to a negotiated agreement and to understand the effect of the agreement.

Ms. Layden had two alternatives: to proceed with her claim for elective share and receive the amount as ordered by the Clerk of Court, or to enter into a settlement agreement with the estate. If the surviving spouse knows what property decedent owned and what financial obligations were owed, she can accurately calculate the share to which she would be entitled absent a settlement. If the amount of the "total net assets" of the estate is known, it is a simple matter to calculate 25% of this amount, and this amount is what the surviving spouse would receive as her elective share by order of the Clerk; the total amount paid to the surviving spouse by the estate would also be reduced by any sums which passed to her by "beneficiary designation," excluding the amount of any death taxes or claims payable out of such assets. N.C. Gen. Stat. § 30-3.2(2c),(3c)(a).[3] But whether the funds are paid to the surviving spouse entirely by the estate or partially by the estate and partially as a direct distribution to the surviving spouse as beneficiary of an account, the amount received by the surviving spouse would be the same.

Here, the existence of the lawsuit against Fidelity was not a material fact because it had no relevance to the calculation of the share of the decedent's total net assets to which Ms. Layden would be entitled. Decedent owned an IRA valued at $38,908.99. This asset was included in the total net assets owned by decedent, valued at $379,796.54, and disclosed on the Inventory for Decedent's Estate of 1 December 2009. The IRA was listed in the section of the Inventory for "Stocks and Bonds In the Sole Name of Decedent or Jointly Owned Without Right of Survivorship" and was identified as a "Fidelity Traditional IRA" with the correct account number listed and the value stated as $38,908.99. The only difference in the Inventory, had the IRA been listed correctly, would be that it would have been listed under Part II of the form, instead of Part

3. Ms. Layden does not contend, and the record does not reflect, any "death taxes or claims payable out of" the IRA assets, so for our purposes the only relevant number is the total value of the IRA which passed to Ms. Layden.

I, as "Stocks/Bonds/Securities Jointly Owned With Right Of Survivorship or registered in beneficiary form and automatically transferable on death." The value, which was the only relevant information for purposes of calculating Ms. Layden's elective share, would be the same.

Ms. Layden, as a second spouse to a decedent with one living child, was entitled to one quarter of decedent's total net assets. This sum could easily be calculated at mediation based upon the values of the decedent's property which had all been disclosed, although some expenses, such as the administrative costs, could only be estimated. Ultimately, the trial court found that there were $15,945.04 in administrative costs and reduced the total net assets by that amount, resulting in total net assets of $363,851.50. Ms. Layden was entitled to a one-quarter share, $90,962.88. Ms. Layden could have calculated this amount based on the information provided to her by Ms. Venier.[4]

Even if the IRA had been distributed to Ms. Layden prior to the mediation, based upon her status as the default beneficiary, the total net assets would have still been the same and Ms. Layden would still be entitled to $90,962.88 from those assets. But she would not be entitled to receive $90,962.88 in addition to the full value of the IRA. Her elective share would be reduced by the value of the IRA, $38,908.99, as the Clerk correctly determined. So, no matter which party is designated the beneficiary of the IRA, the total value of the assets to which Ms. Layden would have been entitled remains the same. Given the information provided, Ms. Layden fully knew the amount to which she would be entitled if she declined to settle the dispute. She settled it nonetheless.

Indeed, it may seem odd that Ms. Layden and Ms. Venier had such a heated dispute regarding the seemingly simple mathematical calculation of this elective share claim that nearly a year passed before it was resolved at mediation, an additional two years before being heard by the Clerk, and that this appeal would be before this Court nearly five years after the decedent's death. The reasons are not apparent above because of the single legal issue presented on appeal, but before the Clerk and trial court, the reasons were clear. Essentially, tragic circumstances surrounded decedent's death, and relations between Ms. Layden, as his second wife, and Ms. Venier, his daughter, were acrimonious. Because of these circumstances, Ms. Venier sought to prevent Ms. Layden from

4. In addition, Ms. Layden was fully aware, based upon documents filed in this matter, that Ms. Venier was seeking to have any rights that she may have related to her marriage to decedent eliminated on a theory of equitable estoppel.

claiming an elective share. Decedent and Ms. Layden had been in the process of negotiating a separation agreement when he died.

Before the trial court, Ms. Venier summarized her argument as follows:

> As a matter of fundamental fairness, Mr. Heiman and Ms. Layden had a deal; the terms were certain, both of them were acting in accordance with these terms, and for all intents and purposes the deal was complete but for their signatures and the subsequent payment of a modest sum of money. Beyond its sheer gall and hypocrisy, it is not merely wrong, it's a travesty that Ms. Layden should lay claim to a quarter of Mr. Heiman's estate on the basis of a short, late in life, unhappy marriage that ended in separation and suicide, when she had already agreed to waive any claim to the estate. The Court must not allow such an injustice to occur.

Although Ms. Venier's attempts to avoid the elective share were unsuccessful and she does not challenge Ms. Layden's entitlement to an elective share on appeal, there were other disputed issues existing at the time of the mediation. In fact, the value of the decedent's estate may have been the only undisputed issue in the settlement negotiations. Viewed in this light, Ms. Layden's agreement to settle the elective share claim for a bit less than the full amount of the statutory share—where the value of the total net estate was known—is quite reasonable.

The Fidelity lawsuit, as discussed above, solely concerned the proper beneficiary of the account. It did not affect the ownership of the account or its value—it was owned by the decedent at his death and that fact is undisputed. It had no bearing on the calculation of the share to which Ms. Layden was entitled, so we see no reason that disclosure of that fact would have affected in any way Ms. Layden's decision to settle. Ms. Layden has not claimed that any other material fact had been concealed. Moreover, Ms. Venier, as executrix, fully performed her part of the negotiated agreement, allowing two of the Fidelity accounts to pass to Ms. Layden. Ms. Layden, by contrast, failed to perform her contractual duties by refusing to dismiss her elective share petition.

Given the immateriality of the Fidelity lawsuit to the calculation of an elective share, we conclude that Ms. Venier fully and fairly disclosed all material information to Ms. Layden. Ms. Layden was fully aware of all of the decedent's assets and liabilities when she decided to waive her

right to an elective share and to enter into the settlement agreement. The settlement agreement constituted a knowing and voluntary waiver of Ms. Layden's elective share rights. We therefore hold that the superior court erred in concluding that the settlement agreement was not an enforceable waiver of Ms. Venier's right to an elective share. We reverse the trial court's order affirming that of the Clerk of Superior Court.

IV. Conclusion

For the foregoing reasons, we conclude that the existence of the Fidelity lawsuit was not a material fact. Therefore, Ms. Venier's failure to disclose its existence does not make the settlement agreement unenforceable. We hold that the superior court erred in concluding that the agreement was not an enforceable waiver of Ms. Layden's elective share rights. We therefore reverse its order affirming the order entered by the Clerk of Superior Court.

REVERSED.

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

IN THE MATTER OF APPEAL OF DIXIE BUILDING, LLC FROM THE DECISION OF THE GUILFORD COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA13-1170

Filed 15 July 2014

Taxation—property tax—revaluation—appeal—timeliness

The Property Tax Commission properly concluded that Dixie Building's appeal of the revaluation of its properties was untimely. Although Dixie Building contended on appeal that it was permitted under N.C.G.S. § 105-322 to submit its appeal to the Guilford County Board at any time prior to the Board's adjournment for the year, Dixie Building's construction of the statute would place various subsections of the statute in conflict with each other. Reading the statute as a whole and in a manner that gave each provision meaning, the legislature intended to allow boards of equalization and review to set deadlines for the filing of hearing requests. Dixie Building failed to comply with the Guilford County deadline.

Appeal by appellant from order entered 28 June 2013 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 19 February 2014.

Tuggle Duggins, P.A., by Michael S. Fox, J. Nathan Duggins III, Martha R. Sacrinty, and Sarah J. Hayward, for appellant Dixie Building, LLC.

Guilford County Attorney J. Mark Payne and Deputy County Attorney Matthew J. Turcola, for appellee Guilford County.

GEER, Judge.

Dixie Building, LLC appeals from an order entered by the North Carolina Property Tax Commission ("the Commission") dismissing Dixie Building's appeal from the Guilford County Board of Equalization and Review ("the Guilford County Board") on the grounds that Dixie Building's original request to the Guilford County Board for a hearing was untimely. Although Dixie Building contends that it was permitted, under N.C. Gen. Stat. § 105-322 (2013), to submit its appeal to the Guilford County Board at any time prior to the Board's adjournment for the year, Dixie Building's construction of the statute would place various subsections of the statute in conflict with each other.

Reading the statute as a whole and in a manner that gives each provision meaning leads to the conclusion that the legislature intended to allow boards of equalization and review to set deadlines for the filing of hearing requests. Because Dixie Building failed to comply with the Guilford County deadline, the Commission properly concluded that Dixie Building's appeal was untimely. We, therefore, affirm.

Facts

Dixie Building owns real property in Guilford County. In 2012, Guilford County performed a revaluation of all property within its boundaries as it was required to do pursuant to N.C. Gen. Stat. § 105-286(a)(1) (2013). The Guilford County Board established a deadline of 2 July 2012 for appealing revaluations and assessments for the 2012 year.

Following the 2012 revaluation, Dixie Building disputed the resulting appraisal values of six properties ("the Dixie properties"). However, Dixie Building did not appeal the revaluations of the Dixie properties by the 2 July 2012 deadline. Instead, almost five months later, on

30 November 2012, Dixie Building filed a written notice with the Guilford County Board formally requesting an appeal of the 2012 revaluations of the Dixie properties. In addition, counsel for Dixie Building, while representing other clients with revaluation appeals, attended a Guilford County Board meeting on 16 January 2013. During that meeting, Dixie Building's counsel made an oral request for the Guilford County Board to review the 2012 revaluations of the Dixie properties.

On 22 January 2013, the Guilford County Board notified Dixie Building in writing that it was denying Dixie Building's request to challenge the 2012 reappraisal values on the grounds that its appeal "was not timely." Dixie Building timely appealed that denial to the Commission on 18 February 2013. On 28 June 2013, the Commission entered an order granting Guilford County's motion to dismiss on the grounds that the appeal to the Guilford County Board was in fact untimely. Dixie Building has timely appealed the Commission's order to this Court.

Discussion

In an appeal from the Commission, "[q]uestions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of the Greens of Pine Glen Ltd. P'Ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Dixie Building contends on appeal that the Commission erred in construing the pertinent statutes when it concluded that Dixie Building's appeal to the Guilford County Board was untimely.

Questions of statutory interpretation, such as Dixie Building poses, "are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature." *First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___, 755 S.E.2d 393, 394 (2014). In construing a statute, "[t]he plain language of a statute is the primary indicator of legislative intent." *Id.* at ___, 755 S.E.2d at 394. However, when statutory language is ambiguous, "we are required to examine the entire statute to ascertain its meaning and to give force and effect to every part of it, reconciling, when reasonably possible, any seeming conflicts by comparing its sections and provisions with each other." *State Bd. of Agric. v. White Oak Buckle Drainage Dist.*, 177 N.C. 222, 226, 98 S.E. 597, 599 (1919).

Pursuant to N.C. Gen. Stat. § 105-286, each county is required to reappraise all real property every eight years. In years when a general reappraisal of real property has not been done, N.C. Gen. Stat. § 105-287 (2013) limits the circumstances under which the county may

change the appraised value of real property. N.C. Gen. Stat. § 105-322(g)(1)c provides that the county board of equalization and review has a duty to review the tax lists and increase and decrease the appraised value of any property as appropriate, although "the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287."

N.C. Gen. Stat. § 105-322(e) sets out the provisions regarding when a board of equalization and review shall meet and regulates the starting date and the ending date for a board's meetings:

> **Time of Meeting.** -- Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. In years in which a county does not conduct a real property revaluation, the board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. Except as provided in subdivision (g)(5) of this section, the board may not sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. *In the year in which a county conducts a real property revaluation, the board shall complete its duties on or before December 1, except that it may sit after that date to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law.* From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(Emphasis added.)

Our Supreme Court has explained that "[t]he reason why the Board of Equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs." *Spiers v. Davenport*, 263 N.C. 56, 59, 138 S.E.2d 762, 764 (1964). *See also* N.C. Gen. Stat.

§ 105-347 (2013) (providing that county must set property tax rate "not later than the date prescribed by applicable law or, in the absence of specific statutory provisions, not later than the first day of August" so as to provide revenues "necessary to meet the general and other legally authorized expenses of the taxing units"); N.C. Gen. Stat. § 105-360(a) (2013) (providing that property taxes are due and payable on September 1 of fiscal year for which taxes are levied with interest accruing if taxes are paid on or after January 6).

N.C. Gen. Stat. § 105-322(g) sets out the powers and duties of a board of equalization and review, including the duty to review tax lists, the duty to hear taxpayer appeals, the power to appoint committees, the power to issue subpoenas, and the power to examine witnesses and documents. With respect to the duty to hear taxpayer appeals, N.C. Gen. Stat. § 105-322(g)(2) provides:

> **Duty to Hear Taxpayer Appeals.** -- On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer's property or the property of others.
>
> a. *A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment.* However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.

(Emphasis added.)

In arguing that its request for a hearing before the Guilford County Board was timely, Dixie Building points to N.C. Gen. Stat. § 105-322(g)(2), asserting that it should be construed as providing that any request made prior to a board's adjournment is timely. Dixie Building further contends that "the time prescribed by law" referenced in N.C. Gen. Stat. § 105-322(e) is defined by N.C. Gen. Stat. § 105-322(g)(2) as the date of the Guilford County Board's adjournment for the year. Consequently, Dixie Building asserts, its request for a hearing, presented prior to the Guilford County Board's adjournment, was timely. We disagree.

The plain language of N.C. Gen. Stat. § 105-322(e) cannot be reconciled with Dixie Building's interpretation of the statute. In N.C. Gen. Stat. § 105-322(e), the General Assembly provided generally that "the board shall meet at such times as it deems reasonably necessary to perform its statutory duties *and to receive requests and hear the appeals of taxpayers* under the provisions of subdivision (g)(2), below." (Emphasis added.) However, the legislature also mandated that in years involving a real property revaluation, as occurred in 2012, "the board shall complete its duties on or before December 1 . . . ." *Id.* The only exception is that the board "may sit after that date *to hear and determine requests* made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law." *Id.* (emphasis added).

Thus, the plain language of N.C. Gen. Stat. § 105-322(e) limits the board's authority after 1 December to only hearing and determining requests for review under N.C. Gen. Stat. § 105-322(g)(2). The General Assembly did not authorize a board of equalization and review to receive requests for hearings under subdivision (g)(2) after 1 December. Under N.C. Gen. Stat. § 105-322(e), the board may only receive requests prior to 1 December. However, N.C. Gen. Stat. § 105-322(e) adds a further limitation that hearings after 1 December may only be held for those requests "made within the time prescribed by law," suggesting that the deadline for requests could be a date other than 1 December.

N.C. Gen. Stat. § 105-322(g)(2)a, the subsection on which Dixie Building relies, can be read in a manner that is consistent with the plain language of N.C. Gen. Stat. § 105-322(e). The focus of N.C. Gen. Stat. § 105-322(g)(2)a is on how "[a] request for a hearing under this subdivision (g)(2) shall be made . . . ." The statute specifies that the hearing request may be made in two ways: in writing to the board or by a personal appearance before the board. The subsection, rather than granting the taxpayer the absolute right to make a request up until the board's adjournment for the year (a construction that would place § 105-322(g)(2)a in conflict with § 105-322(e)), can be read instead as providing an outside limit on when a board of equalization may allow requests for hearings to be made. The subsection establishes that the board has no authority to grant a hearing for a request made after adjournment.[1]

Such a construction is also consistent with N.C. Gen. Stat. § 105-322(f), which requires a board to publish a notice of certain dates prior to the

1. N.C. Gen. Stat. § 105-322(g)(2)a includes an exception, not applicable here, when the board has made a decision under § 105-322(g)(1) and notice was sent out less than 15 days prior to the board's adjournment.

board's first meeting for the year. In addition to announcing the date, hours, place, and purpose of the first meeting of the board, the notice must also "state the dates and hours on which the board will meet following its first meeting *and the date on which it expects to adjourn* . . . ." *Id.* (emphasis added). If a board subsequently decides to adjourn at a later date than was originally announced, it must provide notice "published at least once in the newspaper in which the first notice was published, *such publication to be prior to the date first announced for adjournment.*" *Id.* (emphasis added).

The notice requirements of N.C. Gen. Stat. § 105-322(f) regarding adjournment can only be effective if a board has the authority to set deadlines prior to the time of adjournment for the submission of requests for a hearing. It would be difficult for a board to identify an adjournment date in advance that would allow adequate time to conduct hearings without setting a deadline for requests for hearings sufficiently in advance of the projected adjournment date. In addition, under Dixie Building's construction of N.C. Gen. Stat. § 105-322(g)(2)a, an aggrieved taxpayer could request a hearing on the scheduled date of adjournment, but that would require that the board then postpone adjourning until the hearing could be conducted. However, the board would then be unable to comply with the notice provision for adjournment set out in N.C. Gen. Stat. § 105-322(f).

Dixie Building nonetheless urges that a board could hear an appeal the same day it was requested, thus avoiding any deviation from the statute's notice requirements. N.C. Gen. Stat. § 105-322(g)(2)c, however, provides that "[u]pon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal." In addition, the General Assembly has granted a board of equalization and review the power to "subpoena witnesses or documents on its own motion . . . ." N.C. Gen. Stat. § 105-322(g)(3)b. A hearing occurring on the same day as a request for a hearing would preclude the board from exercising these powers.

Further, it is entirely plausible that if an announced adjournment date were the deadline for requests for hearing rather than the deadline set by a board, many taxpayers would wait until the last day to make their requests. An inability to conduct all the requested hearings in one meeting would then force a postponement of the adjournment date and violation of the notice provisions.

We can see no basis for concluding that the General Assembly intended to strip a board of equalization and review of the power to set a reasonable schedule for receiving requests for a hearing that would ensure a full and careful consideration of a taxpayer's appeal. Indeed, N.C. Gen. Stat. § 105-322(e) mandates that "[f]rom the time of its first meeting until its adjournment, the board shall meet *at such times as it deems reasonably necessary* to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below." (Emphasis added.)

In short, Dixie Building's proposed construction of N.C. Gen. Stat. § 105-322(g)(2) to allow requests for hearing through the date of adjournment would place that subsection in conflict with numerous other subsections. When the statute is read as a whole giving effect to all of its provisions, we hold that the Guilford County Board and the Property Commission properly concluded that the legislature intended for a local board of equalization and review to have the authority to set a reasonable deadline prior to its adjournment for accepting requests for revaluation appeals and that such time is "the time prescribed by law" provided for in N.C. Gen. Stat. § 105-322(e). *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (holding that "this Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision.").

Because 2012 was a revaluation year for Guilford County, the Guilford County Board set 2 July 2012 as the deadline for appeal requests for that year and because Dixie Building did not submit its hearing request by that date, Dixie Building did not timely request an appeal of the revaluation of the Dixie properties for the tax year 2012. The Commission, therefore, properly dismissed Dixie Building's revaluation appeal.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

IN RE J.C.

[235 N.C. App. 69 (2014)]

IN THE MATTER OF J.C. & J.C.

No. COA14-79

Filed 15 July 2014

1. Jurisdiction—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—sufficiency of evidence

The trial court did not err in a child neglect case by allegedly failing to make adequate findings to establish its jurisdiction in light of a prior case in Kentucky. Although it would have been better for it to make more specific findings of fact to support its jurisdiction, the evidence was sufficient to support the trial court's assertion of jurisdiction pursuant to N.C.G.S. § 50A-201(a)(1).

2. Child Abuse, Dependency, and Neglect—neglect—findings of fact

The trial court did not err by adjudicating the juveniles neglected based on the evidence and the trial court's findings of fact.

3. Child Abuse, Dependency, and Neglect—dependency—clerical error

Although the Department of Social Services filed petitions alleging that the juveniles were both neglected and dependent, it only argued that they were neglected at the adjudication hearing. Thus, the trial court's checking of the box for dependency represented a clerical error.

4. Child Visitation—supervised visitation—costs—opportunity to present evidence—modification

The trial court did not err by ordering respondent mother to pay the costs of her supervised visitation. Respondent has ample opportunity to present evidence of her inability to pay the cost of supervised visitation and have the visitation plan modified, should the need arise.

Judge HUNTER, Robert N., concurring in part and dissenting in part.

Appeal by respondent mother from orders entered 15 and 22 October 2013 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 16 June 2014.

Holland & O'Connor, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Richard Croutharmel for respondent-appellant mother.

Marie H. Mobley for guardian ad litem.

ELMORE, Judge.

Respondent mother appeals from the trial court's orders adjudicating the juveniles neglected and dependent. Respondent contends that the trial court made insufficient findings to demonstrate it had obtained jurisdiction over the matter, made insufficient findings to support its order adjudicating the juveniles neglected and dependent, and improperly required respondent to pay the costs of her visitation. We affirm the adjudication of neglect and the disposition order, but remand for correction of a clerical error as to the adjudication of dependency.

The juveniles were born in 2007. Kentucky authorities became involved with the family in 2008 based on reports of domestic violence between respondent and the juveniles' father. A Kentucky court granted the father custody of the juveniles. The family moved to North Carolina in December of 2011, and respondent and the father have been involved in domestic violence and custody disputes in North Carolina since March of 2012.

On 31 May 2013, the Johnston County Department of Social Services ("DSS") substantiated a report of neglect due to an injurious environment, based on the parents' unresolved conflict and its negative impact on the juveniles. That conflict included concerns that the juveniles had made false accusations of sexual abuse against their father at respondent's behest. On 27 June 2013, DSS filed petitions alleging that the juveniles were neglected and dependent, and it filed amended petitions on 11 July 2013.

The matter came on for an adjudication hearing on 29 August 2013. At the conclusion of the hearing, the trial court made an oral finding that the juveniles were neglected. The trial court entered its initial adjudication order on 4 October 2013, and entered an amended order on 22 October 2013. In the written orders, the trial court adjudicated the juveniles neglected and dependent. The disposition hearing took place on 12 September 2013. The trial court placed the juveniles in the custody of their paternal grandmother and provided respondent with

supervised visitation to be held at a visitation center at her expense. Respondent appeals.

[1] In her first argument on appeal, respondent contends that the trial court failed to make adequate findings to establish its jurisdiction, in light of the prior case in Kentucky. We disagree.

"This Court's determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*." *Powers v. Wagner*, 213 N.C. App. 353, 357, 716 S.E.2d 354, 357 (2011) (citation and quotation omitted). The district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2013). The jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to the Juvenile Code. *In re Brode*, 151 N.C. App. 690, 692-94, 566 S.E.2d 858, 860-61 (2002).

Under the UCCJEA, a North Carolina court has jurisdiction to make an initial child-custody determination if North Carolina "is the home state of the child on the date of the commencement of the proceeding[.]" N.C. Gen. Stat. § 50A-201(a)(1) (2013). A child's "home state" is "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2013). Although this Court has recognized that making specific findings of fact related to a trial court's jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) "would be the better practice," the statute "states only that certain circumstances must exist, not that the court specifically make findings to that effect." *In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007). Therefore, so long as the trial court asserts its jurisdiction and there is evidence to satisfy the statutory requirements, the trial court has properly exercised subject matter jurisdiction. *Id.* at 397, 642 S.E.2d at 473-74.

In this case, the trial court made a finding that it had jurisdiction to enter an adjudication order, and the evidence shows that the juveniles have continuously resided with a parent in North Carolina since December of 2011. Although, as we have previously held, it would be the better practice for the trial court to make more specific findings of fact to support its jurisdiction, the evidence was sufficient to support the trial court's assertion of jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a)(1). Accordingly, respondent's first argument lacks merit.

[2] Next, respondent contends that the trial court erred by adjudicating the juveniles neglected and dependent. We first address respondent's argument that the trial court erred by adjudicating the juveniles neglected. Respondent disputes the trial court's conclusion that the effect of the parents' domestic violence and discord on the juveniles was sufficient to support an adjudication of neglect. Respondent also disputes the trial court's finding that respondent failed to submit to DSS's in-home services. We do not agree with respondent's contentions.

"The allegations in a petition alleging abuse, neglect, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013). In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

N.C. Gen. Stat. § 7B-101, in part, defines a neglected juvenile as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent" or "who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2013). A parent's refusal to cooperate with DSS's attempts to offer services and a "long standing" and "enduring" history of domestic violence between the parents are factors that support an adjudication of neglect. *In re B.M.*, 183 N.C. App. 84, 89, 643 S.E.2d 644, 647 (2007).

Here, the trial court's findings of fact support its conclusion that the juveniles were neglected. The trial court found that the parents' history of domestic violence dated back to the initial investigation in Kentucky, that the juveniles were aware of the violence and domestic discord, and that a Child and Family Evaluation indicated that the parents were not able to parent the juveniles due to "their continued conflicts with each other and the impact the conflicts have on the children." Specifically, the trial court found:

> 16. [T]he children were negatively impacted by witnessing the parents' domestic discord and that it caused the children emotional stress. The Court further finds that the children were put in the middle of the parents' dispute, which also caused stress upon the children.

> The Court is further concerned about the children being coached to make allegations in an effort to circumvent the domestic action.

In addition, the trial court found that respondent refused to develop an in-home services agreement with DSS to address the identified issues.

Contrary to respondent's contentions, these findings are supported by the evidence introduced at the adjudication hearing, specifically the testimony of a social worker, and in turn support the trial court's conclusion that the juveniles were neglected. Respondent points to her own testimony that she only "hesitated" in response to DSS's efforts to implement in-home services, but the trial court was free to weigh that testimony against the social worker's contradictory testimony and make a finding adopting one point of view. Accordingly, we hold that the evidence and the trial court's findings of fact support the adjudication of neglect.

[3] Next, as respondent correctly points out, at the hearing the trial court orally concluded that the juveniles were neglected, but both the original and amended adjudication orders contain conclusions, made by checking boxes on each of the pre-printed portions of the orders, that the juveniles were neglected and dependent. We believe that the trial court's checking of the box for dependency represents a clerical error.

"A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jones*, ___ N.C. App. ___, ___, 736 S.E.2d 634, 637 (2013) (citations and quotations omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citations omitted).

In this case, although DSS filed petitions alleging that the juveniles were both neglected and dependent, it only argued that they were neglected at the adjudication hearing. The trial court orally concluded that the juveniles were neglected and made findings of fact supporting that conclusion, but made none to support a conclusion that they were dependent. Accordingly, it appears that the "dependent" box on the adjudication form was inadvertently checked, and the matter should be remanded for entry of a new adjudication order that reflects the trial court's conclusion that the juveniles were neglected, but not dependent.

[4] Finally, respondent contends that the trial court erred by ordering her to pay the costs of her supervised visitation. We disagree.

In 2013, the General Assembly enacted N.C. Gen. Stat. § 7B-905.1 (2013), which sets out the requirements for findings regarding visitation in abuse, neglect, and dependency cases.[1] Under the new statute, a disposition order that removes a juvenile from a parent's custody "shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2013). The new statute describes the findings the trial court must make defining the conditions of visitation when a child is placed with a relative, as is the case here:

> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(c) (2013). The terms of the statute are consistent with our case law interpreting the visitation findings required by N.C. Gen. Stat. § 7B-905(c), the prior statute. *See In re J.P.*, ___ N.C. App. ___, ___, 750 S.E.2d 543, 547 (2013) (holding that a disposition order must, at a minimum, set out the time, place, and conditions of visitation).

In this case, the trial court made a finding that squarely addresses all three requirements of N.C. Gen. Stat. § 7B-905.1(c): "[Respondent] is to have a supervised visit every other week for one hour via a supervised visitation center, at her expense." Respondent does not challenge the sufficiency of this finding as to the statutory requirements and concedes that the trial court made findings that support its decision that supervised visitation was in the juveniles' best interests under the circumstances.

Instead of challenging the need for supervised visitation or the trial court's findings, respondent first contends that the Juvenile Code does not permit the trial court to order her to pay the cost of supervised

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1. Formerly, visitation was addressed in the disposition statute, N.C. Gen. Stat. § 7B-905(c) (2011). Section 7B-905.1 was effective 1 October 2013, and applies to actions "filed or pending on or after that date." 2013 N.C. ALS 129. The disposition order in this matter was entered 15 October 2013. Therefore, the matter was pending as of the effective date of the new statute, and we must review the disposition order under the terms of the new statute.

visitation. When an argument presents an issue of statutory interpretation, full review is appropriate, and the trial court's conclusions of law are reviewed *de novo*. *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (citations omitted). " 'If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms.' " *Whitman v. Kiger*, 139 N.C. App. 44, 46, 533 S.E.2d 807, 808 (2000), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001) (citation omitted).

Here, respondent's argument is contradicted by the plain language of the statute, which provides: "The court may specify in the order conditions under which visitation may be suspended." N.C. Gen. Stat. § 7B-905.1(a). Thus, in the best interests of the juvenile, the trial court has the authority to set conditions for visitation, as the trial court did in this case by requiring respondent to pay the costs of visitation. We also note that other sections of the Juvenile Code, including N.C. Gen. Stat. § 7B-903 and -904, permit the trial court to impose costs on the parents of a juvenile adjudicated abused, neglected, or dependent. Accordingly, we disagree with respondent's contention that the Juvenile Code does not authorize the trial court to order her to pay the costs of supervised visitation.

Next, respondent contends the trial court erred by ordering her to pay the costs of supervised visitation without making any findings that she was able to do so. Respondent cites no authority to support her assertion that such findings are required pursuant to N.C. Gen. Stat. § 7B-905.1, or its predecessor, N.C. Gen. Stat. § 7B-905(c). Instead, respondent relies on case law interpreting other statutes, including N.C. Gen. Stat. § 7B-904 and N.C. Gen. Stat. § 50-13.4, to support her argument. *See*, *e.g.*, *In re W.V.*, 204 N.C. App. 290, 296-97, 693 S.E.2d 383, 388 (2010) (holding that the trial court must make findings that a parent is able to pay a reasonable portion of the cost of foster care before ordering her to do so).

We find respondent's argument on this point to be unpersuasive. The section of the Juvenile Code cited in *In re W.V.* specifically instructs courts to consider the parents' ability to pay. *See* N.C. Gen. Stat. § 7B-904(d) (providing that the trial court may order a parent to pay support "if the court finds that the parent is able to do so"). This specific directive is significant in interpreting the intent of the legislature in enacting the statute, and there is no such statutory instruction as to the costs of supervised visitation in the recently enacted N.C. Gen. Stat. § 7B-905.1(c). Further, the terms of the disposition order in this case

account for a 90-day review hearing, and N.C. Gen. Stat. § 7B-905.1(d) (2013) specifically authorizes all parties to "file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d). Thus, respondent has ample opportunity to present evidence of her inability to pay the cost of supervised visitation and have the visitation plan modified, should the need arise. Accordingly, we affirm the visitation portion of the disposition order.

In sum, we affirm the trial court's adjudication of neglect and the disposition order, but remand the matter for correction of clerical error in the adjudication order.

Affirmed, in part; remanded, in part.

Chief Judge MARTIN concurs.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

Though I agree with the majority's decision to affirm the trial court's adjudication of neglect and to remand for correction of a clerical error as to the adjudication of dependency, I cannot agree with the majority's decision to affirm the visitation portion of the disposition order. Pursuant to N.C. Gen. Stat. § 7B-905.1(a) (2013), the trial court should consider a parent's ability to pay before requiring the parent to pay supervised visitation costs. Accordingly, because the court below ordered respondent to pay the costs of supervised visitation without making any findings that she was able to do so, I respectfully dissent from the majority on this issue.

The potential consequences of failing to pay the costs of supervised visitation includes having visitation suspended, a condition which, if uncured, could ultimately lead to the termination of parental rights. This Court has consistently held that a parent's poverty, alone, should not be grounds for termination of parental rights. *See In re T.D.P.*, 164 N.C. App. 287, 290–91, 595 S.E.2d 735, 738 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). Denying visitation to a poor parent who was required, but unable, to pay the costs of visitation conditions an important constitutional right on wealth. As judges, we have a duty to construe statutes so that their application would not violate either the Constitution of North Carolina or the United States Constitution. *See*, *e.g.*, *Appeal of Arcadia Dairy Farms*, *Inc.*, 289 N.C. 456, 465, 223 S.E.2d 323, 328 (1976) ("If a statute is reasonably susceptible of two

constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question."). Requiring the trial court to make findings of fact addressing a parent's ability to pay before ordering the parent to pay the costs of supervised visitation would obviate any unconstitutional result.

Accordingly, because N.C. Gen. Stat. § 7B-905.1(a) is silent as to whether the trial court must make the findings at issue, and because the majority's holding could lead to undesirable outcomes for poverty-stricken parents, I respectfully dissent. I would remand the disposition order for further findings of fact addressing respondent's ability to pay the costs of supervised visitation before entering such an order.

IN RE GREGORY S. LYNN AND RENEE J. LYNN, PLAINTIFFS
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SETERUS, INC., DEFENDANTS

No. COA13-1334

Filed 15 July 2014

Fiduciary Relationship—debtor-creditor—right of redemption —trustee

The trial court did not err by dismissing plaintiffs' complaint under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The statutory right of redemption created by N.C.G.S. § 45-21.20 does not give rise to a fiduciary relationship and plaintiffs failed to disclose any additional facts supporting the existence of a fiduciary relationship. Furthermore, as no facts indicated that the trustee or substitute trustee was joined as a defendant, no party owing a fiduciary duty to plaintiffs was a party to this breach of fiduciary duty claim.

Appeal by plaintiffs from order entered 11 July 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 24 April 2014.

Elliot Law Firm, PC, by Michael K. Elliot, for Plaintiffs-Appellants.

No brief filed on behalf of Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Gregory S. Lynn and Renee J. Lynn (collectively, "Plaintiffs") appeal from a final order dismissing their complaint under N.C. R. Civ. P. 12(b)(6). Plaintiffs contend that their complaint shows the existence and breach of a fiduciary duty owed to them by Federal National Mortgage Association ("Fannie Mae") and Seterus, Inc. ("Seterus") (collectively "Defendants"). For the following reasons, we affirm the trial court's order.

I. Facts & Procedural History

The complaint states the following facts. Plaintiffs owned a home at 1012 King Grant Way in Matthews. On 19 April 2007, plaintiff Gregory Lynn executed a promissory note ("the Note") to JP Morgan Chase Bank ("Chase") with a principal balance of $360,000. The loan was described on the Note as an "Interest First Note." On 19 April 2007, Plaintiffs also executed a deed of trust ("the Deed") securing the Note.[1] The Deed was recorded in Union County and named Constance R. Stienstra as the trustee and Chase as the lender and beneficiary of the instrument.

In early 2011, Plaintiffs received notice that Seterus had become the servicer of the loan and that Fannie Mae was the holder of the Note and Deed after having purchased the Note at some point after 19 April 2007. The complaint indicates that a "Substitute Trustee" was appointed at some point after 19 April 2007 and references a "Defendant Substitute Trustee," but does not identify either party. Plaintiffs' appellate brief identifies the substitute trustee as "Trustee Services of Carolina, Inc."[2]

On 26 October 2011, after Plaintiffs fell behind on payments, "Plaintiffs received a 'Notice of Hearing,' from Defendant Substitute Trustee which initiated a Union County Special Proceeding Case entitled: 'Foreclosure of Real Property Under Deed of Trust from Gregory Scott Lynn and Renee Jeanette Lynn . . . .' " Plaintiffs filed for Chapter 13 bankruptcy on 28 December 2011, which was later converted to a Chapter 7 filing. Fannie Mae filed a motion for relief from the automatic stay. Plaintiffs filed a motion in response challenging Fannie Mae's status

1. The Deed and Note were not included in the record on appeal.

2. At Defendants' 12(b)(6) hearing, Plaintiffs and Defendants both stated that the trustee is not a party to this case.

as the holder of the Note. Both Fannie Mae and Seterus were granted relief from the automatic stay, but there were no findings of fact relating to their status as the holder of the Note.

On 21 May 2012, before the entry of the order granting relief from the automatic stay, Plaintiffs received documents from Seterus indicating Plaintiffs could modify their loan. Plaintiffs promptly signed and returned those documents. As part of the modification, Plaintiffs were required to make three trial payments of $2,332.14 on 1 July 2012, 1 August 2012, and 1 September 2012. On 30 June 2012, Plaintiffs sent their initial July payment. However, Plaintiffs sent $2,300.00 instead of the required $2,332.14. Because Plaintiffs remitted an incorrect amount, Defendants rejected the loan modification.

Following the rejection, the "Substitute Trustee" gave notice to Plaintiffs of the foreclosure sale which was to take place on 5 September 2012. After the sale, but prior to the expiration of the ten-day upset bid period, Plaintiffs filed an action designated 12 CVS 2676 enjoining the foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 (2013).

On 28 January 2013, "Plaintiffs, by and through Counsel, requested from Counsel for Defendants a re-instatement quote so that Plaintiffs could exercise their Right of Redemption . . . ."[3] The same day, Defendants sent an email to Plaintiffs' counsel asking Plaintiffs to make a settlement offer. Plaintiffs offered to send a discounted lump sum to Defendants sometime between 28 January 2013 and 25 March 2013. Plaintiffs assert they had a family friend that was "ready, willing, and able to pay the re-instatement amount." Plaintiffs state that the offer was eventually rejected sometime before 25 March 2013. During the intervening period, Defendants provided no redemption or reinstatement quote. The 12(b)(6) hearing transcript indicates that after Plaintiffs made a lump sum offer, Plaintiffs made no attempt to contact Defendants regarding redemption until after Defendants rejected Plaintiffs' offer. At the 12(b)(6) hearing, Plaintiffs argued that proffering any estimate of a reasonable offer was futile because Defendants rejected the loan modification payment for being $32.14 short.

Following the 25 March 2013 hearing concerning 12 CVS 2676, the court dissolved the preliminary injunction. On 23 April 2013, a "Substitute Trustee's" deed was recorded which conveyed the property

3. During the 12(b)(6) hearing, Plaintiffs moved to amend their complaint to specifically allege the statutory right of redemption in addition to the right of reinstatement. The court did not respond to that request at the 12(b)(6) hearing.

to Fannie Mae. Plaintiffs received a letter from Defendants disclosing the payoff amount for the loan on 29 April 2013, after the upset period had passed. Plaintiffs were given notice to vacate their home on 9 May 2013. According to Plaintiffs' appellate brief, Plaintiffs have since vacated the home.

On 30 May 2013, following the dismissal of the claims in 12 CVS 2676, Plaintiffs filed the present complaint for preliminary injunction, breach of fiduciary duty, misrepresentation, and unfair and deceptive trade practices. Plaintiffs also filed a motion for a temporary restraining order against Defendants on 30 May 2013. The motion was denied on 6 June 2013. Defendants then filed a motion to dismiss under N.C. R. Civ. P. 12(b)(6) and a motion for attorneys' fees on 10 June 2013. Defendants amended these motions on 21 June 2013. Judge Lee granted the motion to dismiss on 12 July 2013 and denied Defendants' motion for attorneys' fees. Plaintiffs provided timely written notice of appeal on 26 July 2013.

II. Jurisdiction & Standard of Review

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A–27(b) (2013) as Plaintiff appeals from a final order of the superior court as a matter of right.

" 'On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.' " *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood, 355 N.C. at 166, 558 S.E.2d at 494.

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779 (2014).

"[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

Plaintiffs argue that the statutory right of redemption created by N.C Gen. Stat. § 45-21.20 (2013)[4] gives rise to a fiduciary relationship requiring disclosure of the redemption amount upon a debtor's request. After careful review, we disagree and affirm the trial court.

A. Fiduciary Relationship in Redemption

"For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Fiduciary relationships are established when a special confidence is placed in a party which is bound to act in good faith and in the best interest of the party who reposes that confidence. *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). A number of relationships traditionally give rise to fiduciary duties, such as attorney and client, broker and principal, guardian and ward, and trustee and beneficiary. *Id.* Fiduciary duties may also be established in "a variety of circumstances" within *any relationship* "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* The determination of such a relationship is generally a question of fact to be determined by the jury. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009).

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4. The statutory right to redemption provides that a debtor may terminate the power of sale by tendering the remaining obligation secured by the deed of trust and expenses incurred in the sale of the property before the foreclosure sale or within the upset bid period. N.C. Gen. Stat. § 45-21.20. Plaintiffs requested a "re-instatement quote" in their complaint and also referenced the statutory right of redemption in their complaint.

Plaintiffs clarified at the 12(b)(6) hearing that they intended to include the right of redemption and asked, if need be, to amend their complaint to include this claim. On appeal, Plaintiffs do not raise any argument concerning a contractual right to reinstatement and thus abandon any argument relating to reinstatement. N.C. R. App. P. 28(b)(6).

Our Supreme Court recently addressed the fiduciary duties inherent in a typical debtor-creditor relationship in *Dallaire v. Bank of America*, ___ N.C ___, ___, ___ S.E.2d ___, ___, 51PA13, 2014 WL 2612658 (2014):

> Ordinary borrower-lender transactions, by contrast, are considered arm's length and do not typically give rise to fiduciary duties. In other words, the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code. Nonetheless, because a fiduciary relationship may exist under a variety of circumstances, it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary relation given the proper circumstances.

Id. at ___, ___ S.E.2d at ___, 2014 WL 2612658 at *4 (citations and quotation marks omitted). Applying this test in *Dallaire*, our Supreme Court found that "[a] loan officer's mere assertion that the Dallaires could obtain a first priority lien mortgage loan" was not sufficient to allow our Supreme Court to conclude the Dallaires reposed fiduciary duties in Bank of America. *Id.* (citation and quotation marks omitted).

The right of redemption may arise in any typical foreclosure proceeding; it is a statutorily created right to terminate a power of sale. N.C Gen. Stat. § 45-21.20. Nothing about the statute indicates that the moment a debtor attempts to act upon its right of redemption is anything other than an ordinary part of a debtor-creditor relationship during foreclosure proceedings. As this is an ordinary feature of debtor-creditor relationships, here the debtor or creditor must show some additional fact which tends to elevate the relationship above that of a typical debtor and creditor.

Here, Plaintiffs simply assert that a fiduciary relationship is created by Plaintiffs' invocation of the right of redemption or Defendants' response email requesting Plaintiffs make an offer to pay off the loan. As in *Dallaire*, merely invoking a statutorily created right in a debtor-creditor transaction, like a loan officer making assertions concerning possible lien priorities, does not alone create a fiduciary relationship. *Dallaire*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2014 WL 2612658 at *4. As Plaintiffs fail to disclose any additional facts supporting the existence

of a fiduciary relationship, dismissal was proper under N.C. R. Civ. P. 12(b)(6), as this was a normal debtor-creditor relationship.[5]

B. Trustee Fiduciary Relationship

Trustees,[6] on the other hand, have a long-recognized fiduciary duty to both the debtor and creditor in a typical foreclosure proceeding. *In re Vogler Realty, Inc.*, 365 N.C. 389, 397, 722 S.E.2d 459, 465 (2012). The trustee, vested in a position of power by the debtor and creditor, is bound to act in the interests of the parties and exercise its powers accordingly. *Id.* at 397, 722 S.E.2d at 465.

The complaint shows that neither Fannie Mae nor Seterus were the trustee or the substitute trustee when Defendants requested Plaintiffs make a lump sum offer, nor at any other point in the proceedings. At the 12(b)(6) hearing, both parties stated that the trustee is not a defendant in the case. Moreover, in Plaintiffs' appellate brief, Plaintiffs name the substitute trustee as Trustee Services of Carolina, LLC. As no facts indicate that the trustee or substitute trustee was joined as a defendant, no party owing a fiduciary duty to Plaintiffs is a party to this breach of fiduciary duty claim. Accordingly, dismissal under N.C. R. Civ. P. 12(b)(6) was proper.

IV. Conclusion

For the reasons stated above, the decision of the trial court is

AFFIRMED.

Judges STROUD and DILLON concur.

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5. In *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 418 S.E.2d 694 (1992), this Court held that no fiduciary duty existed where borrowers relied on outside counsel and advice as well as representations made by a lender. *Id.* at 60–61, 418 S.E.2d at 699. The reliance on the advice from a banker, accountant, and their business partner showed that they had not reposed any sort of special confidence with the plaintiff. *Id.*

Here, Plaintiffs were represented by an attorney when they requested the redemption amount. Plaintiffs' attorney initially requested the redemption price, received Defendants' email requesting that Plaintiffs make an offer, and replied with the sum which was eventually rejected. As Plaintiffs relied on outside counsel, dismissal is also proper under the standard announced in *Branch Banking & Trust.*

6. In this case, it seems that the parties substituted the trustee at some point before Plaintiff fell behind on payments. The parties are generally free to substitute a trustee. N.C. Gen. Stat. § 45-10 (2013). The substitute trustee is generally vested with the powers of the original trustee, and among those powers is the power to proceed with foreclosure upon a deed in default. *Id.*; *Pearce v. Watkins*, 219 N.C. 636, 642, 14 S.E.2d 653, 656 (1941).

LEWIS v. LESTER

[235 N.C. App. 84 (2014)]

ROBERT F. LEWIS, PLAINTIFF
v.
LEWIS LESTER, DEFENDANT

No. COA14-147

Filed 15 July 2014

1. Contracts—agreement to divide estate—consideration—actions by family member

Summary judgment was properly granted for defendant in an action between two nephews who acted as power of attorney for an uncle regarding their alleged oral agreement while their uncle was alive to divide the estate, and their uncle leaving the estate to defendant. Although plaintiff argued that action to his detriment after his uncle's death was evidence of the contract, those actions were not contemplated at the time of the agreement and could not constitute consideration. Furthermore, plaintiff conceded that he would have acted as power of attorney and performed services for his uncle regardless of any agreement with defendant and expected no compensation.

2. Contracts—oral agreement to divide estate—real property included—statute of frauds

Summary judgment was correctly granted to defendant in a case involving two nephews who held powers of attorney for an uncle and who allegedly orally agreed to divide the estate, which the uncle willed to one of them. The alleged oral agreement was to divide an estate which included both real and personal property and was therefore not enforceable because it was not in writing.

Appeal by plaintiff from judgment entered on 6 August 2013 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2014.

OERTEL, KOONTS & OERTEL, PLLC, by Geoffrey K. Oertel for plaintiff-appellant.

BENSON, BROWN & FAUCHER, PLLC, by James R. Faucher for defendant-appellee.

STEELMAN, Judge.

Where the plaintiff failed to demonstrate that there was consideration supporting an alleged oral agreement, the trial court properly granted summary judgment for defendant. Where the property in decedent's estate included both real and personal property, the statute of frauds required the alleged agreement to be in writing. This is a separate and independent basis for affirming the ruling of the trial court.

I. Factual and Procedural Background

Robert F. Lewis (plaintiff) and Lewis T. Lester (defendant) are the nephews of Floyd H. Lewis (Lewis). On 1 September 2006, plaintiff and defendant were both designated as power of attorney for Lewis. Plaintiff and defendant discovered Lewis' will in January of 2007, learning that plaintiff was not included as a beneficiary in the will. The will provided that all of Lewis' real and personal property was devised to defendant and his sister. Lewis died in December 2011. Defendant's sister predeceased Lewis, resulting in the entire estate passing to defendant.

In his complaint, plaintiff alleged that in September 2006, the parties made an oral agreement regarding the property of their uncle. Defendant allegedly agreed to split Lewis' estate equally with plaintiff in exchange for plaintiff acting as power of attorney for Lewis. The complaint also states that the parties were aware of the contents of Lewis' will at the time of this agreement.

However, in his deposition, plaintiff admitted that he did not become aware of the contents of the will until January 2007, some four months after the alleged agreement took place. Plaintiff further stated in his deposition that he would have acted as his uncle's power of attorney regardless of any agreement he made with defendant.

The Power of Attorney allowed defendant and plaintiff to each act independently as power of attorney for Lewis. Before Lewis' death, defendant used his authority as power of attorney to change the beneficiary on several of Lewis' bank accounts from his deceased sister to plaintiff. As a result of those actions, plaintiff received approximately $204,000 of Lewis' property.

In April 2012, plaintiff learned of an additional bank account in Lewis' name at First Citizens Bank in the amount of $84,000. Defendant refused to split the proceeds of the account with plaintiff. Plaintiff commenced this action by filing a complaint on 5 October 2012, seeking to enforce the alleged oral agreement.

Plaintiff sought to recover one-half of the assets of Lewis' estate, which included real property. On 18 October 2012, defendant filed an

answer that contained a number of affirmative defenses; including lack of consideration and statute of frauds. On 17 July 2013, defendant filed a motion for summary judgment based upon the depositions of plaintiff, Brian Lewis, and defendant.

On 7 August 2013, Judge Doughton filed an order granting summary judgment in favor of defendant.

Plaintiff appeals.

II. Summary Judgment

In his sole argument on appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

B. Analysis

1. Lack of Consideration

[1] The essential elements of a valid, enforceable contract are offer, acceptance, and consideration. *Copy Products, Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983). When there is no genuine issue of material fact as to the lack of consideration, summary judgment is appropriate. *See Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 294, 326 S.E.2d 280, 283 (1985) (holding trial court should have entered summary judgment for defendant where "undisputed" evidence established that no new consideration was exchanged for plaintiff's renewed promise to pay pre-existing debt). "A mere promise, without more, lacks a consideration and is unenforceable." *Stonestreet v. S. Oil Co.*, 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946).

In the instant case, plaintiff disavowed the theory set forth in his complaint, that the consideration for the alleged agreement was his agreement to serve as power of attorney, in his deposition testimony. Plaintiff acknowledged that he was unaware of the contents of the will at the time he claims the agreement was made, and that he would have acted as power of attorney, and continued providing help to his uncle,

regardless of any agreement with defendant, and that he expected no compensation for acting as power of attorney.

Plaintiff now attempts to assert that, "any obligation held by Robert F. Lewis to act to benefit Floyd H. Lewis ended with the death of Floyd H. Lewis. Thus, any actions taken following the death of Floyd H. Lewis were taken at the detriment or loss of Robert F. Lewis and are admissible evidence of the bargained for legal detriment of the contract between the Defendant and Plaintiff." This argument is without merit because these actions were not contemplated at the time the alleged agreement was made and therefore cannot constitute consideration for that agreement.

Past consideration or moral obligation is not adequate consideration to support a contract. *See Jones v. Winstead*, 186 N.C. 536, 540, 120 S.E. 89, 90–91 (1923). Furthermore, "services performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation." *Allen v. Seay*, 248 N.C. 321, 323, 103 S.E.2d 332, 333 (1958) (quoting *Francis v. Francis*, 223 N.C. 401, 402, 26 S.E.2d 907, 908 (1943)).

This presumption can be rebutted by evidence that the party rendering the services reasonably expected compensation for those services. *Penley v. Penley*, 314 N.C. 1, 18, 332 S.E.2d 51, 61 (1985). There is no such evidence in the instant case. Plaintiff conceded that he would have acted as power of attorney and performed services for his uncle regardless of any agreement with defendant, and expected no compensation.

This argument is without merit.

2. Statute of Frauds

[2] The trial court's order granting summary judgment does not specify a basis for granting summary judgment. Plaintiff argued against the application of the statute of frauds before the trial court on summary judgment, but on appeal fails to make any argument pertaining to the statute of frauds. Defendant asserted the affirmative defense of statute of frauds in his answer. This constitutes a separate and independent basis supporting the trial court's entry of summary judgment.

"It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. § 22-2). An indivisible oral contract to devise both real and personal property is also void." *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 559 (1962) (citing *Grady v. Faison*, 224 N.C. 567, 31 S.E.2d

760 (1944)). Furthermore, "[u]pon a plea of the statute, it may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach." *Id.* at 698, 127 S.E.2d at 560 (citing *Daughtry v. Daughtry*, 223 N.C. 528, 24 S.E.2d 446 (1943)).

The alleged agreement between plaintiff and defendant was to divide the assets of Lewis' estate, which included both real and personal property. Therefore, the agreement is unenforceable because it was not in writing.

We hold that the trial court did not err in granting defendant's motion for summary judgment.

AFFIRMED.

Chief Judge MARTIN and Judge DILLON concur.

GRANT A. LOOSVELT, PLAINTIFF/FATHER
v.
STACY LEIGH BROWN, DEFENDANT/MOTHER

No. COA13-747

Filed 15 July 2014

1. Child Custody and Support—pre-birth non-medical expenses—not allowed

In an action to establish paternity, custody, and support, an award for nursery expenses and maternity clothes incurred prior to the child's birth was reversed. The legal obligation arises when the child is born and expenses incurred prior to the child's birth cannot be considered as retroactive child support, with the only exception being medical expenses as allowed by statute. While it is reasonable to incur expenses in preparation for the birth of a baby, there is no evidence or argument that nursery expenses and maternity clothes could qualify as "medical expenses" under even the most generous definition.

2. Child Custody and Support—retroactive support—post-birth expenses—date incurred—insufficient evidence

A retroactive child support award for nursery expenses and basic needs incurred after the child's birth was reversed for

insufficient evidence that the expenses were incurred prior to filing the complaint.

3. Child Custody and Support—retroactive support—ability to pay—relevant time period

An award of retroactive child support for post-birth expense for daycare, child care, and the child's birth was remanded for findings as to plaintiff's ability to pay during the time period for which reimbursement was sought.

4. Child Custody and Support—retroactive support—allotment of expenses

An award of retroactive child support was remanded partly because the appellate court could not discern from the findings why the trial court failed to allot any portion of the retroactive expenses as defendant's responsibility.

5. Child Custody and Support—support—plaintiff's income—findings

An award of prospective child support was remanded for findings as to the monetary value of plaintiff's income and any other findings of fact or conclusions of law necessary to set an appropriate child support amount. The trial court's findings listed plaintiff's average gross monthly income and stated that plaintiff "is a man with substantial income," but there was no finding as to plaintiff's actual income. Furthermore, the income on which the court based the finding that plaintiff was able to pay the child support ordered was not clear, and it did not make any findings which would permit consideration of plaintiff's estate as supporting his ability to pay child support.

6. Child Custody and Support—support—child's reasonable needs—findings

Where a child support award was remanded for other reasons, the trial court was also instructed to make findings of fact with monetary values as to the child's reasonable needs in light of the abilities of the parents to provide support. The amount of child support ordered far exceeded the actual needs of the child based upon the child's historical individual expenditures. Although the trial court has the discretion to award child support in excess of actual historical expenses based upon plaintiff's financial position, the findings of fact as to how this amount was established must be detailed enough to permit appellate review.

7. Child Custody and Support—support—earnings and conditions of parties—non-quantifiable contributions—findings

Where a child support order was remanded for several reasons, the trial court was ordered on remand to take into account the earnings, conditions and standard of living of both parties in a manner reviewable on appeal. Not all of the factors under N.C.G.S. § 50-13.4(c) can be quantified and it is appropriate for the trial court to consider the fact that defendant bears 100% of the daily responsibilities of child care and making a home for the child. If the court does so, it should make reviewable findings.

8. Attorney Fees—child custody and support—custody still at issue—findings

Child custody was still at issue when a judgment concerning child support was entered and the trial court was not required to find that plaintiff had refused to provide prior support to the child when awarding attorney fees. Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order.

9. Attorney Fees—child custody and support—findings sufficient—no necessity for ability to pay

The trial court made sufficient findings of fact to support the award of attorney fees in a child custody and support action. There is no requirement of a finding that the party being ordered to pay have the ability to pay.

Appeal by plaintiff from order entered 1 April 2013 by Judge Donnie Hoover in District Court, Mecklenburg County. Heard in the Court of Appeals 19 November 2013.

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

James, McElroy & Diehl, P.A., by Preston O. Odom, III, by defendant-appellee.

STROUD, Judge.

Plaintiff appeals order regarding permanent child custody and child support. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

Plaintiff, a resident of Los Angeles, California, filed a complaint in North Carolina against defendant, a resident of Charlotte, North Carolina. Plaintiff sought to establish the paternity of a child born out of wedlock, to determine custody, and an order addressing the parties' support obligations. On 7 December 2011, defendant filed an answer and counterclaims seeking child custody, child support, and attorney fees. On or about 10 April 2012, defendant filed a request "to upwardly deviate from the North Carolina Child Support Guidelines[.]" On 7 May 2012, plaintiff replied to defendant's counterclaims admitting "it is in the best interest of the minor child that his primary custody be awarded to" defendant, stating that "child support should be awarded in accordance with North Carolina law[,]" and denying allegations related to defendant's request for attorney fees.

On 24 May and 20 June 2012, both *nunc pro tunc* to 16 April 2012, the trial court entered temporary child support orders. The trial court ordered that plaintiff make monthly child support payments in the amount of $2,317.00. Defendant's claim for retroactive child support was to be heard at a later date along with her claim for attorney fees.

On 1 April 2013, *nunc pro tunc* to 4 January 2013, the trial court entered a corrected order regarding permanent child custody and child support finding that because the aggregate of the parties' adjusted gross incomes exceeded $25,000.00 per month, the North Carolina Child Support Guidelines were not controlling for this case. The order established paternity and custody of the minor child, set plaintiff's retroactive and prospective child support obligations as well as arrearages, and awarded attorney fees to defendant. As to the child support obligations and attorney fees, the trial court ordered:

> 4. Effective November 1, 2012, and continuing on the first (1st) day of each month thereafter until modified by this Court. Plaintiff/Father shall pay child support to Defendant/Mother in the amount of $7,342.84 per month. All payments shall be made directly to Defendant/Mother on or before the first (1st) day of each month.
>
> 5. Plaintiff/Father shall be responsible for ninety percent (90%) and Defendant/Mother shall be responsible for 10 percent (10%) of all uninsured medical, dental, optical, orthodontic, therapy, counseling, prescription drug expenses, and any other expenses incurred by the minor

> child in connection with his healthcare that is not covered by the major medical insurance provider(s). In the event Defendant/Mother is required to advance any of the foregoing expenses to be paid by Plaintiff/Father as set forth above, Plaintiff/Father shall reimburse Defendant/Mother within thirty (30) days of the receipt of written verification of said expenses.
>
> 6. Plaintiff/Father's child support arrearage in the amount of $15,077.52 shall be paid in full on or before March 5, 2013.
>
> 7. Plaintiff/Father's retroactive child support obligation in the amount of $39,655.27 shall be paid in full on or before March 5, 2013.
>
> 8. Defendant/Father shall pay to Plaintiff/Mother's counsel the sum of $24,942.21 to partially defray Plaintiff/Mother's legal fees. Defendant/Father shall make this payment directly to Claire J. Samuel, James, McElroy & Diehl, P.A., 600 South College Street, Charlotte, NC 28202 on or before March 15, 2013.

Plaintiff appeals.

II. Retroactive Child Support

Plaintiff first argues that the trial court erred in awarding retroactive child support because the trial court "[f]ailed to [m]ake [f]indings of [f]act to [s]upport its [a]ward[,]" lacked evidence to support its award, and failed to apportion the expenses incurred between both parties. Our Court has stated:

> an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took due regard of the factors enumerated in the statute, namely, the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

> These findings must, of course, be based upon competent evidence, and it is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it. In short, the evidence must support the findings, the findings must support the conclusions, and the conclusions must support the judgment; otherwise, effective appellate review becomes impossible.

Atwell v. Atwell, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985) (citations, quotation marks, and ellipses omitted). Furthermore,

> [c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Leary v. Leary, 152 N.C. App. 438, 441-42, 567 S.E.2d 834, 837 (2002) (citations and quotation marks omitted).

"The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet the needs." *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (citation, quotation marks, and brackets omitted). Retroactive child support encompasses "[c]hild support awarded prior to the time a party files a complaint[.]" *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (citation and quotation marks omitted). "However, retroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period. Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary." *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795 (citation, quotation marks, and brackets omitted).

A. Findings of Fact as to Retroactive Child Support Expenses

The trial court awarded defendant retroactive child support from October 2010, the date of the child's birth, through November 2011, the month following the filing of plaintiff's complaint. The retroactive child support award of $39,655.27[1] was reimbursement for the following:

- "$5,160 in nursery expenses prior to [the child's] birth"
- "806.13 in maternity clothes prior to [the child's] birth"
- "$460.00 in additional daycare cost for [the child] from October 28, 2011 through March 20, 2012"
- "$1,313.54 in nursery expenses after [the child's] birth"
- "$6,485.67 in expenses related to the minor child's basic needs (i.e. baby food, diapers, formula, and clothing) after the minor child's birth"
- "$11,520.00 to provide work-related child care" in 2011
- "$8,800.00 to provide work-related child care" in 2010
- "5,479.93 in expenses related to the minor child's birth"

Because these expenses raise different evidentiary and legal issues, we will separately address them.

1. Nursery Expenses and Maternity Clothes Prior to Birth

[1] The award for expenses incurred prior to the child's birth appears to raise a novel legal issue. We have found no authority, either in North Carolina or in any other state that addresses recovery of expenses incurred prior to the child's birth for nursery expenses or maternity clothes as retroactive child support. Apparently, defendant did not find any law to support this proposition either, as her argument is that "the fact that a 'father's duty to support his child arises when the child is born[,]' *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976), does not preclude awarding retroactive child support covering expenditures incurred before a child's birth." Defendant seeks to analogize these expenses to medical expenses under North Carolina General Statute § 49-15. But we find that because (1) the child support obligation does not arise until birth and (2) North Carolina has a statute which limits recovery of pre-birth expenses to medical expenses, there is no legal

1. We note that these expenses actually add up to $40,025.27, although neither party has challenged the accuracy of the numbers in the trial court order.

basis for an award of any other types of expenses incurred prior to birth. *See* N.C. Gen. Stat. § 49-15 (2011); *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991).

"A parent's obligation to support his child arises *when the child is born*, not when the courts order a specific amount to be paid." *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991) (emphasis added). As the legal obligation arises when the child is born, expenses incurred prior to the child's birth cannot be considered as retroactive child support; *see Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795; *Freeman*, 103 N.C. App. at 803, 407 S.E.2d at 263, the only exception to this rule is North Carolina General Statute § 49-15[2] which allows for "medical expenses incident to the pregnancy and birth of the child." N.C. Gen. Stat. § 49-15. While many mothers reasonably incur expenses of many types in preparation for the birth of a baby, our General Assembly has provided for recovery of only one type of pre-birth expense, medical expenses, pursuant to North Carolina General Statute § 49-15. *See id.* Medical expenses related to the pregnancy are necessarily incurred before birth of the child, but there is no evidence or argument that these nursery expenses and maternity clothes could qualify as "medical expenses" under even the most generous definition. *Id.* Accordingly, we must reverse the award for nursery expenses and maternity clothes incurred prior to the child's birth.

2. Nursery Expenses and Basic Needs After Birth

[2] For the nursery expenses incurred after the child's birth and the expenses incurred for the child's basic needs, we conclude there was not sufficient evidence to support an award of these expenses as retroactive child support because defendant did not present evidence that these expenses were actually incurred prior to the filing of the complaint. Defendant herself concedes that her evidence required the trial court "to draw the reasonable inference" regarding the dates of the expenses. Defendant's exhibit listing the expenses showed only the merchant from which the purchase was made and the amount of the expense; defendant does not direct our attention to any evidence before the trial court, including her testimony, providing any dates for when

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2. North Carolina General Statute § 49-15 provides that "[u]pon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child." N.C. Gen. Stat. § 49-15.

the expenses were incurred. As retroactive child support may only be awarded for expenses incurred "prior to the time a party files a complaint[,]" *Carson*, 199 N.C. App. 105, 680 S.E.2d at 888, the trial court needed actual evidence upon which to determine when such expenses were incurred. Defendant's evidence did not provide sufficient detail as to the dates that these expenses were incurred such that the trial court could reasonably find that they were incurred prior to the filing of the complaint. We reverse the award of nursery expenses and basic needs expenses incurred after the child's birth.

3. Daycare, Child Care, and Birth Expenses

[3] For the expenses regarding daycare, child care, and the child's birth, plaintiff does not challenge the timing of these expenses or the evidence supporting the amounts awarded. Thus, the trial court's findings as to these expenses are binding on this court. *See Powers v. Tatum*, 196 N.C. App. 639, 640, 676 S.E.2d 89, 91 ("Where [a party] fails to challenge any of the trial court's findings of fact on appeal, they are binding on the appellate court[.]"), *disc. review denied*, 363 N.C. 583, 681 S.E.2d 784. As to these expenses, plaintiff challenges only the trial court's findings as to his ability to pay the award of retroactive child support, arguing that the trial court was required to make findings of fact regarding plaintiff's "ability to pay such amounts 'during the time for which reimbursement is sought[,]' " and "the trial court was required to exercise some amount of discretion to determine what portion of the expenses . . . [defendant] purportedly incurred . . . represent[ing] her share of support." As plaintiff's ability to pay child support is actually a broader issue implicating more than just daycare, child care, and birth expenses, we separately address it below.

B. Ability to Pay Retroactive Child Support

Plaintiff contends that the trial court was required to make findings regarding his ability to pay child support "during the period in which [the expenses] were purportedly incurred." In *Hicks v. Hicks*, this Court stated that the trial court must make findings as to the obligor's ability to pay during the time period of the retroactive support sought:

> What the defendant should have paid is not the measure of his liability to plaintiff. The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support. In determining this amount the court must take into consideration the needs of the children and *the ability of the defendant to pay during the time for which reimbursement*

> *is sought.* The plaintiff is not entitled to be compensated for support for the children provided by others, nor is she entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge, considering "the relative ability of the parties to provide support[.]"

34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977) (emphasis added) (citations, quotation marks, and ellipses omitted). "[T]he time for which reimbursement is sought[,]" *id.*, is not the time when this case was heard, as defendant contends -- that would be the time at which reimbursement is sought -- but is instead the time period during which the expenses were incurred. *See Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 903 (1991) ("An award of retroactive child support must also take into account the defendant's ability to pay during the period *in the past* for which reimbursement is sought." (emphasis added)).

Here, the trial court specifically found that "Plaintiff/Father has the ability to pay the child support ordered herein" and "Plaintiff/Father's income is more than sufficient to cover the awards contained herein based on his monthly expenditures and income." Yet the trial court failed to make findings of fact as to plaintiff's ability to pay for the time period for which reimbursement was sought, specifically, from the pre-birth medical expenses incurred until the filing of the complaint, the relevant time period for retroactive child support. *See Carson*, 199 N.C. App. at 105, 680 S.E.2d at 888, *see also* N.C. Gen. Stat. § 49-15. Therefore, we reverse and remand the order for the trial court to make findings of fact as to plaintiff's ability to pay during that time period for which reimbursement was sought.

C. Allotment of Retroactive Child Support Expenses

[4] In addition, plaintiff raises a related issue of the trial court's apportionment of retroactive support. Plaintiff contends "the trial court was required to exercise some amount of discretion to determine what portion of the expenses . . . [defendant] purportedly incurred related to . . . [defendant's] share of support." We agree that "[t]he measure of [plaintiff]'s liability to [defendant] is the amount actually expended by [defendant] *which represented the* [*plaintiff's*] *share of support.*" *Hicks*, 34 N.C. App. at 130, 237 S.E.2d at 309 (emphasis added). Here, the trial court awarded defendant 100% of each of the expenses listed pursuant to its award of retroactive child support; this indicates that the trial court failed to allot any portion of the retroactive child support expenses as defendant's responsibility. In contrast, we note that the trial

court allocated to defendant 10% of the child's prospective "uninsured medical, dental, optical, orthodontic, therapy, counseling, prescription drug expenses, and any other expenses incurred by the minor child in connection with his healthcare that is not covered by the major medical insurance provider(s)[;]" we cannot discern from the findings in the order why defendant has responsibility for 10% of these prospective expenses but has no responsibility for the retroactive expenses.

D. Summary as to Retroactive Child Support

In summary, as to the award of retroactive child support, we reverse the award for nursery expenses and maternity clothes prior to the child's birth because there is no legal basis for making such an award. We reverse the award for nursery expenses and basic needs after the birth because there was not sufficient evidence that such expenses were incurred prior to the filing of plaintiff's complaint. We reverse and remand the order as to the expenses for daycare, child care, and birth for the trial court to consider the plaintiff's ability to pay during the time for which reimbursement is sought, how these expenses should be apportioned between plaintiff and defendant, and to make any other findings of fact and conclusions of law necessary to support the award of retroactive child support.

III. Prospective Child Support

[5] Plaintiff next contends that the trial court erred in awarding prospective child support ("child support") because it failed "to [m]ake [s]pecific [f]indings of [f]act [c]oncerning [plaintiff's] [i]ncome and [a]bility to [p]ay [c]hild [s]upport[,]" based its award on plaintiff's income without considering the needs of the child, and abused its discretion in setting defendant's child support obligation and failing to "offset" plaintiff's child support obligation by such amount. Again, we note that we review the child support award to consider if the evidence supports the findings of fact, the findings support the conclusions of law, and the conclusions support the judgment. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

North Carolina General Statute § 50-13.4(c) requires the trial court to consider several factors when establishing a child support obligation:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child

> care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4 (2011). Plaintiff raises arguments regarding several of these factors and we will address each separately.

A. Plaintiff's Income and Ability to Pay

As to plaintiff's income and ability to pay, the trial court made the following findings of fact:

> 12. On October 16, 2012, Plaintiff/Father filed an Amended Financial Affidavit listing his average gross monthly income as being $24,409.66.
>
> . . . .
>
> 16. The child support award set forth herein is necessary to meet the reasonable needs of the minor child related to his health, education and maintenance, having due regard to the estates, earning, conditions, accustomed standard of living of the child and of the parties.
>
> . . . .
>
> 18. Plaintiff/Father is an able-bodied man who is gainfully employed and fully capable of paying to Defendant/Mother, for the benefit of the minor child, child support in the amount set forth herein.
>
> 19. Plaintiff/Father is a cosmetic dentist in Beverly Hills and Los Angeles, California. Plaintiff/Father has served on the faculty at UCLA's School of Dentistry and is a member at Century City Hospital. Plaintiff/Father has also appeared on the ABC shows Extreme Makeover and Average Joe.
>
> 20. Plaintiff/Father has the ability to pay the child support ordered herein.
>
> 21. Plaintiff/Father is a man with substantial income.
>
> 22. Plaintiff/Father's spending is inconsistent with the income reported on his Amended Financial Affidavit.
>
> 23. Plaintiff/Father's average monthly spending according to his testimony and his checking account statements for his Chase Checking Accounts ending #8427

and #8435 reflect that he spends an average of $88,617.80 per month.

24. At the time of trial, Plaintiff/Father had no credit card debt.

25. Plaintiff/Father owns and pays for two (2) luxury residences in Los Ang[e]les, California at a cost of approximately $12,000.00 per month.

26. In nine and a half (9 ½) months, Plaintiff/Father spent $31,322.85 on vacations or an average of $3,297.14 per month.

27. In two (2) months, Plaintiff/Father spent $51,000.00 on jewelry, or an average of $25,500.00 per month.

28. Plaintiff/Father . . . spent $1,466.78 for alcohol in three (3) days.

. . . .

34. Plaintiff/Father has monthly shared family expenses of $15,446.54 and monthly individual expenses of $6,937.00, as reflected on his Amended Financial Affidavit.

. . . .

36. Plaintiff/Father should have a child support obligation of $7,342.84 per month ($5,148.84 (1/3 of Plaintiff/Father's shared family expenses) +$2,194.00 ([the child's] individual expenses) = $7,342.84).

. . . .

38. Plaintiff/Father's child support obligation should be made effective to November 1, 2012.

39. Plaintiff/Father currently has a child support arrearage of $15,077.52 through January 2013 ($7,342.84 x 3 months = $22,028.52 less $6,951.00 paid = $15,077.52).

. . . .

44. Plaintiff/Father should pay ninety percent (90%) of the minor child's uninsured medical expenses.

. . . .

> 46. The provisions of this Order regarding support of the minor child are fair and reasonable under the existing circumstances.

Only two of these findings address plaintiff's income: finding of fact number 12 which finds that his financial affidavit listed his average gross monthly income as $24,409.66,[3] and finding of fact number 21 which finds that plaintiff "is a man with substantial income."

When a trial court is considering child support outside of the North Carolina child support guidelines, the trial court must make sufficient findings as to the parties' incomes and ability to pay to permit appellate review:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case. [N.C. Gen. Stat. § 50-13.4(c)].
>
> . . . .
>
> Where, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment -- and the legal conclusions which underlie it -- represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

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3. This "finding of fact" is actually a recitation of evidence and not a finding by the trial court; this is apparent from the fact that the trial court ultimately determined that plaintiff has more income than what he listed on his affidavit.

> Under G.S. 50-13.4(c), quoted *supra*, an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned. In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Coble v. Coble, 300 N.C. 708, 711-13, 268 S.E.2d 185, 189 (1980) (citations and quotation marks omitted); *see also Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

In *Coble*, the trial court had found that the "plaintiff is in need of financial assistance for the support of the minor children and that defendant is capable of providing such assistance." *Id.* at 713, 268 S.E.2d at 189. Our Supreme Court noted that "[t]his finding is more properly denominated a conclusion of law, since it states the legal basis upon which defendant's liability may be predicated under the applicable statutes, G.S. 50-13.4(b) and (c). As a conclusion of law, it must itself be based upon supporting factual findings." *Id.* (quotation marks omitted). The Court then determined that the findings of fact failed to support the conclusion, since the only relevant finding of fact was that the:

> [d]efendant's monthly net income is approximately $483.32, plus an indeterminable amount earned from overtime work, and yet her monthly expenses are approximately $510.00. To the degree that this finding indicates that defendant's living expenses tend to exceed her average income, it would seem to negate, rather than support, the conclusion that she is capable of providing support payments. Moreover, the next part of finding No. 12 shows

> that although the monthly financial needs of the children average approximately $432.00, plaintiff's net monthly income is approximately $825.00. Far from supporting the conclusion that plaintiff is in need of partial assistance in meeting his support obligation, this part of the finding suggests instead that he is capable of sufficiently providing for his children on his own. On the face of the order alone, therefore, finding No. 12 does not support the trial court's conclusions as to either plaintiff's financial need for support assistance or defendant's financial ability to provide it. In the absence of other findings which support these conclusions, then, the order awarding plaintiff partial child support cannot be sustained.

Id. (quotation marks omitted).

In the case before us, the trial court's findings of fact are of similar import. *Compare id.* Again, only two of the trial court's findings address plaintiff's income: finding of fact number 12 which finds that his financial affidavit listed his average gross monthly income as $24,409.66, and finding of fact number 21 which finds that plaintiff "is a man with substantial income." There is no finding of fact as to plaintiff's actual income, only that it is "substantial[.]" We can infer that "substantial" here means more than $24,409.66 but we cannot, determine what the trial court found plaintiff's income to be. Furthermore, the trial court found that although plaintiff claims to earn $24,409.66 on average per month, he actually spends an average of $88,617.80 per month. Here, the trial court clearly assumed that the plaintiff's income is quite significantly more than $25,000 per month, but we have no way of knowing what number the trial court had in mind.[4]

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4. Plaintiff also implies that the trial court imputed income to him due to what it may have found to be extravagant expenditures. We do not believe this is so, but if the trial court was actually imputing income to plaintiff, this would be error, as there were no findings of fact that that defendant was suppressing his income intentionally or spending excessively to avoid his child support obligation. *See generally Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 703-04 (2014) (addressing defendant's argument that the trial court erred in the amount of income it imputed to him: "Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities[.] This showing may be met by a sufficient degree of indifference to the needs of a parent's children." (citation, quotation marks, ellipses, and brackets omitted)). While certainly the trial court may find plaintiff's evidence not to be credible, the trial court must still make an actual finding as to plaintiff's income.

Normally, findings as to the incomes of the parties are stated in monetary amounts of dollars per month or year. Although these numbers might even be averages or approximations, particularly when a parent does not receive a set monthly paycheck, a finding of an actual monetary amount of income will permit this Court to review the findings based upon the evidence.[5] While the trial court did give some regard "to the estates, earnings, conditions, accustomed standard of living of the" parties, it failed to make a finding of fact as to plaintiff's income which is definite enough for this Court to review. N.C. Gen. Stat. § 50-13.4(c). Furthermore, while the trial court specifically found plaintiff was able to pay the child support ordered, the income the trial court was basing this finding on is unclear, and thus leaves this Court also unable to review the finding of plaintiff's ability to pay.

In addition, even though the trial court's order contained some findings as to "the estates[,]" N.C. Gen. Stat. § 50-13.4(c), of the parties, particularly plaintiff, it did not make any findings which would permit consideration of plaintiff's estate as supporting his ability to pay child support; rather, the findings of fact addressed only the expenses plaintiff has incurred. For example, the trial court found that "Plaintiff/Father owns and pays for two (2) luxury residences in Los Ang[e]les, California at a cost of approximately $12,000.00 per month." Having a large house payment does not necessarily equate to having a substantial estate; it can mean just the opposite. The trial court did not find the value of these "luxury residences[,]" whether plaintiff's indebtedness on these residences equals or exceeds their values, or any other facts regarding the net value of plaintiff's estate.

Accordingly, we reverse and remand the award of prospective child support for the trial court to make findings as to the monetary value of plaintiff's income and any other findings of fact or conclusions of law necessary to set an appropriate child support amount. We note that plaintiff also makes arguments as to the specific evidence the trial court should rely upon on remand in making its determination as to what his income is, but we will not address this, since arguments about which evidence should weigh more heavily are properly directed to the trial

5. We also note that without an actual monetary number for the income it could be difficult for either party to prove the need for a modification of child support in the future based upon a change in circumstances, as the trial court would have to determine what the plaintiff's "substantial" income actually was in 2012 and whether any alleged change in the plaintiff's income would be sufficient to support modification. *See generally* N.C. Gen. Stat. § 50-13.7(a) (2011) ("Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party[.]")

court, which has the discretion to determine the credibility and the weight of the evidence. *See Coble*, 300 N.C. at 712-13, 268 S.E.2d at 189.

B. Reasonable Needs of the Child

[6] While we are reversing and remanding the child support award for the reasons noted above, plaintiff also has argued that the trial court failed to consider the child's actual needs in setting the amount of child support. The child support ordered in the amount of $7,342.84 per month far exceeds the actual needs of the child based upon the child's historical individual expenditures as found by the trial court, which were $2,194.00 per month. Although the trial court has the discretion to award child support in excess of actual historical expenses based upon plaintiff's financial position, the findings of fact as to how this amount was established must be detailed enough to permit review:

> Whatever may have been the rule at common law, a father's duty of support today does not end with the furnishing of mere necessities if he is able to afford more. In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.
>
> In *Hecht v. Hecht*, 189 Pa. Super. 276, 283, 150 A.2d 139, 143, Woodside, J., observed:
>
> > Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the advantages, but most parents strive and sacrifice to give their children advantages which cost money. Much of the special education and training which will be of value to people throughout life must be given them when they are young, or be forever lost to them.
>
> What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might

> properly be deemed necessaries by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. In determining that amount which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse.
>
> It is never the purpose of a support order to divide the father's wealth or to distribute his estate. Furthermore, even though the father be a man of great wealth, an excessive award which would encourage extravagant expenditures either by the child or in his behalf would not be in his best interest.

Williams v. Williams, 261 N.C. 48, 57-58, 134 S.E.2d 227, 234 (1964) (citations, quotation marks, and ellipses omitted); *Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

The trial court's order seems to "divide the father's wealth" by basing child support upon a number calculated by adding one-third of plaintiff's "shared family expenses" to the child's historical individual expenses. *Id.* at 58, 134 S.E.2d at 234. The order also finds that plaintiff resides in Los Angeles, California, but fails to make any findings of fact as to how plaintiff's expenses incurred in California, which apparently do not include any child-related expenditures, relate to the expenses of raising a child, even the child of a wealthy parent, in Charlotte, North Carolina.

A child support award can be made by using estimates of needs based upon the higher standard of living made possible by plaintiff's means, but the trial court must make findings of fact which assign a monetary value to these needs. *See Payne v. Payne*, 91 N.C. App. 71, 75, 370 S.E.2d 428, 431 (1988) ("Although an equation for child support does not lend itself to an exact mathematical calculation, it is difficult, if not impossible, to know whether a trial judge has made a complete and reasonable assessment of the child's needs and the parties' abilities to pay when the needs-variable has no monetary value."). As such, upon remand we also instruct the trial court to make findings of fact, specifically with monetary values, as to the child's reasonable needs in light of the abilities of the parents to provide support.

C. Defendant's Child Support Obligation

[7] The trial court found defendant's portion of responsibility for support of the minor child to be $100.00 per month, which plaintiff argues is

too low, but at the very least should offset his own obligation by $100.00. But the order does not state that the total child support obligation of both parents is $7,342.84 per month, but rather that "Plaintiff/Father should have a child support obligation of $7,342.84 per month[,]" and thus we see no merit in his argument that his child support obligation should be reduced by defendant's child support obligation. But, as discussed above, we are reversing and remanding the child support award for several reasons, and on remand the trial court should take into account, in a manner this Court can review, "the estates, earnings, conditions, accustomed standard of living" of *both* parties in calculating the child support obligation. N.C. Gen. Stat. § 50-13.4(c); *see Coble v. Coble*, 300 N.C. at 712, 268 S.E.2d at 189. The trial court found unchallenged that defendant did have an income, and the trial court must consider the relative abilities and financial circumstances of both parties; though plaintiff's earnings and estate may be far greater than defendant's, defendant's circumstances must also be taken into account. *See* N.C. Gen. Stat. § 50-13.4(c); *Coble v. Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

But despite the need for findings with monetary amounts for incomes and expenses, we acknowledge that not all of the factors under North Carolina General Statute § 50-13.4(c) can be quantified. *See* N.C. Gen. Stat. § 50-13.4(c). The trial court is directed to take into account "the child care and homemaker contributions of each party, and other facts of the particular case[,]" in setting child support; *id.*, these factors are less susceptible to descriptions in monetary terms. Particularly, in a case such as this, where plaintiff lives thousands of miles away and has no role at all in the child's daily care and life, it is appropriate for the trial court to consider the fact that defendant bears 100% of the daily responsibilities of child care and making a home for the child. *See id.* Only defendant will make the daily physical and emotional sacrifices required to raise a child. All the law requires of plaintiff is to make a monthly payment. If the trial court does consider defendant's non-monetary, but truly priceless, contributions, it should make findings of fact regarding those contributions so that its use of this factor may be reviewed on appeal. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

D. Summary of Prospective Child Support

In summary, we reverse the trial court's award for child support and remand for the trial court to make specific findings of fact, including plaintiff's income stated in a monetary value, plaintiff's ability to pay, the child's reasonable needs stated in a monetary value, and to make any further findings of fact or conclusions of law that would be necessary

to set support obligations for both parties in a manner that would be reviewable by this Court.

IV. Attorney Fees

[8] Lastly, plaintiff argues that the trial court erred in awarding attorney fees to defendant. Plaintiff challenges the finding of facts supporting the award.

A. Finding Regarding Refusal to Provide Support

> In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6 (2011). "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Simpson v. Simpson*, 209 N.C. App. 320, 323, 703 S.E.2d 890, 892 (2011) (citations and quotations omitted).

Plaintiff contends,

> [t]he trial court made no finding [he] "refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." It is well established that in a child support, action, this finding is a necessary prerequisite to an award of attorneys' fees. *Hudson*, 299 N.C. at 472-73, 263 S.E.2d at 723-24.

Indeed,

> [b]efore a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when the action was initiated. *On the other hand, when the*

> *proceeding or action is for both custody and support, the court is not required to make that finding.*

Spicer v. Spicer, 168 N.C. App. 283, 296, 607 S.E.2d 678, 687 (2005) (emphasis added) (citation omitted). Plaintiff thus contends that his action was only an action for support.

Plaintiff, citing *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 199 (1984), argues that "the mere fact a lawsuit includes claims for support and custody does not convert a proceeding into one for both custody and support where custody is not contested." Plaintiff then directs our attention to the fact that both parties agreed from the outset of this case that defendant would have sole legal and physical custody of the child. However, *Gibson* states,

> the issue of custody had been settled in *Hudson* by a consent order entered twenty months prior to the order concerning the child support while here the issue of custody, though uncontested, was settled by the judgment of the court some five months prior to the entry of the child support judgment. *What appears to be important, however, is not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered.*

Gibson, 68 N.C. App. at 574, 316 S.E.2d at 105 (emphasis added).

Here, the order being appealed from is entitled "ORDER (RE: PERMANENT CHILD CUSTODY AND CHILD SUPPORT)[.]" Furthermore, unlike in *Hudson* and *Gibson*, *see id.*, the order on appeal is the first and only order that grants legal and physical custody of the child to defendant. Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order which also addresses child support. Custody was therefore "at issue when the judgment concerning support was entered[;]" *id.*, so this was an action for custody and support, and the trial court was not required to find that plaintiff had refused to provide prior support to the child. *See* N.C. Gen. Stat. § 50-13.6; *Spicer*, 168 N.C. App. at 296, 607 S.E.2d at 687.

B. Other Findings of Fact

Lastly, plaintiff contends that "[t]he trial court's findings of fact do not support the amount of its award of attorneys' fees" because "the trial court made no findings as to the actual hours spent or what any of

the three lawyers representing . . . [defendant] did or the time they spent on the case, or the reasonableness of the work or time spent" or defendant's attorneys' "skill or experience." Plaintiff again also notes that the failure of the trial court to find his income meant it could not rightfully find he had the ability to pay the attorney fees. We disagree.

The trial court reviewed the attorney fee affidavits and found the fees to be "necessary and reasonable[;]" the trial court also made several findings of fact regarding defendant's attorney fees including, the necessity and reasonableness of the fees, the attorney's rate, that the rate is reasonable as compared to others with like experience and skill, the "reasonable rates" of others in the firm who assisted on the case, and the total amounts charged. We conclude that the trial court made sufficient findings of fact to support the award of attorney fees.

Regarding plaintiff's ability to pay the award of attorney fees, plaintiff has cited no authority requiring the trial court to find he is able to pay defendant's attorney fees. North Carolina General Statute § 50-13.6 provides in relevant part simply that

> [i]n an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit[;]

N.C. Gen. Stat. § 50-13.6, the statute has no requirement that the trial court also find that the party being ordered to pay these fees have the ability to pay, and although some cases have mentioned an obligor's ability to pay, we have found no requirement that a trial court make this finding of fact. North Carolina General Statute § 50-13.6 places this matter in the trial court's discretion, *see id.*, and plaintiff has failed to demonstrate an abuse of discretion as to the trial court's attorney fee award.

C. Summary of Attorney Fees

In summary, we affirm the trial court's award for attorney fees.

V. Conclusion

In conclusion, for the award of retroactive child support, we reverse the award for nursery expenses and maternity clothes prior to the child's birth because there is no legal basis for making such an award;

we reverse the award for nursery expenses and basic needs after the birth because there was not sufficient evidence that such expenses were incurred prior to the filing of plaintiff's complaint; and we reverse and remand the order as to the expenses for daycare, child care, and birth for the trial court to consider the plaintiff's ability to pay during the time for which reimbursement is sought and how these expenses should be apportioned between plaintiff and defendant. As to the award of prospective child support, we reverse the trial court's award for child support and remand for the trial court to make specific findings of fact, including plaintiff's income stated in a monetary value, plaintiff's ability to pay, the child's reasonable needs stated in a monetary value, and to make any further findings of fact or conclusions of law that would be necessary to set support obligations for both parties in a manner that would be reviewable by this Court. As to the award of attorney fees, we affirm.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges McGEE and BRYANT concur.

RON D. MEYER, Plaintiff-Appellant
v.
RACE CITY CLASSICS, LLC, Defendant-Appellee

No. COA13-1371

Filed 29 July 2014

Jurisdiction—personal—North Carolina Corporation—Nebraska judgment

A foreign judgment from Nebraska involving the purchase of a classic car was valid and enforceable in North Carolina where the Nebraska trial court properly exercised personal jurisdiction over the North Carolina defendant. Defendant intentionally directed its actions towards Nebraska, plaintiff's inability to use and enjoy the car resulted from defendant's contacts with Nebraska, it was foreseeable that any hindrance to plaintiff's use and enjoyment of the car caused by defendant's misrepresentations would occur in Nebraska, and defendant could reasonably have anticipated being haled into court in Nebraska. Defendant did not show that defending the suit

in Nebraska would have been unduly burdensome to the extent that it would offend notions of fair play and substantial justice.

Appeal by Plaintiff from order entered 21 October 2013 by Judge H. Thomas Church in District Court, Iredell County. Heard in the Court of Appeals 7 April 2014.

Pope McMillan Kutteh & Schieck, P.A., by William H. McMillan and Matthew J. Pentz, for Plaintiff-Appellant.

Homesley, Gaines & Dudley, LLP, by Edmund L. Gaines and Leah Gaines Messick, for Defendant-Appellee.

McGEE, Judge.

Ron D. Meyer ("Plaintiff") saw a 1970 Ford Mustang ("the car") in an advertisement placed by Race City Classics, LLC, ("Defendant") on the website classiccars.com in July of 2012. Defendant is a business, located in Iredell County, that specializes in the consignment and sale of classic cars. Defendant also placed advertisements on carsforsale.com, on eBay, and on its own website. Plaintiff, a resident of Nebraska, contacted Defendant and, through a series of telephone calls and emails, Plaintiff and Defendant reached an agreement whereby Plaintiff would pay Defendant $21,000.00 to purchase the car. Thomas M. Alphin ("Alphin"), one of Defendant's owners, handled the negotiations for Defendant. Plaintiff wired the full amount of $21,000.00 to Defendant. Plaintiff did not come to North Carolina at any time during the negotiation and purchase transaction. Plaintiff wanted the car shipped to his home in Nebraska, telling Defendant that Plaintiff planned to present the car at vehicle car shows in Nebraska.

Alphin sent Plaintiff an email in which Alphin stated: "I lined up a shipper, and he will give me the price tomorrow." In a subsequent email to Plaintiff, Alphin stated:

> I have the shipping lined up and it is something I can't control. They put it out and have a driver accept the bid and they come and get it. I had it on multiple sites looking for the best quote, and Alpine was the best so I went ahead and booked it for you. I paid $380, so your cost is $345.

The car was delivered to Plaintiff in Nebraska, but Plaintiff was dissatisfied with the condition of the car. Plaintiff requested that Defendant refund the purchase price, but Defendant refused.

Plaintiff filed an action for damages against Defendant in Nebraska state court. Plaintiff contended that, upon receipt of the car, the "paint on the car was cracked at various spots, the front hood was out of alignment, the trunk could not be opened and the car could not be started." Defendant, after being served with notice of the action, failed to appear to contest Plaintiff's claims and the Nebraska court entered a default judgment against Defendant in the amount of $8,942.30 on 26 February 2013. That was the amount the Nebraska court found necessary to repair the problems alleged by Plaintiff.

Pursuant to N.C. Gen. Stat. § 1C-1703, Plaintiff filed a "Docketing of Foreign Judgment" and the default judgment from the Nebraska state court in Iredell County Superior Court on 30 May 2013. Plaintiff also filed, pursuant to N.C. Gen. Stat. § 1C-1704, a "Notice of Filing Foreign Judgment" on the same day. Pursuant to N.C. Gen. Stat. § 1C-1705(a), Defendant filed a "Motion for Relief Against Foreign Judgment" on 18 June 2013, contending the Nebraska court lacked personal jurisdiction over Defendant. Pursuant to N.C. Gen. Stat. § 1C-1705(b), Plaintiff then filed a "Motion for Enforcement of Foreign Judgment" on 8 July 2013. At a 21 October 2013 hearing, the trial court found Defendant did not have sufficient minimum contacts with the State of Nebraska to confer personal jurisdiction over Defendant to the State of Nebraska. The trial court granted Defendant's "Motion for Relief Against Foreign Judgment" and set aside the docketing of the State of Nebraska foreign judgment. Plaintiff appeals.

I. Standard of Review

In questions of personal jurisdiction, this Court "considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record;' . . . we are not free to revisit questions of credibility or weight that have already been decided by the trial court." *Deer Corp v. Carter*, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006) (citation omitted). "If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights." *Id.* at 321-22, 629 S.E.2d at 165.

II. Analysis

Defendant's Motion for Relief Against Foreign Judgment

Plaintiff argues that the trial court erred in granting Defendant's motion for relief from the Nebraska foreign judgment because Nebraska

courts had personal jurisdiction over Defendant for the cause of action arising out of the sale of the car.

> Generally, one state must accord full faith and credit to a judgment rendered in another state. However, because a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit.
>
> To meet the requirements of a valid judgment, the rendering court must comport with the demands of due process such that it has personal jurisdiction — otherwise known as minimum contacts — over defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945). The Due Process Clause protects an individual's liberty interest in not being subject to the judgment of a forum with which he has established no meaningful contacts or relations. *Id.* "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490 (1980). N.C. Gen. Stat. § 1A–1, Rule 60(b)(4) allows a party to petition for relief from judgment on the grounds that the judgment is void. A void judgment is a legal nullity which may be attacked at any time.

Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc., 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223-24 (1994) (some citations omitted). This Court has held that, in actions to enforce a foreign judgment, the burden of proof on the issue of full faith and credit is on the judgment creditor. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 300, 429 S.E.2d 435, 438 (1993). The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to N.C. Gen. Stat. § 1A-1, Rule 44, establishes a presumption that the judgment is entitled to full faith and credit. *Lust*, 110 N.C. App. 298 at 301, 429 S.E.2d 435 at 437 (citing *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d, 397, 400 (1967)). "This presumption can be rebutted by the judgment debtor upon a showing that the rendering court . . . did not have jurisdiction over the parties[.]" *Id.*

In the present case, Plaintiff filed an authenticated judgment in the Office of the Clerk of Superior Court of Iredell County. Therefore,

Defendant, as the judgment debtor, had the burden of presenting evidence to rebut the presumption that the judgment was valid. We agree with Plaintiff that Defendant has not done so.

Nebraska courts perform a two-step analysis when determining whether a state court's exercise of personal jurisdiction over a defendant is constitutional. *Quality Pork Intern. v. Rupari Food Services, Inc.*, 267 Neb. 474, 480, 675 N.W.2d 642, 649 (2004). First, Nebraska's long-arm statute must authorize the exercise of personal jurisdiction over a defendant. *Id.* Second, the trial court must consider whether minimum contacts exist between the defendant and the forum state and whether such personal jurisdiction may be exercised over the defendant without offending constitutional due process. *Id.*

In the present case, this Court must determine whether Nebraska's long-arm statute authorized personal jurisdiction over Defendant. Neb. Rev. Stat. § 25-536 (1983) reads:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Subsection (2) of the above statute "expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits." *Crete Carrier Corp. v. Red Food Stores, Inc.*, 254 Neb. 323, 328, 576 N.W.2d 760, 764 (1998) (citing *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998)). Therefore, we need only address whether Defendant had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles of due process. *Id.* Depending on the quality and nature of Defendant's contacts with Nebraska, Nebraska's courts may have either general or specific personal jurisdiction over Defendant. *Quality Pork*, 267 Neb. at 482-83, 675 N.W.2d at 650.

Due process for personal jurisdiction over a nonresident defendant requires that the defendant's minimum contacts with the forum state be such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King v. Rudzewicz* 471 U.S. 462, 472, 85 L. Ed. 2d 528, 540 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

In *Burger King*, the United States Supreme Court further held that individuals have fair warning that a particular activity may subject them to a foreign state's specific jurisdiction if the defendant had "purposefully directed" his activities at residents of the forum, and the litigation resulted from alleged injuries that "ar[ose] out of or relate[d] to" those activities. *Burger King*, 471 U.S. at 472, 85 L. Ed. 2d at 540-41 (citations omitted). Even when the cause of action does not arise out of or relate to a defendant's activities in the forum state, the state may exercise general jurisdiction over the defendant when there are sufficiently continuous and systematic contacts between the state and the defendant. *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414-15, 80 L. Ed. 2d 404, 411-12.

Defendant argues that sufficient minimum contacts do not exist for Nebraska state courts to exercise general personal jurisdiction over him because "[t]he sale to this Nebraska resident happened one time, and did not create any sort of systematic or continuous relationship with the state." We agree that Defendant's conduct in this instance was

insufficient to allow Nebraska to obtain general personal jurisdiction over Defendant.

However, the cause of action arose out of Defendant's contact with Nebraska, and we hold that the quality and nature of Defendant's contacts were such that the contacts conferred specific personal jurisdiction over Defendant in Nebraska state courts. Plaintiff first saw the car indirectly through an advertisement Defendant placed on classiccars.com, and Plaintiff and Defendant entered into extensive negotiations for the car immediately after Plaintiff contacted Defendant on 15 July 2012. The negotiations lasted for three days and took place through a series of telephone calls and emails. During these discussions, Alphin told Plaintiff, both verbally and in emails, that everything in the car worked as it should, and that the car "sounded and drove great." Plaintiff told Alphin that Plaintiff intended to present the car at car shows in Nebraska. Plaintiff and Defendant agreed to split the cost of shipment of the car. Plaintiff and Alphin now disagree as to who was responsible for hiring the shipping company. Plaintiff contends that pursuant to agreement of the parties, Alphin handled all the shipping logistics. The emails in the record indicate that Alphin handled the logistics of the car's shipment. Defendant accepted the wire transfer of $21,000.00 from Plaintiff, who resided in Nebraska, as payment for the car.

It logically follows that Alphin knew that if Plaintiff's ability to use and enjoy the car was impaired, such impairment would likely occur in Nebraska. By directing these activities towards Nebraska, Defendant could reasonably have anticipated being haled into court in Nebraska if the car was defective and the quality was less than represented by Defendant. *World-Wide*, 444 U.S. at 297, 62 L. Ed. 2d. at 501.

Furthermore, a single contract is a sufficient contact for due process purposes, even if the defendant has not physically entered the forum state, as long as the contract has a substantial connection to the forum state. *McGee v. Int'l Life Insurance Co.*, 355 U.S. 220, 223, 2 L. Ed. 223, 226 (1957). In *McGee*, a single life insurance contract was sufficient to confer personal jurisdiction over the defendant in California, despite the fact that the defendant had no other contracts in California, did not market its services there, and never had its agents physically enter the state in the course of their employment. *McGee*, 355 U.S. at 222, 2 L. Ed. at 225.

The North Carolina Supreme Court followed this rule in *Williamson Produce, Inc. v. J.H. Satcher, Jr.*, holding: "When a contract bears a substantial connection to the forum state, a defendant who enters into that contract 'can reasonably anticipate being haled into court . . .' in

the forum state." *Williamson Produce, Inc. v. J.H. Satcher, Jr.*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996) (citations omitted). In *Williamson Produce*, the plaintiff initiated negotiations in South Carolina with the defendant, a South Carolina peach farmer. *Id.* at 589, 471 S.E.2d at 97. The plaintiff travelled to South Carolina, where the plaintiff finalized a contract with the defendant to sell the defendant's peaches in North Carolina. *Id.* at 590, 471 S.E.2d at 96. When the defendant breached the contract, the plaintiff sued the defendant in North Carolina. *Id.* at 591, 471 S.E.2d at 97. Since the defendant contracted with the plaintiff to have his peaches sold in North Carolina, the contract bore a substantial connection to North Carolina and the defendant "should not be surprised with being haled into a North Carolina court." *Id.* at 594, 471 S.E.2d at 99 (citation omitted).

In the present case, Plaintiff initiated the negotiations with Defendant for the purchase of the car. Defendant did not physically enter Nebraska, but it contracted with Plaintiff, a Nebraska resident, to sell the car to Plaintiff and have it shipped to Plaintiff's residence in Nebraska. Payment for the car was sent from Plaintiff in Nebraska. Defendant knew Plaintiff intended to show the car at car shows in Nebraska. These aspects of the contract show that the contract had a substantial connection to Nebraska. Therefore, Defendant should not be surprised to have been haled into a Nebraska court when Plaintiff alleged the car was not as Defendant had represented. Defendant's constitutional right to due process was not violated by Plaintiff's action having been initiated in Nebraska.

Defendant argues that because he was never physically in Nebraska, never paid a sales tax in Nebraska, never attended meetings in Nebraska, and never purchased a car in Nebraska, the Nebraska state court lacked personal jurisdiction over him. However, in the above mentioned *McGee* case, the defendant did not physically enter the forum state, did not advertise directly to residents of the forum state, nor did it have any other contracts with residents of the forum state. *McGee*, 355 U.S. at 222, 2 L. Ed. at 225. Yet the forum state's exercise of personal jurisdiction over the defendant in *McGee* was upheld as constitutional. *Id.*

In *Quality Pork*, the Nebraska Supreme Court found that personal jurisdiction existed over Rupari Food Services, Inc. ("Rupari"), a Florida corporation, despite the fact that Rupari had never made any sales into or directly to the State of Nebraska and none of its employees or officers had ever visited Nebraska in the course of their employment with Rupari. *Quality Pork*, 267 Neb. at 478, 675 N.W.2d at 647. Rupari had

contracted to pay for three shipments of Quality Pork's products to Star Food Processing, Inc., a Texas corporation. *Id.* at 477, 675 N.W.2d at 646. Rupari failed to pay for one of the orders, and Quality Pork, a Nebraska corporation, filed an action in Nebraska state court to recover the cost of the third order. *Id.* at 477, 675 N.W.2d at 647.

In its conclusion in *Quality Pork*, the Nebraska Supreme Court stated:

> Quality Pork's claim arose out of Rupari's contacts with a company located in Nebraska. Therefore, in evaluating whether the exercise of specific personal jurisdiction is reasonable, we conclude that it would not be unduly burdensome for Rupari to defend an action in Nebraska. Quality Pork had a valid interest in obtaining convenient and effective relief which supported the bringing of its action in this state. By purposefully conducting business with Quality Pork, Rupari could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from Quality Pork.

Id. at 484-85, 675 N.W.2d at 652.

Similarly, in the present case, Defendant could reasonably anticipate being sued in Nebraska if the car Defendant delivered to Plaintiff was alleged to be not of the quality represented by Defendant to Plaintiff. Plaintiff had a valid interest in obtaining convenient and effective relief, and Defendant presented no evidence to show that defending the lawsuit in Nebraska would be unduly burdensome or that doing so would violate notions of fair play and substantial justice. *Internat. Shoe*, 326 U.S. at 316, 90 L. Ed. at 102.

Finally, case law from this Court, on enforcement of foreign judgments, supports a finding that Nebraska state courts have personal jurisdiction over Defendant. In *Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury, Inc.*, Automotive Restyling Concepts, Inc. ("Automotive"), a Virginia corporation, contracted with Central Service Lincoln Mercury ("Central"), a North Carolina corporation, to restyle four of Central's used cars on Automotive's Virginia premises. *Automotive Restyling Concepts Inc. v. Central Service Lincoln Mercury, Inc.*, 92 N.C. App. 372, 373, 374 S.E.2d 399, 400 (1988). The contract was negotiated and agreed to in North Carolina. *Id.* One of Automotive's employees came to North Carolina and transported the cars to Virginia. *Id.* The cars were restyled in Virginia, but Central was dissatisfied and refused to pay its bill. *Id.* at 374, 374 S.E.2d at 400.

Automotive sued Central in Virginia state court, and a default judgment was entered against Central. *Id.* Automotive filed the judgment in a North Carolina district court, which upheld the judgment. *Id.* Our Court stated that, for a foreign judgment against a nonresident to be valid, the trial court must be authorized by statute to exercise jurisdiction over the nonresident defendant, and the exercise of jurisdiction must be in accord with the constitutional limits of due process. *Id.* This Court affirmed the trial court's order, holding that the requirements for jurisdiction in Virginia had been met. *Id.* This Court concluded: "Having voluntarily availed itself of the privilege of having its cars improved and restyled in Virginia, that state's enforcement of defendant's obligation to pay for the services so obtained was to be expected." *Id.* at 375, 374 S.E.2d at 401; *see also Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 537 S.E.2d 227 (2000).

Defendant argues the present case is different from *Automotive Restyling* because less of the contract in this case was performed in the foreign state than in *Automotive Restyling*. We find that argument unpersuasive. In both cases, the defendant did not physically enter the state in which judgment was entered. Each contract was fulfilled in the state foreign to each defendant. In *Automotive Restyling*, the contract was fulfilled by the restyling of the four cars in Virginia. In the present case, the contract was fulfilled by the delivery of the car to Plaintiff in Nebraska.

We hold that the trial court in Nebraska properly exercised personal jurisdiction over Defendant. Defendant intentionally directed its actions towards Nebraska through: (1) advertising its cars on websites accessible to Nebraskans, (2) its contract negotiations with Plaintiff, (3) receiving Plaintiff's payment from Nebraska, and (4) shipment of the car to Plaintiff in Nebraska. Plaintiff's inability to use and enjoy the car resulted from Defendant's contacts with Nebraska. It was foreseeable that any hindrance to Plaintiff's use and enjoyment of the car caused by Defendant's misrepresentations would occur in Nebraska. As such, Defendant could reasonably have anticipated being haled into court in Nebraska. Defendant did not show that defending the suit in Nebraska would have been unduly burdensome to the extent that it would offend notions of fair play and substantial justice. We hold that the foreign judgment from the Nebraska state court is valid and enforceable in North Carolina.

Reversed and remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

OSBORNE v. TOWN OF NAGS HEAD

[235 N.C. App. 121 (2014)]

HUGH OSBORNE AND TERESA OSBORNE, PETITIONERS
v.
TOWN OF NAGS HEAD, ET AL., RESPONDENTS

No. COA13-1122

Filed 15 July 2014

Zoning—Board of Adjustment—motion to reconsider—majority vote

The Nags Head Board of Adjustment (BOA) was without authority to consider the merits of a motion to reconsider a zoning variance where the chair of the BOA mistakenly ruled that a motion to deny reconsideration had failed because the vote to deny did not reach the needed 4/5 majority. Under both the North Carolina General Statutes and the Nags Head Town Code, the vote was sufficient to deny the motion to reconsider; a 4/5 vote was needed to grant a variance, but the BOA was not voting on a motion to grant a variance. Moreover, the failure to deny a negative proposition was not the same as adopting a positive proposition.

Appeal by petitioners from order entered 16 April 2013 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 18 March 2014.

Vandeventer Black LLP, by Norman W. Shearin, Wyatt M. Booth, and Ashley P. Holmes for petitioner-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and John D. Leidy, for respondent-appellee.

STEELMAN, Judge.

Where the Board of Adjustment voted to deny petitioners' motion to reconsider, it lacked jurisdiction to consider the merits of that motion.

I. Factual and Procedural Background

In 1997, the owner of Lot 30 of the Hills of Nags Head subdivision in the Town of Nags Head requested a variance from the Town of Nags Head Board of Adjustment (BOA), which would permit the use of a shared driveway with an adjoining lot in the subdivision, Lot 29. At the time, the two lots were owned by the same entity. The owner contended that the topography of the land made it impossible to construct a single

family residence on the property within the setback requirements of the ordinance, and proposed the variance as a solution. BOA found that the zoning restrictions created an unnecessary hardship and granted the variance. After the granting of the variance, neither lot was developed. Subsequently, the lots were acquired by different owners.

In 2012, Hugh and Teresa Osborne (Osbornes) sought to purchase Lot 30 from Gateway Bank. The contract to purchase the property was contingent upon receiving a variance from BOA for their development plan, which would include a single driveway entirely on Lot 30, a shorter driveway than that proposed in 1997, and a smaller size dwelling than was proposed in 1997.

On 13 March 2012, the Osbornes applied to BOA for a variance to eliminate the shared driveway under the 1997 variance. On 24 April 2012, BOA denied this request and refused to modify the terms of the 1997 variance. BOA concluded that, while the ordinance did create an unnecessary hardship, reasonable use of the property could still be had pursuant to the 1997 variance. The Osbornes appealed this order in a separate appeal that is pending before this Court. *Osborne v. Nags Head*, COA 13-1123.

Subsequently, the Osbornes sought a cross-easement from the owners of Lot 29 to proceed with construction of the shared driveway, pursuant to the 1997 variance. The owners of Lot 29 refused to grant the necessary cross-easement, and provided an affidavit documenting their refusal.

On 11 June 2012, the Osbornes filed a motion to reconsider before BOA, citing a change in circumstances and new evidence. On 12 July 2012, BOA held a meeting regarding the Osbornes' motion to reconsider. A motion was made to deny the motion, based upon a failure to show a substantial change in circumstances. The members of BOA voted 3-2 in favor of denying the motion to reconsider. However, BOA then determined that a 4/5 supermajority vote was required, and therefore the motion to deny reconsideration failed.

BOA then conducted a hearing upon the motion to reconsider. After hearing arguments, BOA determined that the Osbornes still had a reasonable use for the property, and in an order dated 13 September 2012, denied the Osbornes' request for a variance. The Osbornes appealed to the Superior Court of Dare County, which, on 16 April 2013, affirmed BOA's decision to deny the Osbornes' request.

The Osbornes appeal.

II. Standard of Review

> The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, de novo review is proper. Moreover, [t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and quotation marks omitted).

"Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Id.* (citations and quotation marks omitted).

III. Denial of the Variance

On appeal, the Osbornes contend that BOA erred in denying their variance request on 13 September 2012, and that the trial court erred in affirming BOA's decision. We disagree.

When BOA considered the Osbornes' motion to reconsider, its members "voted three in favor of denying the Motion to Reconsider and two against denying it." The Chair then "announced that the Motion to Reconsider failed as it did not pass by the needed 4/5 vote."

The Chair misconstrued the applicable law. The General Statutes provide that "[t]he concurring vote of four-fifths of the board shall be necessary to *grant a variance*. A majority of the members shall be required to decide any other *quasi-judicial* matter or to determine an appeal made in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e)(1) (2013) (emphasis added); *see also* Nags Head Town Code § 48-595 (2013). The language of the statute is quite clear; a four-fifths majority is required to grant a variance, but an ordinary majority is sufficient to conduct other business. In the instant case, three fifths of BOA voted to deny the motion to reconsider. Under both the North Carolina General Statutes and the Nags Head Town Code, this was a sufficient vote to deny the motion to reconsider.

The failure to deny a negative proposition is not the same as adopting a positive proposition. BOA was not voting on a motion to grant a variance, but rather on a motion to deny a motion to reconsider.

Because the chair of BOA mistakenly ruled that the motion to reconsider had passed, BOA was without authority to consider the merits of the motion. Boards of Adjustments, and other local government boards, perform vital services within our governmental structure. It is as important that they follow proper procedures as it is for city councils and boards of county commissioners. Procedures for the operation of such boards are in place to ensure fair treatment for all persons who come before them for rulings. We cannot ignore the violation, in the instant case, of procedures set forth in N.C. Gen. Stat. § 160A-388(e) and the Town Code of Nags Head.

BOA's order dated 12 July 2012 as to the merits of the Osbornes' application for a variance is vacated. The order of the trial court dated 16 April 2013 is also vacated. This matter is remanded to the Superior Court of Dare County for further remand to the Board of Adjustment of the Town of Nags Head. BOA is directed to enter an order denying the Osbornes' motion to reconsider, dated 11 June 2012.

VACATED AND REMANDED.

Judges HUNTER, Robert C., and BRYANT concur.

NORLINDA PHILBECK, EMPLOYEE, PLAINTIFF
v.
UNIVERSITY OF MICHIGAN, EMPLOYER, AND STAR INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA13-911

Filed 15 July 2014

1. Workers' Compensation—compensable injury—unexplained fall

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's accident was due to an unexplained fall and was, therefore, compensable. The Commission's findings that plaintiff did not know why she fell and that the medical theories explaining the various possible causes of her fall were

speculative and unsupported by sufficient evidence were supported by the record and these finding supported its legal conclusion that plaintiff's fall was unexplained.

2. Workers' Compensation—temporary total disability benefits—inability to earn pre-injury wage—caused by injury

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total disability benefits beyond the date plaintiff was released to return to work without any permanent restrictions. The Commission's findings were supported by competent evidence, and these findings supported its conclusion that plaintiff was unable to earn her pre-injury wage in the same or any other employment under the second prong of *Russell* and that plaintiff's inability to earn her pre-injury wage was caused by her injury.

Appeal by defendants from opinion and award entered 25 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2014.

Bobby L. Bollinger, Jr. for plaintiff-appellee.

Rudisill White & Kaplan, P.L.L.C., by John R. Blythe, for defendants-appellants.

DAVIS, Judge.

University of Michigan and Star Insurance Company (collectively "Defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding Norlinda Philbeck ("Plaintiff") workers' compensation benefits. The primary issue before us is whether the Commission erred in concluding that Plaintiff's accident was due to an unexplained fall and, therefore, compensable. After careful review, we affirm the Commission's Opinion and Award.

Factual Background

Plaintiff is a 67-year-old woman who was employed at the time of her injury by the University of Michigan as a field interviewer in social sciences research. Plaintiff's job duties required her to travel from her home in North Carolina to various locations on the East Coast to interview potential participants for a research study. Plaintiff would travel to an assigned location and interview randomly selected individuals.

On 8 August 2011, Plaintiff was in Columbia, Maryland conducting interviews for the study. Plaintiff visited a small apartment complex and attempted to interview one of the residents. When she discovered that the resident was not eligible to participate in the study, Plaintiff began walking back to her vehicle. On the way to her vehicle, Plaintiff fell and fractured her left arm near her wrist. At the hearing before the deputy commissioner, Plaintiff testified: "I don't know why I fell. . . . I might have stumbled. I don't know what happened. . . . Seconds after I hit the ground I think that I – I was kind of dazed. I think I might have been on the ground a few seconds and then I looked at my arm and I could see that it was knocked out of place. It was deformed."

Plaintiff was transported to Laurel Regional Hospital for treatment, and medical personnel administered various tests in an effort to determine why she had fallen. Plaintiff testified that the emergency room staff "didn't know why [she] fell" and "said there was no medical reason." Medical records from the emergency room indicated that Plaintiff had suffered a fall, was unable to explain what caused her to fall, and had experienced a loss of consciousness. Dr. Michael E. Carlos, one of her treating physicians at Laurel Regional Hospital, noted that "vasovagal mechanism" was the "most likely reason for the syncope [loss of consciousness]" and that the injury to Plaintiff's arm was a "left radioulnar fracture."

Dr. Neveen Habashi ("Dr. Habashi"), Plaintiff's primary care physician since 2006, reviewed Plaintiff's medical records from Laurel Regional Hospital and opined that Plaintiff's fall was caused by heat exhaustion. Dr. Habashi was not, however, able to state with a reasonable degree of medical certainty that heat exhaustion was the cause of Plaintiff's fall. Instead, Dr. Habashi noted that since Plaintiff had "no underlying medical problems that would predispose her" to falling and passing out, Plaintiff's fall was likely "environmentally related." Dr. Habashi also acknowledged that at the time she concluded that Plaintiff's fall was probably heat related, she was not aware of the note on Plaintiff's intake records from the hospital stating that Plaintiff "was not overheating."

When Plaintiff returned to North Carolina, she sought treatment for her left arm from Dr. Mark McGinnis ("Dr. McGinnis"), an orthopedic surgeon. Dr. McGinnis surgically repaired the fracture on 15 August 2011 using a dorsal plate and seven surgical screws. Plaintiff subsequently had numerous follow-up visits with Dr. McGinnis. Dr. McGinnis took Plaintiff out of work until 6 September 2011, at which time he released her to work with a one-pound lifting restriction for her left arm. On 18 October 2011, Dr. McGinnis placed Plaintiff on a left arm lifting restriction of no

more than 20 pounds. On 12 December 2011, Dr. McGinnis concluded that Plaintiff had reached maximum medical improvement and released Plaintiff to work without restrictions.

Plaintiff filed a Form 18 seeking workers' compensation benefits in connection with her 8 August 2011 fall, and on 15 November 2011, Defendants denied Plaintiff's claim on the basis that the "alleged injuries were a result of [an] idiopathic condition." The matter was heard by Deputy Commissioner Phillip A. Holmes on 22 May 2012. Deputy Commissioner Holmes filed an opinion and award on 22 October 2012 concluding that Plaintiff's injury was "due to factors that were not job related" and denying her claim for workers' compensation benefits.

Plaintiff appealed, and the Full Commission heard the matter on 1 March 2013. In its Opinion and Award filed on 25 April 2013, the Commission, with one commissioner dissenting, reversed the deputy commissioner and awarded Plaintiff temporary total disability benefits. Defendants appealed to this Court.

Analysis

I. Compensability of Plaintiff's Injury

[1] Our review of an opinion and award of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). When reviewing the Commission's findings of fact, this Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Id.* (citation and quotation marks omitted).

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). The Commission's conclusions of law, however, are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, ___ N.C. ___, 719 S.E.2d 26 (2011). Evidence supporting the plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of any reasonable inferences that may be drawn from the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Under the Workers' Compensation Act, an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an

accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 746 (2011). Here, Defendants acknowledge that Plaintiff's injury was (1) caused by an accident; and (2) sustained in the course of her employment. However, the Commission erred in awarding compensation, they argue, because the injury did not arise out of Plaintiff's employment. Specifically, they contend that Plaintiff fell because she fainted and, as such, her injury could not be deemed compensable under the doctrine of "unexplained falls."

In a workers' compensation case, if the cause or origin of a fall is unknown or undisclosed by the evidence, "we apply case law unique to unexplained fall cases. When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment." *Id.* at 736, 699 S.E.2d at 127. This inference is permitted because when the cause of the fall is unexplained such that "[t]here is no finding that any force or condition independent of the employment caused or contributed to the accident[,] . . . the only active force involved [is] the employee's exertions in the performance of his duties." *Id.* (citation omitted).

Unexplained falls, however, are differentiated in our case law from falls associated with an idiopathic condition of the employee. "An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee." *Hodges v. Equity Grp.*, 164 N.C. App. 339, 343, 596 S.E.2d 31, 35 (2004) (citation and quotation marks omitted). Unlike a fall with an unknown cause — where "an inference that the fall had its origin in the employment is permitted" — a fall connected to an idiopathic condition is not presumed to arise out of the employment. *Id.* at 344, 596 S.E.2d at 35 (citation and quotation marks omitted). Instead, the compensability of an injury caused by a fall associated with an idiopathic condition is determined as follows:

> (1) Where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made; (2) Where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury.

Hollar v. Montclair Furniture Co., 48 N.C. App. 489, 496, 269 S.E.2d 667, 672 (1980).

Defendants argue that Plaintiff's injury was not compensable because her fall (1) was a result of an idiopathic condition; and (2) was not associated with any risk attributable to her employment. In making this argument, Defendants rely primarily on *Hollar*. In *Hollar*, the plaintiff was working in an "extremely hot" and poorly ventilated work environment when she "suddenly, for an unexplained reason, felt as if she were passing out." *Id.* at 490, 269 S.E.2d at 669. The plaintiff fainted, fell to the floor, and struck her back. The Commission concluded that the plaintiff's injury was not compensable, and she appealed to this Court. *Id.* at 489, 269 S.E.2d at 668.

On appeal, we first noted that the plaintiff's fall "d[id] not come within the 'unexplained' category of falls" because "it [was] clear that [the] plaintiff fell because she fainted." *Id.* at 491, 269 S.E.2d at 669. Consequently, we determined that the compensability of the plaintiff's claim turned on why she fainted — specifically, "whether [her] fainting was caused in any part by the conditions or circumstances of her employment." *Id.* at 497, 269 S.E.2d at 672. Because the record was devoid of any medical evidence as to why the plaintiff fainted, we remanded the matter to the Commission so that it could determine if the plaintiff's fainting was caused solely by an idiopathic condition or if it was in some way associated with the conditions of her employment. *Id.*

Defendants contend that this Court's decision in *Hollar* is controlling in the present case. As such, they argue that the Commission erred in applying the law of unexplained falls to Plaintiff's claim. We disagree.

Here, in determining that Plaintiff's injury arose from her employment and was therefore compensable, the Commission made the following pertinent findings of fact:

> 4. The fall on August 8, 2011, occurred while Plaintiff was walking in a parking lot after the conclusion of an attempted interview at an apartment complex. Plaintiff had been out of her car for approximately 10 to 15 minutes when she fell. Plaintiff does not recall what, if anything, caused her to fall. She did not recall any broken pavement or objects that caused her fall.
>
> 5. Immediately after the fall, Plaintiff was taken by an ambulance and admitted to Laurel Regional Hospital, whereupon she informed her medical providers that "she

was not overheated" prior to the fall. She was unable to tell the Emergency Room staff why she fell. The ambulance crew that transported Plaintiff interviewed an unnamed witness at the scene of the fall, who reported that she did not see any obvious reason to cause Plaintiff's fall.

6. While admitted to Laurel Regional Hospital, Dr. Michael E. Carlos, treated Plaintiff and noted that "vasovagal mechanism" was the "most likely reason for the syncope" and that dehydration "predisposed her to vasovagal syncope."

. . . .

8. On August 19, 2011, Plaintiff treated with her primary care physician, Dr. Naveen Habashi. Dr. Habashi opined that Plaintiff fainted and fell due to exposure to environmental elements, such as overheating. Dr. Habashi also opined that the facts related to Plaintiff's food and fluid intake prior to the fall were "consistent with a person potentially suffering from a dehydration condition," and that dehydration contributed to Plaintiff's fainting. However, Dr. Habashi was not able to testify to a reasonable degree of medical certainty that heat exhaustion, dehydration, or any other medical condition caused Plaintiff's fall. The Full Commission finds Dr. Habashi's testimony to be speculative with regard to the cause of Plaintiff's fall and assigns little weight to the opinions of Dr. Habashi. Dr. Habashi testified that the diagnosis made by Dr. Carlos of "vasovagal mechanism" is a non-specific diagnosis and by itself, it does not explain why Plaintiff fell.

. . . .

12. Plaintiff at various times has speculated that she may have fallen due to being overheated, dehydrated, or stressed, but Plaintiff consistently reported and testified that she actually does not know what caused her to fall. Based upon the preponderance of the credible evidence of record, the Full Commission finds that there is insufficient evidence that Plaintiff was overheated due to her work environment, and there is insufficient evidence that Plaintiff fainted and fell due to heat exhaustion.

13. Plaintiff recalled the sight of almost hitting the ground and seeing her deformed wrist immediately after the fall

> while lying on the ground. Plaintiff testified that she may have been dehydrated on August 8, 2011, because she did not eat or drink any fluids between breakfast at 8:00 a.m. and the fall which occurred at 2:30 p.m., but there is insufficient medical evidence to support a finding that she fell due to dehydration.
>
> 14. The Full Commission finds that Plaintiff's fall was due to factors that were not disclosed by the evidence, and that her fall was unexplained. There was no competent medical opinion evidence presented to establish a medical or idiopathic reason for her fall.

Based on these findings, the Commission concluded as a matter of law that "Plaintiff's unexplained fall on August 8, 2011, constitute[d] a compensable injury by accident."

Contrary to Defendants' contention, *Hollar* is distinguishable from the present case. In *Hollar*, the fact that it was the plaintiff's fainting episode that caused her to fall and sustain an injury was uncontroverted. *Hollar*, 48 N.C. App. at 491, 269 S.E.2d at 669. Here, conversely, the Commission found that the medical evidence did *not* sufficiently establish the cause of Plaintiff's fall. Furthermore, the Commission declined to make a finding that Plaintiff did, in fact, faint. We believe that based on the conflicting evidence in the record, the absence of such a finding was permissible.

Plaintiff stated on several occasions that she does not know why she fell. While at various times she speculated that she could have been overheated, dehydrated, or stressed at the time she fell, she provided no consistent explanation of the reason for her fall. The medical evidence suggests that Plaintiff suffered a loss of consciousness at some point but fails to provide clarity as to whether Plaintiff fell because she fainted. The Commission determined that the testimony offered by Dr. Habashi regarding the possible cause of Plaintiff's fall was speculative and assigned that testimony little weight. The Commission therefore concluded that there was insufficient credible evidence that Plaintiff fell due to heat exhaustion or dehydration.

It is well established that the Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation and quotation marks omitted). As such, its determinations regarding the credibility of witnesses or the weight certain evidence

is to be accorded are not reviewable on appeal. *See Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 434, 637 S.E.2d 299, 301 (2006) ("This Court may not weigh the evidence or make determinations regarding the credibility of the witnesses.").

The Commission's findings that Plaintiff "does not know what caused her to fall" and "recalled the sight of almost hitting the ground" are supported by competent record evidence. Furthermore, these findings were not challenged by Defendants on appeal and are thus binding on this Court. *See Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal."). The Commission's findings as to the appropriate weight and consideration to be accorded to the medical evidence regarding the various theories of why Plaintiff might have fallen are within its discretion as the trier of fact, and this Court is "not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." *Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987) (citation and quotation marks omitted).

Once the Commission determined that the evidence suggesting Plaintiff's fall occurred because of heat exhaustion or dehydration was speculative and entitled to little to no weight, there was no remaining evidence regarding the cause or origin of her fall. Consequently, we cannot conclude that the Commission erred in its ultimate determination that Plaintiff's fall was unexplained and "due to factors that were not disclosed by the evidence." *See Sheenan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 514, 563 S.E.2d 300, 305 (2002) (explaining that Commission is sole judge of weight and credibility of evidence and, as such, may accord less weight to testimony of medical expert if it determines that expert's opinions are based on inaccurate account of circumstances surrounding injury).

Thus, the Commission's findings that (1) Plaintiff does not know why she fell; and (2) the medical theories explaining the various possible causes of her fall were speculative and unsupported by sufficient evidence, support its legal conclusion that Plaintiff's fall was unexplained. *See Slizewski v. Int'l Seafood, Inc.*, 46 N.C. App. 228, 232, 264 S.E.2d 810, 813 (1980) (holding that workers' compensation claim was compensable where plaintiff could not recall why he fell and "[t]he evidence, or lack thereof, on the cause of the fall is sufficient to sustain the finding that the cause of the fall was unknown"). As such, we affirm the Commission's determination that Plaintiff's injury was compensable.

II. Temporary Total Disability Benefits

[2] Defendants next assert that the Commission erred in awarding Plaintiff temporary total disability benefits beyond 12 December 2011, the date Plaintiff was released to return to work without any permanent restrictions. Defendants argue that as of that date she could no longer establish that her injury was affecting her ability to earn her pre-injury wage and that, for this reason, an award of temporary total disability benefits was improper. We disagree.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2013). Accordingly, to support a conclusion of disability, the Commission must find

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A claimant may prove the first two elements of disability through several methods, including

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib'n, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted); *see Medlin v. Weaver Cooke Constr., LLC*, ___ N.C. ___, ___ S.E.2d ___, slip op. at 12-13 (No. 411A13) (filed Jun. 12, 2014) (explaining that plaintiff "may prove the first two elements through any of the four methods articulated in *Russell*, but these

methods are neither statutory nor exhaustive"). "In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury." *Medlin*, ___ N.C. ___, ___ S.E.2d ___, slip op. at 13.

"The absence of medical proof of total disability . . . does not preclude a finding of disability under one of the other three *Russell* tests." *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) (citation, quotation marks, and brackets omitted) (concluding that plaintiff could still be disabled under second or third prong of *Russell* test despite being released to work without restrictions). Here, citing *Hilliard*, the Commission found Plaintiff had proved that — as a result of her injury and despite a reasonable effort on her part — she was unable to obtain suitable employment within her restrictions. Specifically, the Commission found that once Plaintiff was released to return to work, the University of Michigan did not have a job available for her and that Plaintiff "engaged in an unsuccessful, reasonable job search after being released to work with restrictions, but received no job offers." The Commission further found that Plaintiff's reasonable job search continued until 2 February 2012, when she refused suitable employment offered to her by the University of Michigan. As such, the Commission concluded that Plaintiff "suffered a loss in wage earning capacity as a result of her compensable injury . . . through February 2, 2012" but "has failed to prove any loss of wage earning capacity as a result of her compensable August 8, 2011 injury after February 2, 2012."

These findings are supported by Plaintiff's testimony regarding both her job search and her ongoing experience with pain and range-of-motion limitations after being released to work. *See Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010) ("In addition to medical testimony, an employee's own testimony that he is in pain may be evidence of disability." (citation and quotation marks omitted)). Nor do Defendants specifically challenge these findings. As such, they are binding on appeal. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) ("Findings of fact that are not challenged on appeal are binding on this Court."), *disc. review denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). Because the Commission's findings of fact support its conclusion that Plaintiff established that she was unable to earn her pre-injury wage in the same or any other employment from 12 December 2011 to 2 February 2012 under the second prong of *Russell* and that Plaintiff's inability to earn her pre-injury wage was caused by her injury, we overrule Defendants' argument

and affirm the Commission's award of temporary total disability benefits to Plaintiff.

Conclusion

For the reasons stated above, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

CARL H. POOLE, Plaintiff
v.
UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, Defendant

No. COA13-1345

Filed 15 July 2014

1. Workers' Compensation—legal standard—willingness to resume vocational rehabilitation

The Industrial Commission did not err in a workers' compensation case by allegedly applying an incorrect standard. Where plaintiff's declaration of willingness to resume vocational rehabilitation and evidence in support thereof was deemed credible by the Commission, such a finding properly supported the correct legal standard.

2. Workers' Compensation—authorized treating physician—acceptance of change in medical providers

The Industrial Commission did not err in a workers' compensation case by finding that one of plaintiff's doctors was an authorized treating physician. Although plaintiff continued medical treatment with a doctor not authorized to accept workers' compensation patients, defendant UNC had acknowledged and already accepted plaintiff's change in medical providers.

Judge HUNTER, Robert C., concurring in part and dissenting in part.

Appeal by defendant from opinion and award entered 27 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for defendant-appellant.

The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for plaintiff-appellee.

BRYANT, Judge.

Where plaintiff's declaration of willingness to resume vocational rehabilitation and evidence in support thereof is deemed credible by the Industrial Commission, such a finding properly supports the correct legal standard and will not be disturbed on appeal. The Industrial Commission did not err in awarding plaintiff continued medical treatment with a doctor not authorized to accept workers' compensation patients where UNC had acknowledged and already accepted plaintiff's change in medical providers.

On 23 April 1992, plaintiff Carl H. Poole suffered a compensable injury to his lower back while moving tables for his employer, the University of North Carolina at Chapel Hill ("UNC"). On 9 May 1992, UNC filed a Form 19, "Report of Employee's Injury or Occupational Disease," and on 5 June a Form 21, "Agreement for Compensation for Disability," regarding plaintiff's injury. Under the North Carolina Workers' Compensation Act, UNC was to provide plaintiff with temporary total disability payments, medical care, and other benefits such as vocational rehabilitation relating to plaintiff's lower back injury.

On 28 April 1998, UNC filed a Form 24, "Application to Terminate or Suspend Payment of Compensation," alleging that plaintiff had failed to cooperate with vocational rehabilitation services. UNC's Form 24 was granted by order on 10 July 1998, suspending plaintiff's temporary disability compensation payments "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts."

On 15 July 2005, plaintiff filed a Form 18 seeking pain management treatment which UNC accepted. On 25 May 2007, plaintiff filed a Form 33, "Request for Hearing," alleging that he had an ongoing disability and change in his condition. A Deputy Commissioner dismissed plaintiff's claim with prejudice on 17 November 2010, concluding that plaintiff's failure to bring his claim within a reasonable period of time had prejudiced UNC as a result.

On 18 January 2012, the Full Commission ("the Commission") reopened plaintiff's case and remanded it for a new evidentiary hearing

before a Deputy Commissioner, which was held on 30 April 2012. In its award and order filed 27 August 2013, the Full Commission reversed the ruling of the Deputy Commissioner and ordered UNC to reinstate plaintiff's temporary disability compensation payments. UNC appeals.

UNC raises two issues on appeal: whether the Commission (I) applied an incorrect legal standard; and (II) erred in finding that one of plaintiff's doctors was an authorized treating physician.

I.

[1] UNC contends the Commission applied an incorrect legal standard in determining that plaintiff was entitled to temporary total disability after 8 May 2008. We disagree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008) (citations omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Id.* at 304-05, 663 S.E.2d at 325 (citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 305, 663 S.E.2d at 325.

UNC argues that the Commission applied an incorrect legal standard "by allowing [p]laintiff to merely assert a present willingness to comply with vocational rehabilitation." North Carolina General Statutes, section 97-25, holds that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases . . . ." N.C. Gen. Stat. § 97-25 (1992).[1] "G.S. 97-25 is clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation "until such refusal ceases . . . ." *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1991) (holding that where the plaintiff's weekly compensation benefits were suspended pursuant to N.C.G.S. § 97-25, the fact remained "that plaintiff may again be entitled to weekly compensation benefits upon a proper

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1. As plaintiff's claim arose in 1992, plaintiff's claim for continuing medical compensation must be considered under N.C.G.S. § 97-25 (1992).

showing by plaintiff that he is willing to cooperate with defendants' rehabilitative efforts").

The Commission found as fact that plaintiff's compensation payments were suspended, effective 18 March 1998, "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts." The Commission also found that although plaintiff's doctors felt plaintiff would never be able to return to work due to his injuries, plaintiff's management of his pain and depression had improved, and vocational rehabilitation would have "proactive benefits" for him. The Commission then found that:

> [b]ased upon a preponderance of the evidence, Plaintiff's testimony at the hearing before Deputy Commissioner Ledford on May 8, 2008 that if there was employment available within his restrictions and physical limitations, he would be willing to cooperate with pursuing employment at that time, including attending job fairs and vocational rehabilitation is found to be credible and constituted a proper showing that he is willing to comply with reasonable rehabilitation efforts.

Finally, the Commission found as fact that:

> [b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's suspension of compensation for failure to cooperate with "reasonable rehabilitation efforts" ended as of May 8, 2008 and compensation should have been reinstated as of May 8, 2008 as [UNC] had notice he was willing to cooperate and [UNC] has not proven that he was no longer disabled on as of May 8, 2008.

UNC contends the Commission applied an incorrect legal standard, stating that allowing a plaintiff to assert a present willingness to comply with vocational rehabilitation was rejected in *Powe v. Centerpoint Human Servs.* (*Powe I*), 215 N.C. App. 395, 715 S.E.2d 296 (2011), and that a test of constructive refusal of suitable employment must be applied. *Id.* at 405-06, 715 S.E.2d at 303-04.

In *Powe*, both the plaintiff and the defendant appealed an order of the Industrial Commission which found that the plaintiff failed to "fully comply" with the defendant's vocational rehabilitation services. This Court found that the legal standard applied by the Commission was incorrect, as the Commission needed to determine the extent to which

the plaintiff, who was participating in some but not all vocational rehabilitation services, failed to "fully comply." *Id.* at 406, 715 S.E.2d at 304. Noting that "declarations of a willingness to comply are not necessarily sufficient if deemed not credible by the Commission[,]" this Court remanded for the Commission to make further findings of fact as to the plaintiff's compliance. *Id.* at 402, 715 S.E.2d at 301.

Powe is not applicable to the instant case. Here, plaintiff's compensation was suspended beginning 18 March 1998 for failure "to cooperate with vocational rehabilitation services," with suspension to continue "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts." The Commission found that plaintiff resumed his willingness to cooperate with vocational rehabilitation services on 8 May 2008 but that UNC made no attempt to provide plaintiff with any vocational services after 24 March 1998. UNC argues that plaintiff has not met his burden of demonstrating he is truly willing to undertake vocational services. Although "declarations of a willingness to comply are not necessarily sufficient if deemed not credible by the Commission[,]" here the Commission clearly noted in its findings of fact that it reviewed the entire record before it and found plaintiff's testimony that he wished to begin vocational rehabilitation again to be credible.

UNC further contends the Commission applied an incorrect legal standard because UNC was prejudiced by plaintiff's delay in seeking the resumption of his benefits. UNC cites *Daugherty v. Cherry Hosp.*, 195 N.C. App. 97, 670 S.E.2d 915 (2009), in support of its contention.

In *Daugherty*, the plaintiff was injured in 1992 while working as a nurse for the defendant. *Id.* at 98, 670 S.E.2d at 917. In 1993, the Commission granted plaintiff's claim for physical injury, but denied her claim for psychological injury. *Id.* at 99-100, 670 S.E.2d at 917-18. The plaintiff resigned from her job with the defendant in 1994. *Id.* at 100, 670 S.E.2d at 918. In 2006, the plaintiff filed a Form 33, requesting a hearing as to her denied claim for psychological injury and seeking retroactive benefits and compensation. *Id.* The Commission denied the plaintiff's claim, holding that it was now barred by laches. *Id.* at 101, 670 S.E.2d at 918. On appeal, this Court reversed and remanded, finding that the doctrine of laches was not applicable. Instead, the Commission needed to make findings as to whether the plaintiff's claim should be dismissed, pursuant to Rule 613, for failure to timely prosecute. *Id.* at 103-04, 670 S.E.2d at 919-20.

Daugherty is not applicable to the instant case. Here, pursuant to N.C. Gen. Stat. § 97-25, plaintiff's claim for temporary disability

compensation was suspended pending plaintiff's willingness to resume cooperating with UNC's vocational rehabilitation services. Unlike the plaintiff in *Daugherty* whose claim was denied thirteen years prior to her seeking a hearing, here plaintiff's claim was only suspended, pending a finding by the Commission that plaintiff met the requirements needed to lift the suspension.

We are mindful of the length of time about which UNC complains. However, we note that plaintiff's temporary disability compensation was only suspended, not terminated, for refusal to cooperate with vocational rehabilitation. As such, the Commission could order, at any time, the reinstatement of plaintiff's compensation upon a determination that plaintiff's willingness to cooperate was supported by credible evidence. *See Powe v. Centerpoint Human Servs.* (*Powe II*), ___ N.C. App. ___, ___, 742 S.E.2d 218, 926 (affirming the decision of the Commission to reinstate the plaintiff's temporary disability benefits, despite evidence that the plaintiff was extremely uncooperative with vocational rehabilitation efforts, for "even though there may be evidence from which a fact finder could determine plaintiff has failed to cooperate with vocational rehabilitation efforts, [this Court] must uphold the finding [of the Commission]." (citation omitted)); *Bowen v. ABF Freight Sys., Inc.*, 179 N.C. App. 323, 331, 633 S.E.2d 854, 859-60 (2006) ("Where any competent evidence exists to support a finding of the Commission, that finding is binding upon this Court. Thus, even though there may be evidence from which a fact finder could determine [the] plaintiff has failed to cooperate with vocational rehabilitation efforts, we must uphold the finding." (citation omitted)). Accordingly, as the Commission's opinion and award contained findings of fact, supported by competent evidence, which in turn supported its legal conclusions, those findings are conclusive on appeal. UNC's argument is overruled.

II.

[2] UNC next argues that the Commission erred in finding that one of plaintiff's doctors was an authorized treating physician. Specifically, UNC contends the Commission erred in awarding plaintiff continued treatment with a doctor and at a facility that does not accept workers' compensation patients. We disagree.

UNC argues that the Commission erred in finding that Dr. Clarke, one of plaintiff's doctors, was an authorized treating physician. In its findings of fact, the Commission noted that after plaintiff's compensation payments were suspended on 18 March 1998, plaintiff sought treatment from Dr. Clarke for his lower back injury beginning 22 September 1998.

The Commission then found as fact that "[b]ased upon [UNC]'s Claim Activity Notes, [UNC] authorized Plaintiff to receive treatment from Dr. Clarke for 'facets of his workers' compensation claim.' " Additionally, the Commission made findings of fact that plaintiff continued to seek treatment from Dr. Clarke for lower back pain, as well as heart disease, sleep apnea, incontinence, depression, diabetes, and renal disease, through 4 August 2011, when Dr. Tobin took over plaintiff's care from Dr. Clarke. These findings of fact are supported by competent evidence in the record. Further, plaintiff filed a Form 18 seeking pain management treatment with UNC on 15 July 2005, which UNC accepted on 31 August and approved on 6 September. As such, the Commission's findings that UNC acknowledged and accepted plaintiff's change in medical providers to Dr. Clarke, even though Dr. Clarke was not an authorized medical provider, are properly supported by competent evidence. *See* N.C.G.S. § 97-25(d) (2013) ("The refusal of the employee to accept any medical compensation when ordered by the Industrial Commission shall bar the employee from further compensation until such refusal ceases[.]").

UNC further argues that the Commission erred because Dr. Tobin, plaintiff's current treating physician, is not authorized to accept workers' compensation patients and, thus, such a finding by the Commission violates N.C.G.S. § 97-25. The Commission made findings of fact, based on the evidence, that UNC continued to provide plaintiff with medical treatment even though plaintiff switched to a non-authorized doctor, Dr. Clarke, on 22 September 1998, after plaintiff's authorized medical providers discontinued his treatment on 15 June 1998. Therefore, UNC accepted plaintiff's claims for compensation for medical treatment through Dr. Clarke, even though Dr. Clarke was not authorized to accept workers' compensation patients. The Commission also found, and the record supports, that Dr. Tobin succeeded Dr. Clarke as plaintiff's primary physician. Accordingly, UNC's argument is overruled.

Affirmed.

Judge STEELMAN concurs.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I concur with the majority's well-reasoned conclusions as to the legal standard used by the Full Commission and the finding that one of plaintiff's doctors was an authorized treating physician. However, because I

believe the Full Commission was required to address defendant's motion to dismiss and the Deputy Commissioner's dismissal of plaintiff's claim pursuant to Workers' Compensation Rule 613 in its opinion and award, I respectfully dissent and conclude that this matter should be remanded for further proceedings.

Background

Carl H. Poole ("plaintiff") suffered a compensable work-related injury on 23 April 1992. His employer, the University of North Carolina at Chapel Hill ("UNC"), filed a Form 21, "Agreement for Compensation for Disability," and provided plaintiff with medical care and vocational rehabilitative services. Plaintiff's benefits were suspended on 10 July 1998 for failure to cooperate with the vocational rehabilitation services that defendant provided. Compensation was to be suspended "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts."

On 15 May 2007, plaintiff filed a Form 33, "Request for Hearing," in which he requested compensation be reinstated and alleged a "change in condition." On 7 May 2007, defendant filed a motion to dismiss, alleging that plaintiff's claim was barred by laches and the statute of limitations. The parties were heard on defendant's motion to dismiss by Deputy Commissioner Kim Ledford ("Deputy Commissioner Ledford") on 8 May 2008. In Deputy Commissioner Ledford's opinion and award, the issues for determination were stated as follows:

> 1. Whether Plaintiff's claim is barred by the Statute of Limitations, either pursuant to N.C. Gen. Stat. § 97-47 or other statute?
>
> 2. Whether Plaintiff's claim otherwise should be dismissed due to his failure to prosecute this claim in a timely manner per the Rules of the Industrial Commission?
>
> 3. Whether Plaintiff's claim for additional medical treatment is otherwise barred?

After hearing testimony from the parties and receiving evidence, Deputy Commissioner Ledford entered the following relevant findings of fact in her opinion and award:

> 20. Following the suspension of benefits and the last payment of indemnity compensation in July 1998, Plaintiff did not seek reinstatement of indemnity compensation until the filing of his Form 33 in May 2007, almost nine

> years after the entry of the Order of Special Deputy Commissioner Gillen.
>
> 21. Plaintiff has shown no reason for his failure to appeal in a timely manner the Order of Special Deputy Commissioner Gillen, which suspended Plaintiff's ongoing total disability benefits. Plaintiff has otherwise shown no reason for his failure to seek reinstatement of indemnity compensation for almost nine years, an unreasonable delay. Due to this unreasonable delay, Plaintiff has essentially abandoned and failed to prosecute his claim.
>
> 22. This unreasonable delay has hindered the Defendant's ability to investigate the matter. The delay has prevented Defendant from providing services otherwise intended to lessen Plaintiff's period of disability.
>
> 23. During the passage of the nine years since the suspension of his benefits, Plaintiff's physical condition has changed due primarily to health issues unrelated to his compensable injury, including his heart disease and kidney disease, which are now his primary limiting health conditions.
>
> 24. The Defendant has been prejudiced by Plaintiff's failure to pursue this matter in a timely manner. Based upon Plaintiff's unreasonable delay, and the resulting prejudice to Defendant, sanctions short of dismissal of the claim will not suffice.

Pursuant to these findings, Deputy Commissioner Ledford entered the following conclusions of law:

> 8. Pursuant to Rule 613 of the North Carolina Industrial Commission Workers' Compensation Rules, "Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission." Prior to dismissing a claim pursuant to this Rule, the Commission must find: (1) that Plaintiff acted in a manner which deliberately or unreasonably delayed the matter, (2) that Defendant was prejudiced by the Plaintiff's delay or failure to prosecute, and (3) that sanctions short of dismissal would not suffice.

> *Lee v. Roses Stores, Inc.*, 162 N.C. App. 129, 131, 590 S.E.2d 404, 406 (2004).
>
> 9. In this case, Plaintiff has been given proper notice and opportunity to be heard on the issue of dismissal of his case. The greater weight of credible evidence shows that Plaintiff failed to prosecute his claim within a reasonable period of time. Where Plaintiff waited nine years to pursue his claim for additional benefits, Defendant has been prejudiced, and nothing short of dismissal would be fair and just.

Thus, Deputy Commissioner Ledford dismissed plaintiff's claim with prejudice on 17 November 2010. Plaintiff appealed this ruling to the Full Commission.

By order of the Full Commission on 18 January 2012, the case was reopened and remanded for a new evidentiary hearing. The Full Commission found "old" files related to the case in the Industrial Commission file room, including "correspondence from the parties, Industrial Commission Orders, various forms filed by the parties, form agreements, [and] medical records submitted primarily as attachments to various motions dating from 1992 to 2007." Because Deputy Commissioner Ledford did not have access to these files when she entered her opinion and award, the Full Commission remanded the matter for a new Deputy Commissioner to gather this evidence, order a transcript of the proceedings, and forward the transcript and evidence to the Full Commission for review and a determination.

Deputy Commissioner James C. Gillen ("Deputy Commissioner Gillen") presided over the new evidentiary hearing. On 13 February 2013, he entered an order transferring the requested materials to the Full Commission but did not issue an opinion and award on the substance of the parties' claims. After receiving the evidence and transcript from Deputy Commissioner Gillen, the Full Commission entered its opinion and award on 27 August 2013, from which defendant appeals. In its opinion and award, the Full Commission stated that it "reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Ledford and Deputy Commissioner Gillen and the briefs, supplemental briefs and arguments of the parties before the Full Commission." However, the Full Commission's opinion and award contained no findings of fact or conclusions of law relating to the substance of Deputy Commissioner Ledford's dismissal of plaintiff's claim pursuant to Rule 613, the almost nine-year delay in the proceedings, or

the potential prejudice to defendant that may have resulted from the delay. Rather, the Full Commission examined the new evidence introduced before the Deputy Commissioner and concluded that plaintiff had carried his burden of demonstrating his willingness to cooperate with vocational rehabilitation. Thus, it ordered that plaintiff was entitled to temporary total disability benefits beginning 8 May 2008 and continuing until further order of the Commission. Defendant timely appealed from the Full Commission's opinion and award.

Discussion

On appeal, defendant argues that the Full Commission erred by failing to dismiss plaintiff's claim pursuant to Rule 613. Because the Full Commission failed to address this contention in its opinion and award, I believe that the matter should be remanded for entry of findings of fact and conclusions of law on this issue.

The Industrial Commission has exclusive original jurisdiction over workers' compensation proceedings. *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 604, 70 S.E.2d 706, 708 (1952). It is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue[.]" N.C. Gen. Stat. § 97-84 (2013). "The reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

"[W]hen the transcript and record before the full Commission is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing." *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993) (quotation marks omitted). However, "[a]lthough the decision to take additional evidence is one within its sound discretion, *the full Commission has the duty and responsibility to decide all matters in controversy between the parties*[.]" *Id.* (emphasis added); *see also Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 501, 616 S.E.2d 356, 360 (2005) ("It is well established that the full Commission has the duty and responsibility to decide all matters in controversy between the parties, and, if necessary, the full Commission must resolve

matters in controversy even if those matters were not addressed by the deputy commissioner." (citation and internal quotation marks omitted)).

Here, after hearing the parties on defendant's motion to dismiss, Deputy Commissioner Ledford dismissed plaintiff's claim with prejudice pursuant to Workers' Compensation Rule 613, which provides that "[u]pon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion *or by motion of any party* for failure to prosecute or to comply with these Rules or any Order of the Commission." 4 N.C.A.C. 10A.0613(a)(3) (2013) (emphasis added). This Court has ruled that the Commission must make the following relevant findings before dismissing a case pursuant to Rule 613:

> (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant [caused by the plaintiff's failure to prosecute]; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Lee v. Roses, 162 N.C. App. 129, 132-33, 590 S.E.2d 404, 407 (2004) (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001)).

Deputy Commissioner Ledford found as fact that: (1) "[p]laintiff has otherwise shown no reason for his failure to seek reinstatement of indemnity compensation for almost nine years, an unreasonable delay"; (2) "[t]his unreasonable delay has hindered the Defendant's ability to investigate the matter[;] [t]he delay has prevented Defendant from providing services otherwise intended to lessen Plaintiff's period of disability"; and (3) "[b]ased upon Plaintiff's unreasonable delay, and the resulting prejudice to Defendant, sanctions short of dismissal of the claim will not suffice." Thus, Deputy Commissioner Ledford entered all of the findings of fact required by the *Lee* Court before dismissing plaintiff's claim with prejudice pursuant to Rule 613.

However, the Full Commission's opinion and award is devoid of any factual findings or legal conclusions disposing of these arguments. Although the Full Commission stated that it "reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Ledford[,]" the Full Commission failed to address the basis of Deputy Commissioner Ledford's ruling in her prior opinion and award—dismissal under Rule 613. The Full Commission also entered no findings or conclusions as to the delay in the proceedings, the potential prejudice to defendant that may have resulted from the delay, or the reasons for the delay—all of which were included in Deputy Commissioner

Ledford's findings of fact in support of her ruling. As is made clear by the list of issues for determination in Deputy Commissioner Ledford's opinion and award, these contentions were raised by defendant in its motion to dismiss and were "in controversy" throughout these proceedings. *Payne*, 172 N.C. App. at 501, 616 S.E.2d at 360. Thus, because the Full Commission "has the duty and responsibility to decide all matters in controversy between the parties," *id.*, and because it failed to address the legal contentions that formed the basis of Deputy Commissioner Ledford's opinion and award, I would remand this matter back to the Full Commission for entry of appropriate findings and conclusions determining that issue.

Conclusion

Because the Full Commission failed to enter findings of fact or conclusions of law regarding defendant's motion to dismiss or Deputy Commissioner Ledford's previous dismissal of plaintiff's claim pursuant to Workers' Compensation Rule 613, I respectfully dissent from the majority's holding that the Full Commission's opinion and award adequately resolved all matters in controversy between the parties. Accordingly, I would remand this matter to the Full Commission.

JOHN C. PRELAZ AND DEBORAH A. PRELAZ, PLAINTIFFS
v.
TOWN OF CANTON, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA14-225

Filed 15 July 2014

Deeds—declaration of title—rightful title holders—reversionary interest—directed verdict

The trial court erred by denying the Town's motion for a directed verdict at the close of plaintiffs' evidence and again at the close of all evidence in an action where plaintiffs sought a declaration of title recognizing them as the rightful title holders of certain real property and seeking recovery of rents. As a matter of law, the language relied upon by plaintiffs was precatory and could not trigger plaintiffs' reversionary interest in the Camp Hope property. The case was remanded to the trial court for entry of judgment in favor of defendant on directed verdict.

Appeal by plaintiffs and cross-appeal by defendant from judgment entered 16 May 2013 by Judge W. David Lee in Haywood County Superior Court. Heard in the Court of Appeals 3 June 2014.

Roberts & Stevens, P.A., by Mark C. Kurdys and Ann-Patton Hornthal for plaintiffs-appellants.

McGuire Wood & Bissette, P.A., by Sabrina Presnell Rockoff, and Frank G. Queen and Burton C. Smith, Jr. for defendant cross-appellant and defendant-appellee.

ELMORE, Judge.

John C. Prelaz and Deborah A. Prelaz ("plaintiffs") commenced this action against the Town of Canton ("the Town") in Haywood County Superior Court. Plaintiffs prayed the trial court for a declaration of title recognizing them as the rightful title holders of certain real property and to enter an order for the recovery of rents. This real property consists of approximately 110 acres and is known as Camp Hope ("the Camp Hope property" or "the property."). A trial began in the matter on 6 May 2013. At trial, plaintiffs argued that title to the property reverted to them when the Town violated an express condition of a governing deed. The Town argued that the language in the deed upon which plaintiffs relied was precatory. The trial court, finding that the language was not precatory, submitted to the jury the question of whether the Town violated an express condition by allowing a third party to operate a summer camp on the Camp Hope property primarily for the benefit of residents of areas and states other than Canton, Haywood, and adjoining counties. Unanimously ruling in the Town's favor, the jury answered "no." On 16 May 2013, the trial court entered an order declaring that the Town retained fee simple determinable title to the Camp Hope property. Plaintiffs now appeal, *inter alia*, the trial court's denial of their (1) motion for a directed verdict, (2) motion for judgment notwithstanding the verdict, and (3) motion for a new trial. In its cross-appeal, the Town appeals the trial court's denial of its motion for a directed verdict. After careful consideration, we conclude that the trial court erred when it denied the Town's motion for a directed verdict. Accordingly, we reverse the trial court's 16 May 2013 order and remand this matter to the trial court for entry of a judgment in favor of defendant on directed verdict.

I. Background

The relevant facts of this case are largely undisputed and are as follows: By deed dated 4 May 1992 ("the Deed"), Champion International

Corporation ("Champion" or "grantor"), as party of the first part, conveyed title to the Camp Hope property to Donald W. Randolph, Carl M. Gillis, and R. Cecil Roberts, Trustees of the Robertson Memorial Young Men's Christian Association ("YMCA"), as party of the second part, and to the Town, a municipal corporation, as party of the third part. The Deed is recorded in Book 426 at Page 771 in the Office of Register of Deeds in Haywood County.

Specifically, the Deed conveyed to the YMCA a fee simple determinable estate in the property so long as the property was used in accordance with certain enumerated express terms and conditions set forth in the Deed. The Deed conveyed to the Town a reversionary interest in the Camp Hope property which would, by operation of law and without re-entry or suit, cause title of the property to revert to the Town should the YMCA violate any of the express terms and conditions. Should the Town take title to the property, the Deed also required that the Town abide by certain enumerated express terms and conditions or risk forfeiting title. If the Town violated the express conditions contained in the Deed, Champion provided that title to the Camp Hope property would, by operation of law and without re-entry or suit, revert to Champion, or its successor corporation, as party of the first part. The YMCA subsequently forfeited its title to the Camp Hope property, and the Town took title to it on 25 July 1996. The Town has held title to the property as party in the third part since that time.

In March 2006, plaintiffs purchased a tract of land adjacent to the Camp Hope property. Soon thereafter, in April 2006, International Paper Company, successor by merger to Champion, assigned and conveyed its reversionary interest in the Camp Hope property to plaintiffs by assignment and Quitclaim Deed recorded in Book 667 at Page 179 in the Haywood County Register of Deeds. Plaintiffs have held a reversionary interest in the property as party in the first part since that time.

In April 2005, the Town negotiated a five-year lease agreement with Wellspring Adventure Camp, LLC ("Wellspring") for the operation of a weight loss and fitness summer camp to be located on the Camp Hope property. Wellspring is a for-profit limited liability company that operates weight loss camps throughout the United States and Europe. On 11 April 2006, the Canton Board of Aldermen approved a two-year extension of the lease agreement. Pursuant to the lease terms, Wellspring has primary use and control of the property from 15 May through 15 September each year for the duration of the lease term. Wellspring is responsible for maintaining the property and paying a $700.00 monthly rental fee to the Town. In addition, the lease requires that Wellspring not violate any of

the enumerated conditions set forth in the Deed. Evidence at trial tended to show that Wellspring campers reside throughout the United States and may select the camp location of their choosing. Approximately 978 campers participated in the Wellspring summer camp at the Camp Hope property during the summers of 2005-2011. Of these, only 20 or so campers resided permanently in Haywood or adjoining counties.

A clause in the Deed provides: "the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states." Because so few campers resided permanently in the local community, plaintiffs filed suit against the Town based on an alleged violation of this clause, which plaintiffs argued was an express condition. At trial, the Town took the position that the clause was merely precatory. Alternatively, the Town argued that it did not violate this express condition (assuming it was one) because the operation of the Wellspring camp *did*, in fact, primarily benefit local residents, not residents from other areas and states. The Town presented the following evidence in support of its position: (1) the Town has received over $450,000 in capital improvements to the Camp Hope property as a result of its lease with Wellspring; (2) the local economy has been boosted because Wellspring contracts with local exterminators, electricians, plumbers, and external vendors to maintain the grounds; (3) Wellspring operates family workshops that bring $200,000 annually to local businesses; (4) Wellspring recommends Canton and Haywood County hotels and restaurants to the campers' families; and (5) the Wellspring lease allows local residents to use the Camp Hope property from 15 September to 15 May each year.

To reflect the jury's determination that the Town did not violate the condition requiring that it not allow a summer camp that primarily benefited residents from other areas and states to operate on the Camp Hope property, the trial court entered an order declaring that the Town retained fee simple determinable title to the property. Both parties now appeal.

II. Analysis

The Town raises one issue on cross-appeal—that the trial court erred in denying its motion for a directed verdict because the clause relied upon by plaintiffs in the Deed is precatory as a matter of law. We agree with the Town on this issue. Therefore, we need not address plaintiffs' issues on appeal.

Initially we note that, although the jury ruled in favor of the Town, that favorable outcome does not prohibit the Town from raising this issue on appeal. *See Finkel v. Finkel*, 162 N.C. App. 344, 349, 590 S.E.2d

472, 475 (2004) (holding that generally "the party who prevails at trial may appeal where the judgment is less favorable than that party thinks is just"). "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

The Deed specifically grants:

> To the party of the third part a fee simple determinable estate in the lands hereinafter described (known as the Camp Hope property) which fee simple determinable estate shall automatically arise at such time as the parties of the second part, [the YMCA], shall violate any of the conditions imposed upon the parties of the second part as hereinafter enumerated. The fee simple determinable estate hereby granted to the party of the third part, once it has come into being, shall last so long as the said lands (and buildings that may be erected thereon) are used by the Town of Canton in accordance with the express conditions hereinafter **enumerated**, and no longer. [Emphasis added].

The Deed also describes the Town's interest as follows:

> Once its estate has arisen by operation of law . . . The Town of Canton, shall have and hold the above described land and premises [the Camp Hope property], together with all the privileges and appurtenances thereunto belonging, or in anywise thereunto appertaining, so long as the lands are used for the purposes hereinafter set out and in accordance with the conditions hereinafter set out and no longer, and **when the party of the third part ceases to use said property for said purposes or when the party of the third part shall violate any of the conditions placed upon the party of the third part; the title to said lands and premises shall, without re-entry or suit, automatically revert to the party of the first part**, Champion International Corporation, or its successor corporation. [Emphasis added].
>
> The Town of Canton will hold title to the Camp Hope property hereinafter described and will use the same for the benefit of the same persons and groups of persons who have historically used the facilities of the YMCA in

> the Town of Canton and the Camp Hope property. This shall include citizens of the Town of Canton and citizens of Haywood County and adjoining counties but should not preclude the use of the property by persons from other areas, **but the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states.** The Town will use its **best efforts** to see that the users of the facilities are those who have historically used the same. [Emphasis added].

As to the express conditions imposed on the YMCA, the Deed sets forth fourteen numbered paragraphs preceded by the sentence: "The conditions hereby placed upon the party of the second part . . . are as follows[.]" As to the conditions imposed on the Town, the Deed sets forth seventeen numbered paragraphs preceded by the sentence: "The conditions hereby placed upon the party of the third part, The Town of Canton, are as follows[.]" The express conditions placed on the Town include:

> 1. The property will be used for active recreational purposes.
>
> 2. The Town of Canton will keep the property free of trash and debris, clearing underbrush and will keep grassed areas mowed and in good condition.
>
> 3. The Town of Canton will maintain all structures existing at the time of this conveyance in good condition, ordinary wear and tear excepted. It will keep up the walls, roof, interior and exterior of the dining hall and all residence buildings and all water and sewer lines and septic facilities. If any structures must be removed because of age and ordinary wear and tear they will be cleared away and not allowed to remain in place.
>
> 4. The Town of Canton will use the property for active recreational purposes such as camping for scout troops, organized camping programs for other organizations, picnicking, social and political gatherings, games such as shuffleboard, baseball, softball, tennis, football, hiking, etc. but will not permit the land to be used solely in a passive manner such as reverting to its nature state with the sole recreational use being hiking.

5. No general timbering operations will be allowed other than the cutting of diseased or dead timber and the ordinary thinning of new growth.

6. All camp fires will be carefully contained and built only in designated areas, such as on concrete pads or outdoor grills.

7. No firearms will be allowed within the area and no hunting or trapping of any kind will be allowed except the hunting or trapping of dangerous animals or snakes by proper governmental agencies.

8. The Town of Canton may build further recreational building, cabins, gyms, etc., but must maintain any such buildings so built.

9. The Town of Canton will permit no illegal activity to take place on the property.

10. The Town of Canton will permit no garbage or waste disposal on the property and will permit no hazardous substances to be brought on to the property or stored thereon.

11. The Town of Canton will carry liability insurance on the property in amounts it deems appropriate.

12. No permanent or semi-permanent hookups for mobile homes or recreational vehicles will be allowed on the property. Any such hookups in existence at the time that the Town of Canton's estate in the property arises will be removed from the property at the sole cost and expense of the Town of Canton. No mobile homes will be allowed on the property and recreational vehicles will be allowed only when such vehicles have their own source of power, water and sewer and then only for two weeks (or a lesser period). Recreational vehicles will be allowed on the property only in conjunction with other types of camping such as when a scout troop uses the area, the scout masters may bring a self-contained recreational vehicles on the property.

13. In the operation of the Camp Hope facilities by the Town of Canton, it may charges fees sufficient to enable the Town of Canton to recover the ordinary costs of the maintenance and operation of the Camp Hope facilities but will not charge fees in excess of those fees which

would ordinarily recoup the expense of the maintenance and operating costs of the facilities. The Town of Canton will not operate Camp Hope as a profit making venture.

14. No building located on the property at such time as the Town of Canton's Estate may arise or no building erected thereafter will be occupied by any person or group of persons as a permanent residence except that one structure may be occupied by a caretaker of the property and his immediate family.

15. The Town of Canton will actively maintain the property at all times and will actively operate a program on the property (at least in warmer months) at all times.

16. Should The Town of Canton violate one or more of conditions number 1 through 14 and such violation is not remedied and continues for a period of 90 days after Champion International Corporation has given to the Town of Canton written notice of the violation, the continued violation of any one of conditions 1 through 14 for 90 days after such written notice will cause an automatic reverter of the title from Town of Canton to the party of the first part, Champion International Corporation.

17. Should the Town of Canton fail to actively maintain the property or actively operate a program on the property as such obligation is placed on the Town by condition number 15, and such failure to maintain or actively operate a program on the property shall continue for a period of one (1) year, the title to the property will also automatically revert from the Town of Canton to the party of the first part, Champion International Corporation.

On appeal, plaintiffs do not allege that the Town violated any of these seventeen conditions. Instead, it is plaintiffs' position that the clause in the Deed, "but the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states[,]" constitutes an express condition, which, if violated, triggers plaintiffs' reversionary interest. Further, given that the Town (allegedly) violated this condition, plaintiffs contend that the trial court erred in denying their motion for a directed verdict and their motion for judgment notwithstanding the verdict. Alternatively, it is the Town's position that the clause is precatory and, therefore, merely advisory. Thus, any

violation could not by operation of law trigger plaintiffs' reversionary interest. Again, we agree with the Town.

"In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument." N.C. Gen. Stat. § 39-1.1 (2013). "[T]he meaning of [a deed's] terms is a question of law, not of fact." *Elliott v. Cox*, 100 N.C. App. 536, 538, 397 S.E.2d 319, 320 (1990). Even "[a]mbiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent." *Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771 (1984). Therefore, the question of whether the language contained in a Deed is precatory is to be decided by the Courts as a matter of law.

"A grantor can impose conditions and can make the title conveyed dependent upon [a grantee's] performance. But if [the grantor] does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive." *Ange v. Ange*, 235 N.C. 506, 508, 71 S.E.2d 19, 20-21 (1952) (internal quotations and citations omitted). It is well established that "[t]he law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is *clearly manifested*." *Washington City Board of Education v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664, (1956) (emphasis added). For a reversionary interest to be recognized, the deed must "contain express and unambiguous language of reversion or termination upon condition broken." *Station Associates, Inc. v. Dare Cnty.*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999). "[A] mere expression of the purpose for which the property is to be used without provision for forfeiture or re[-]entry is insufficient to create an estate on condition[.]" *Id.* at 373, 513 S.E.2d 793.

Applying this law to the Deed in the present case, we note that the document does, in fact, contain language of reversion or termination. However, the reversionary language is in reference to the seventeen enumerated conditions, not the clause on which plaintiffs rely. The Deed provides, should the Town cease "to use said property for said purposes" or "violate any of the conditions placed upon [the Town]," title to the property "shall, without re-entry or suit, automatically revert to . . . Champion . . . or its successor corporation." At the outset of the Deed, the grantor specified that both the YMCA and the Town could maintain

title only if each used the property in accordance with the "express conditions hereinafter **enumerated** and no longer." "Enumerate" means "to count off or designate one by one; to list." BLACK'S LAW DICTIONARY 574 (8th ed. 1999). AS cited above, the Deed enumerates seventeen conditions placed upon the Town, none of which reference the clause at issue. Taken as a whole, it is apparent that the grantor intended to trigger reverter only if one of the enumerated conditions was broken. Further, condition #4 serves as a restraint on use, providing that the Town must use the property for recreational purposes. Arguably, if the grantor intended to further restrain the Town's use of the property by prohibiting it from operating a summer camp that primarily benefited residents of other states, it would have done so in an enumerated paragraph.

However, the paragraph in which the clause is written is un-numbered and devoid of any express and unambiguous language of reversion upon condition broken. In fact, in their brief, plaintiffs do not direct us to any reversionary language in direct reference to this clause. Thus, nowhere in the paragraph or in the Deed itself is it "clearly manifested" that title to the property is to revert to Champion, or its successor, upon the Town's violation of the clause. *See Edgerton*, *supra*. Moreover, the clause is followed by a sentence in which the grantor asks that the Town use its "best efforts" to ensure "that the users of the facilities are those who have historically used the same." The inclusion of such subjective language in this paragraph is additional evidence that the grantor did not envision this paragraph or the clause therein to inflict a rigid restriction upon the title or to create a condition subsequent. Instead, we hold that this clause is precatory. Champion merely sought to express an intended purpose for which the property was (hopefully) not to be used. *See Ange*, 235 N.C. at 509, 71 S.E.2d at 21 (holding that a conveyance of land containing the clause "for church purposes only," did not create a condition subsequent because, without reservation of power of termination or right of re-entry for condition broken, the clause merely expressed the motive and purpose which prompted the conveyance); *see also Nelson v. Bennett*, 204 N.C. App. 467, 472, 694 S.E.2d 771, 775 (2010) (concluding that the portion of a will providing that "[t]he house is not to be used for a business or Bed and Breakfast and is not to be leased out by [Ms.] Frejlach" was precatory because it was unaccompanied by express and unambiguous language of reversion or termination upon condition broken).

III. Conclusion

In sum, the trial court erred in denying the Town's motion for a directed verdict at the close of plaintiffs' evidence and again at the close

of all evidence. As a matter of law, the language relied upon by plaintiffs is precatory and could not trigger plaintiffs' reversionary interest in the Camp Hope property. We remand this matter to the trial court for entry of a judgment in favor of defendant on directed verdict.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
STEPHEN ANTHONY GRANGER, DEFENDANT

No. COA13-1382

Filed 15 July 2014

1. Criminal Law—motion to suppress—minimum requirements

Defendant satisfied the minimum requirements for a motion to suppress driving while impaired blood test results and did not waive his right to argue a violation of his Fourth Amendment rights. Defendant's motion to dismiss on Fourth Amendment grounds may be treated as a motion to suppress even though it was not verified, because his motion to suppress based on a Sixth Amendment challenge was verified and contained substantially the same factual allegations.

2. Search and Seizure—warrantless blood draw—exigent circumstances—findings

In a driving while impaired prosecution, there was competent evidence in the record to support contested findings about a warrantless blood draw after an automobile accident. More specifically, the findings involved the length of the delay before the blood draw and the officer's concerns about defendant's pain medication.

3. Search and Seizure—warrantless blood draw—totality of circumstances—conclusion

The trial court's findings in a driving while impaired prosecution supported its conclusion that the totality of the circumstances showed that exigent circumstances justified a warrantless blood draw after a traffic accident.

Appeal by Defendant from judgments entered 22 August 2013 by Judge William R. Pittman in New Hanover County Superior Court. Heard in the Court of Appeals on 24 April 2014.

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

Kerri L. Sigler, for Defendant-appellant.

DILLON, Judge.

Stephen Anthony Granger ("Defendant") appeals from the judgment entered for driving while impaired following the denial of his motion to suppress. For the foregoing reasons, we affirm the trial court's order denying Defendant's motion to suppress.

I. Background

In the early morning hours of 1 May 2012, Defendant was involved in a motor vehicle accident in Wilmington where the vehicle he was operating rear-ended another vehicle. As a result of the accident, he was charged with driving while impaired ("DWI") and failure to reduce speed.

On 25 June 2013, Defendant filed in the superior court[1] a motion to suppress the results from the test of his blood which was drawn shortly after the accident, arguing *inter alia* that his Sixth Amendment right to confront witnesses had been violated by the State's failure to prove the chain of custody of his blood sample. On 22 July 2013, Defendant filed a motion to dismiss, arguing that his Fourth Amendment rights had been violated because the blood draw was performed without a warrant.

On 21 August 2013, Defendant's motions were argued before the trial court. Evidence presented by the State tended to show the following: On 1 May 2012, Officer Eric Lippert with the Wilmington Police Department responded to a report of an accident occurring around 2:19 a.m. When he arrived at the scene, Officer Lippert observed Defendant sitting in the driver's seat alone in his vehicle and Defendant's vehicle had rear-ended a truck towing an enclosed trailer. Officer Lippert approached Defendant's vehicle and noticed that Defendant was "in some level of pain, discomfort[,]" and had "a moderate odor of an alcoholic beverage coming from his person." Defendant was subsequently transported to

1. This matter was originally brought in district court where Defendant was convicted of DWI. Defendant appealed that conviction to superior court.

New Hanover Regional Medical Center by EMS, without Officer Lippert performing any sobriety checks on Defendant.

Officer Lippert also traveled to the hospital where he spoke with Defendant. During this encounter, Officer Lippert noticed that Defendant had "bloodshot and glassy eyes[,]" and Defendant kept interrupting him and telling him that "I've been drinking[.]" Defendant admitted to Officer Lippert that he had taken "three shots" between 10 p.m. and 11 p.m. and his last shot was 20 minutes before the accident or approximately 2 a.m. While Defendant was lying in his hospital bed, Officer Lippert gave Defendant two Alcosensor portable breath tests, one at 3:04 a.m. and the other at 3:09 a.m.; both tests were positive for alcohol. Because of Defendant's condition, Officer Lippert was limited in the type of field sobriety tests he could perform. He administered the horizontal gaze nystagmus test, which Defendant did not pass. He also administered an alphabet test and a counting test, which Defendant passed.

Based on his investigation, Officer Lippert determined that he had sufficient probable cause to obtain a blood sample from Defendant. At 3:10 a.m., Officer Lippert read Defendant his implied consent rights and waited for a nurse to draw Defendant's blood for analysis. At 3:50 a.m., a nurse became available, and Officer Lippert made a request to Defendant for a blood draw; however, Defendant refused to give his consent. Officer Lippert testified that he did not get a warrant for the blood draw because, *inter alia*, he was by himself with Defendant and would have to get another officer to watch Defendant while he drove to the county jail to get the warrant, about 20 minutes away; he was concerned about the dissipation of the alcohol from Defendant's blood stream, as it had been over an hour since the accident; and he had to get the blood evidence soon as he could not get an accurate blood sample if Defendant were given any medications for his pain or injuries. At 3:51 a.m., Officer Lippert instructed the nurse to draw Defendant's blood. A test of this blood sampled revealed an alcohol concentration of 0.15, in excess of the legal limit.

Following testimony, Defendant argued that there was insufficient exigent circumstances to justify the warrantless seizure of the blood evidence. The superior court ruled in open court that Defendant's Fourth Amendment rights had not been violated because there was sufficient exigent circumstances present, but stated specifically that it was not ruling on the Sixth Amendment "chain of custody" issue.

On 22 August 2013, the superior court issued a written order, with findings of fact and conclusions of law, denying "defendant's motion to

suppress" after concluding that there were sufficient exigent circumstances to justify the warrantless blood draw. On the same day, after preserving his right to appeal the superior court's denial of his motion to suppress, Defendant pled guilty to DWI. As a condition of the plea, the State dismissed the charge of failure to reduce speed. The superior court sentenced Defendant to a term of 12 months imprisonment; this sentence was suspended and Defendant was placed on supervised probation for 18 months. The Court also ordered Defendant to complete 48 hours of community service and "not to drive until licensed to do so." On 22 August 2013, Defendant filed written notice of appeal from this judgment.

II. Argument

In his only issue on appeal, Defendant contends that the trial court erred in denying his motion to suppress certain blood evidence because there were insufficient exigent circumstances to support the warrantless seizure of that evidence in violation of his Fourth Amendment rights.

A. Preliminary Manner

[1] The State, citing *State v. Golden*, 96 N.C. App. 249, 385 S.E.2d 346 (1989), argues that Defendant waived his right to argue a violation of his Fourth Amendment rights. Specifically, the State contends that none of Defendant's attempts in superior court to challenge the admission of the blood test based on Fourth Amendment grounds followed N.C. Gen. Stat. § 15A-977(a) (2012), which requires, in part, that (1) the "motion to suppress . . . be in writing[,]" (2) it "state the grounds upon which it is made[,]" and (3) it "be accompanied with an affidavit containing facts supporting the motion." *Id.* We disagree.

Specifically, the State argues that Defendant's oral motion to suppress made at the hearing based on the Fourth Amendment was not sufficient to preserve Defendant's appeal since this motion did not meet the requirement that it be "in writing." Further, the State argues that Defendant's written motion to suppress was not sufficient to preserve Defendant's appeal, since the only ground stated in that motion is based on the Sixth Amendment (chain of custody/confrontation of witnesses) and *not* the Fourth Amendment (exigent circumstances). Finally, the State argues that Defendant's written motion to dismiss was not sufficient to preserve Defendant's appeal because – though that motion stated the Fourth Amendment as the ground for the challenge - it was not accompanied by the required "affidavit containing facts supporting the motion." *See id.*

We believe that Defendant did satisfy the requirements of N.C. Gen. Stat. § 15A-977(a). Specifically, as the State concedes, Defendant's motion to dismiss – which is based on Fourth Amendment grounds — may be treated as a motion to suppress, pursuant to our decision in *Golden*, *supra*. We recognize that, though the motion to dismiss sets forth factual allegations to support the motion, the motion was unverified. However, Defendant's motion to suppress based on his Sixth Amendment challenge was verified[2] and contains substantially the same factual allegations that are contained in Defendant's unverified motion to dismiss. Since the factual allegations in the motion to suppress are verified and since these allegations are sufficient to support Defendant's motion to dismiss, Defendant has satisfied the minimum requirements for a motion to suppress pursuant to N.C. Gen. Stat. § 15A-977(a). Accordingly, we turn to address Defendant's substantive arguments regarding the denial of his motion to suppress and exigent circumstances.

B. Motion to Suppress-Exigent Circumstances

1. Standard of Review

[2] This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). When a defendant fails to challenge the trial court's findings of fact,

> they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Id. at 168, 712 S.E.2d at 878 (citations and quotation marks omitted). On appeal, Defendant challenges only portions of finding of fact 41. Therefore, the remaining findings of fact are binding to us on appeal and deemed to be supported by competent evidence. *See id.* We first turn to Defendant's challenges to the trial court's finding of fact 41, arguing that subsections (a) and (c) of this finding are not supported by competent evidence in the record.

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2. Although not initially included in the record on appeal, Defendant made a motion with this Court to amend the record on appeal to include the verification of his motion to suppress. We grant this motion.

2. The trial court's finding of fact 41

Finding of fact 41(a) states

> (a) The first exigent circumstance was the fact that defendant's percentage alcohol [sic] in the his [sic] blood was dissipating and had been for approximately 1 hour and 32 minutes, from the time of the accident until the time the defendant refused a consensual blood draw. Such dissipation destroys the vital evidence in the case. An additional 40 plus minute delay by traveling to the New Hanover County Jail to seek a magistrate's signature on a search warrant would allow further dissipation of alcohol and further evidence to be destroyed.

First, Defendant contends that it was not 1 hour and 32 minutes from the accident until he refused a consensual blood draw, as the trial court found, but 1 hour and 32 minutes from the accident until when his blood was actually drawn. Defendant also argues that Officer Lippert arrived at 2:50 a.m. and "wasted" 20 minutes performing field sobriety tests on Defendant and then "wasted" another 40 minutes between Defendant's refusal and the blood draw, enough time for him to obtain the search warrant and he "simply refused to do so." We find Defendant's arguments unpersuasive.

It appears that Defendant is challenging the first and last sentences of this finding. As to the first sentence, Officer Lippert testified that the accident occurred at 2:19 a.m. Officer Lippert further testified that at 3:50 a.m., when a nurse finally became available to perform a blood draw, Defendant refused to give his consent to the draw. One minute later, the nurse drew Defendant's blood at 3:51 a.m. We do not believe that Officer Lippert "waste[d]" 40 minutes, as Defendant argues, from 3:10 until 3:50 a.m., but he was waiting for a nurse. Therefore, this finding is supported by competent evidence in the record. Defendant's argument may be based on the implied consent rights form which shows 3:10 a.m. as the time that Defendant refused, but Officer Lippert clarified in his testimony that he gave the form to Defendant at 3:10 a.m. but it was not until a nurse arrived at 3:50 a.m. that Defendant refused to give his consent.

As to the last sentence in this finding, Officer Lippert testified that it would have taken 15 or 20 minutes to drive to the county jail to see a magistrate and get a warrant and it would take him some amount of time to fill out the proper search warrant form and did not know how long the

process would take. Therefore, the trial court's finding that there would have been a "40 plus minute delay" is supported by competent evidence.

We also find Defendant's argument that Officer Lippert "wasted" 20 minutes doing field sobriety tests unpersuasive because it is well understood that Officer Lippert would have to have probable cause in order to obtain the contested blood draw evidence. *See* U.S. Const. Amend. IV. Those sobriety tests would be in furtherance of establishing probable cause. Therefore, Defendant's arguments are overruled.

As to finding of fact 41(c), Defendant contends Officer Lippert's testimony regarding Defendant needing pain medication was "purely hypothetical," and there was no evidence that Defendant needed or was given any pain medication that would interfere with him getting a blood sample. We likewise find these arguments to be without merit.

Officer Lippert testified that when he arrived on the scene of the accident Defendant appeared to be "in some level of pain [and] discomfort[]," he was taken out of his vehicle and transported to the hospital on a backboard, and, at the hospital, Defendant complained of foot, ankle, knee, and shoulder pain. Officer Lippert testified that he had seen accident victims receive pain medication before and was concerned that pain medication would prevent him from getting an accurate blood test. He further stated that he would not stop or interfere with a person's medical treatment. We are not persuaded by Defendant's argument that no evidence supports finding of fact 41(c) and that Officer Lippert's concerns were merely "hypothetical[.]" Rather, there was competent evidence in the record to support the trial court's finding of fact 41(c) and Defendant's arguments are overruled. We next turn to Defendant's challenges to the trial court's conclusions of law.

3. The trial court's conclusions of law

[3] Defendant contends that the trial court's findings of fact do not support its conclusion of law that sufficient exigent circumstances existed to justify the warrantless collection of his blood sample. Defendant contends that the trial court's findings of fact do not show that Officer Lippert "faced an emergency that justified action without a warrant" as required by *Missouri v. McNeely*, ___ U.S. ___, 185 L. Ed. 2d 696 (2013), for sufficient exigent circumstances. Defendant concludes that the denial of his motion to suppress should be reversed, the evidence suppressed, and his charges dismissed.

Our Supreme Court has stated that "[t]he withdrawal of a blood sample from a person is a search subject to fourth amendment protection."

State v. Welch, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986) (citation omitted). Therefore, "a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search." *Id.* Defendant raises no argument regarding probable cause for the warrantless blood draw. Thusly, our review is limited to whether there were sufficient exigent circumstances.

The United States Supreme Court recently held in *Missouri v. McNeely*, *supra*, that the natural dissipation of alcohol in the bloodstream, standing alone, cannot create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. The inquiry into an exigency is fact-specific and "demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.' " *McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 705 (citation omitted). It stated that in DWI-type investigations, "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at ___, 185 L. Ed. 2d at 707. By way of example, the Court stated that there may be "a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." *Id.* at ___, 185 L. Ed. 2d at 708. But the Court also recognized that "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* at ___, 185 L. Ed. 2d at 707. The Court stated that, for example, "exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." *Id.* at ___, 185 L. Ed. 2d at 709. The Court, in affirming the lower court's ruling, concluded that

> [i]n short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id.

In *State v. Dahlquist*, ___ N.C. App. ___, 750 S.E.2d 580 (2013), *appeal dismissed and disc. review denied*, ___ N.C. ___, ___ S.E.2d ___, 2014 N.C. LEXIS 203 (N.C., 2014), we addressed the effect of the U.S.

Supreme Court's holding in *McNeely*, *supra*, stating that "the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.* at ___, 750 S.E.2d at 583.

In the present case, we conclude that the trial court's findings support its conclusion that the *totality of the circumstances* showed that exigent circumstances justified the warrantless blood draw. Specifically, the trial court found that Officer Lippert had concerns regarding the dissipation of alcohol from Defendant's blood, as it had been over an hour since the accident when Officer Lippert established sufficient probable cause to make his request for Defendant's blood. Those findings also state Officer Lippert's concerns "due to delays from the warrant application process[.]" *See McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 709. Its findings show that Officer Lippert did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant's injuries and need for medical care. Even if he had the opportunity to investigate the matter at the accident scene sufficiently to establish probable cause, unlike the example in *McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 708, Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant. Its findings show that Officer Lippert's "knowledge of the approximate probable wait time" and "time needed to travel[,]" as being over a 40 minute round trip to the magistrate at the county jail. *See Dahlquist*, ___ N.C. App. at ___, 750 S.E.2d at 583 (holding that there were sufficient exigent circumstances justifying the warrantless blood draw in part because of the officer's knowledge of the travel time and delays as a result of the warrant application process). Additionally, Officer Lippert had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body. There was a reasonable chance if Officer Lippert left him unattended to get a search warrant or waited any longer for the blood draw, Defendant would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample.[3]

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3. We note that a defendant can be guilty of impaired driving under N.C. Gen. Stat. § 20-138.1 not only for having "consumed sufficient alcohol" but also for being "under the influence of an impairing substance" or with "any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine." A blood test for Defendant's blood alcohol content could also presumably reveal if he was also under the influence of another "impairing substance" or "Schedule I controlled substance[.]"

For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED

Judge STROUD and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
JERROD STEPHON HILL, DEFENDANT

No. COA13-1188

Filed 15 July 2014

1. Sentencing—failure to hold charge conference prior to instructing jury—new trial

The trial court erred in an attempted robbery with a firearm and assault with a deadly weapon inflicting serious injury case when it failed to hold a charge conference prior to instructing the jury during the sentencing phase of the trial, and therefore, the judgment was vacated and remanded for a new trial on sentencing.

2. Sentencing—aggravating factor—acting in concert—attempted armed robbery

Although defendant argued on appeal that the trial court erred in submitting the N.C.G.S. § 15A-1340.16(d)(2) aggravating factor when he was likely convicted of attempted armed robbery under an acting in concert theory, the Supreme Court has recently rejected that argument.

Appeal by defendant from judgments entered 9 August 2011 by Judge Mark E. Klass in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Nancy D. Hardison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

GEER, Judge.

Defendant Jerrod Stephon Hill appeals from his convictions of attempted robbery with a firearm and assault with a deadly weapon inflicting serious injury ("ADWISI"). The trial court sentenced defendant in the aggravated range based upon the jury's determination that two aggravating factors existed. On appeal, defendant makes several arguments regarding the sentencing phase of the trial. We agree with defendant that the trial court erred when it failed to hold a charge conference prior to instructing the jury during the sentencing phase of the trial and, therefore, vacate defendant's judgment and remand for a new trial on sentencing.

Facts

The State's evidence tended to show the following facts. On 16 March 2010, Howard Moore was with his friend Little Rick when Rick received a phone call from defendant. Defendant told Rick that he had a plan to rob Michael Dyer, defendant's friend from high school. According to the plan, defendant, Howard, and Rick would go to Mr. Dyer's house and Howard would ask to use his bathroom. Once they were inside, they would pin Mr. Dyer down and rob him. Defendant and his friend Jamal Smith had been to the house earlier that day and had seen Mr. Dyer sleeping on the couch.

A few minutes later, defendant and Jamal picked up Howard and Rick in a SUV driven by Jamal, and they headed to Mr. Dyer's house. On the way there, defendant showed Howard a .22 caliber rifle that he had wrapped in a black shirt.

The men arrived at Mr. Dyer's house around 1:00 p.m. Mr. Dyer saw the SUV pulling into his driveway and recognized defendant, who had been to his house a few months earlier to smoke marijuana. Mr. Dyer met defendant and Howard, whom Mr. Dyer did not recognize, at the door. Defendant asked Mr. Dyer if Howard could use his bathroom, and Mr. Dyer let them inside. After showing Howard to the bathroom, Mr. Dyer heard someone behind him say, "Hey, homey." He turned around and saw Rick, whom he did not recognize, pointing a .22 caliber rifle at his head. Then, defendant punched Mr. Dyer in the face, blind-siding him. Howard came out of the bathroom, and Howard, defendant, and Rick began beating Mr. Dyer. Rick hit Mr. Dyer in the head with the butt of the rifle with such force that the rifle broke apart.

Mr. Dyer attempted to fight back, at one point throwing defendant over a chair. Mr. Dyer then pulled out a pocket knife and stabbed Howard in the side and in the buttock. At that point, defendant said "Oh, shit. White boy has a knife[,]" and defendant, Howard, and Rick ran out of the

house. Mr. Dyer's mother arrived shortly thereafter and called 911. Mr. Dyer was hospitalized and required extensive medical treatment including surgery for a fractured orbital bone and cheek bone, and stitches for lacerations to his head and face. He continues to have problems with the vision in his right eye.

Police officers recovered from Mr. Dyer's house the broken pieces of the butt of the rifle used to beat Mr. Dyer, the knife used to stab Howard, a ski mask, a doo rag with Jamal's DNA on it, and defendant's cell phone. Police questioned Mr. Dyer, who identified defendant as one of the suspects. Later that afternoon, police were alerted when Howard went to the hospital to seek treatment for his stab wounds. Howard was interviewed by police at the hospital, and, although he initially denied any knowledge of the incident, he eventually confessed to participating. Howard agreed to plead guilty to a charge of common law burglary in exchange for his testimony against defendant.

Defendant was indicted on 7 June 2010 for attempted robbery with a dangerous weapon, ADWISI, and assault inflicting serious bodily injury. On 6 July 2011, the State provided defendant with notice that it also intended to prove the following aggravating factors at trial: that defendant (1) induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants in the commission of the offense, and (2) joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

At trial, defendant testified in his own defense that on 16 March 2010, he was coming out of a corner store when he saw Rick and offered to pay Rick for a ride home. Howard, whom defendant did not know, was also in the car. As they were driving, Rick asked defendant if he knew where they could get some marijuana. Defendant directed them to Mr. Dyer's house. When they got there, defendant and Howard met Mr. Dyer on the porch. Defendant asked Mr. Dyer if he had any weed, and Howard asked if he could use the bathroom. Mr. Dyer let them inside, and defendant and Mr. Dyer discussed marijuana while Howard went to the bathroom.

Defendant testified that Howard came out of the bathroom and blindsided Mr. Dyer by punching him in the face. At the same time, Rick came in with a gun pointed at Mr. Dyer's face and said, "Give it up." Defendant stood there in shock at first while Howard and Rick began beating Mr. Dyer. Then, defendant tried to break up the fight. When Mr. Dyer stabbed Howard, defendant heard Rick yell, "White boy got a knife." Defendant

ran out of the house, and as he was running down the driveway, Rick and Howard pulled up in the car and Rick told defendant, "Get your ass in the car." Defendant got in because Rick had a pistol in his lap, and he felt threatened. Defendant denied that he saw the rifle before the assault occurred, that he punched Mr. Dyer, or that he intended to rob him.

On cross-examination, the State asked defendant about his interview with Detective Rick Shelton of the Winston-Salem Police Department when he was first arrested. When the State asked if defendant told Detective Shelton that he only got into the car because Rick threatened him with a pistol, defendant claimed that he did say that to Detective Shelton. Defendant also denied telling the detective initially that he did not know Mr. Dyer and then saying, "Oh, yeah, yeah, yeah. I saw Michael at a party on Sunday night in Clemmons where a fight broke out."

The State then called Detective Shelton as a rebuttal witness and played the videotaped recording of Detective Shelton's interview with defendant. Detective Shelton's testimony and the recording showed that defendant never told Detective Shelton that Rick threatened him with a pistol and revealed other inconsistencies in defendant's testimony.

At the close of all the evidence, the State voluntarily dismissed the charge of assault inflicting serious bodily injury. The jury found defendant guilty of attempted robbery with a dangerous weapon and ADWISI. The court then proceeded to the sentencing phase of the trial to allow the jury to render a verdict on the aggravating factors. Neither party presented additional evidence on the aggravating factors. After each side gave closing arguments, the court instructed the jury with respect to the aggravating factors. The jury returned a verdict finding that both aggravating factors were present.

Defendant did not argue that the trial court should find any mitigating factors, and the trial court sentenced him in the aggravated range to a term of 100 to 129 months imprisonment for attempted robbery with a dangerous weapon and to a consecutive presumptive-range term of 26 to 41 months imprisonment for ADWISI. Defendant filed a petition for writ of certiorari on 24 January 2013, which this Court granted on 4 February 2013.

Discussion

[1] Defendant first argues that the trial court violated N.C. Gen. Stat. § 15A-1231(b) (2013) by failing to hold a charge conference prior to instructing the jury in the sentencing phase of the trial. Although defendant did not raise this issue at trial, he argues that this issue is preserved

because "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Defendant contends that holding a charge conference is a statutory mandate under N.C. Gen. Stat. § 15A-1231(b), which provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

With respect to whether holding a charge conference is a statutory mandate, this Court has noted that " 'ordinarily, the word "must" and the word "shall," in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]' " *State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005) (quoting *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978)). Nevertheless, " 'the legislative intent is to be derived from a consideration of the entire statute' " including " 'the importance of the provision involved.' " *Id.* (quoting *House*, 295 N.C. at 203, 244 S.E.2d at 661, 662). " 'Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.' " *Id.* (quoting *House*, 295 N.C. at 203, 244 S.E.2d at 661-62).

The purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to "insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and in reaching the correct verdict," Irving Joyner, *Criminal Procedure in North Carolina* § 11.17 (3d ed. 2005), and "to enable counsel to know what instructions will be given so that counsel will be in a position to argue the facts in light of the law to be charged to the jury."

State v. Wilson, 354 N.C. 493, 524, 556 S.E.2d 272, 292 (2001) (Butterfield, J., concurring), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). After considering N.C. Gen. Stat. § 15A-1231(b) as a whole, including the importance of allowing the parties an opportunity to be heard regarding jury instructions and the use of the word "must," we conclude that holding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial.

The State argues, however, that N.C. Gen. Stat. § 15A-1231(b) should not apply to trials regarding the existence of aggravating factors in non-capital cases. The State asserts that N.C. Gen. Stat. § 15A-1340.16(a1) (2013) sets forth all the procedural requirements for sentencing a defendant in the aggravated range and, because N.C. Gen. Stat. § 15A-1340.16(a1) does not specifically require the court to hold a separate charge conference, the trial court was not required to do so. We disagree.

N.C. Gen. Stat. § 15A-1340.16(a1) provides, in pertinent part, that if the defendant does not admit to the existence of an aggravating factor, "only a jury may determine if an aggravating factor is present in an offense." The statute further provides:

> The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. . . . If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

Id.

The statute goes on to address the procedure to be followed (1) when a defendant admits the aggravating factor, (2) when a defendant pleads guilty to the underlying felony but contests the existence of

an aggravating factor, and (3) when the State seeks to establish a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7) (2013). *See* N.C. Gen. Stat. § 15A-1340.16(a2), (a3), (a5). The statute also sets out requirements for pleading or giving notice of an intent to use aggravating factors or seek addition of prior record level points. *See* N.C. Gen. Stat. § 15A-1340.16(a4), (a5), (a6).

Nothing in the statute addresses the specifics of how the trial court should conduct a separate sentencing proceeding before the jury that decided the underlying felony charge or a separate sentencing proceeding before a newly empanelled jury. N.C. Gen. Stat. § 15A-1340.16 simply does not attempt to regulate how the trial court should conduct the sentencing proceedings, and we can glean no intent to mandate a different procedure than that which governs trials of criminal offenses. Accordingly, we hold that N.C. Gen. Stat. § 15A-1231 applies to sentencing proceedings under N.C. Gen. Stat. § 15A-1340.16(a1).

If, as occurred in this case, the trial court decides to hold a separate sentencing proceeding on aggravating factors as permitted by N.C. Gen. Stat. § 15A-1340.16(a1), and the parties did not address aggravating factors at the charge conference for the guilt-innocence phase of the trial, N.C. Gen. Stat. § 15A-1231 requires that the trial court hold a separate charge conference before instructing the jury as to the aggravating factor issues. The trial court's failure to do so in this case was error.

We note, however, that N.C. Gen. Stat. § 15A-1231(b) (emphasis added) provides that "[t]he failure of the judge to comply *fully* with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." In this case, however, the trial court did not comply with N.C. Gen. Stat. § 15A-1231(b) at all.

This Court considered the failure to hold a charge conference under a prior version of N.C. Gen. Stat. § 15A-1231(b) in *State v. Clark*, 71 N.C. App. 55, 57, 322 S.E.2d 176, 177 (1984), *disapproved of on other grounds by State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). That version included the same requirement of a showing of material prejudice if the trial court failed to " 'fully' " comply with the requirement for a recorded charge conference. *Id.* (quoting N.C. Gen. Stat. § 15A-1231(b) (1983)). However, the 1983 statute only required a recorded charge conference if one of the parties requested it. *Id.*

In *Clark*, the Court held that because the defense counsel had requested a charge conference, the trial court was "mandated . . . to

conduct a recorded instruction conference under G.S. § 15A-1231(b)." *Id.* at 58, 322 S.E.2d at 178. As in this case, the trial court, however, failed to hold any conference at all, recorded or otherwise. *Id.* Without requiring any showing of prejudice, this Court held "that the trial court's failure to hold a jury instruction conference requires a new trial." *Id.*

Under the current version of N.C. Gen. Stat. § 15A-1231(b), the trial court was mandated to hold a charge conference even without a request. Therefore, under *Clark*, the trial court's failure to hold the mandated conference "requires a new trial." 71 N.C. App. at 58, 322 S.E.2d at 178.

Even if *Clark* were not controlling, we hold that defendant has shown sufficient prejudice. Here, in addition to not holding a charge conference, the trial court, contrary to the General Rules of Practice, did not, following his charge to the jury, give counsel an opportunity to object to the charge. *See* Gen. R. Pract. Super. and Dist. Ct. 21 ("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[.]"). As a result, defense counsel was unable to have any input into the jury instructions at all.

Because of the importance of jury instructions, the role the charge conference plays in ensuring that the instructions are clear and correct and framed in the most effective way for a particular party, and the ambiguities and omissions in the instructions and verdict sheet that defendant has pointed out that could have been corrected during a charge conference, we believe that defendant has shown material prejudice. We, therefore, vacate defendant's judgment and remand for a new sentencing proceeding.

[2] Given our disposition of this appeal, we need not address defendant's specific arguments regarding the instructions because they are unlikely to be repeated on remand. We do note, however, that while defendant has argued on appeal that the trial court erred in submitting the N.C. Gen. Stat. § 15A-1340.16(d)(2) aggravating factor when he was likely convicted of attempted armed robbery under an acting in concert theory, the Supreme Court has recently rejected that argument in *State v. Facyson*, ___ N.C. ___, ___, 758 S.E.2d 359, 364 (2014) (holding that because N.C. Gen. Stat. § 15A-1340.16(d)(2) requires evidence that defendant joined with at least two other people to commit the offense while acting in concert requires only one person, "[a]ny evidence that defendant joined with more than one person [is] 'additional evidence'

unnecessary to prove that defendant acted in concert in committing the [offense]" (quoting *State v. Thompson*, 309 N.C. 421, 422, 307 S.E.2d 156, 158 (1983)).

Vacated and remanded.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DAVID FRANKLIN HURT

No. COA09-442-2

Filed 15 July 2014

1. Sentencing—aggravating factor—especially heinous, atrocious, or cruel—sufficient evidence

The trial court did not err in a sentencing hearing on defendant's second-degree murder plea by denying defendant's motion to dismiss the aggravating factor that the offense was especially heinous, atrocious, or cruel. A lack of presence at or participation in a codefendant's gruesome murder does not preclude the submission to the jury of the especially heinous, atrocious, or cruel aggravating factor. Furthermore, in this case, a reasonable inference could have been drawn that defendant did actively participate in the murder of the victim.

2. Sentencing—subpoena—quashed—recitation of basis for guilty plea—not judicial admission

The trial court did not abuse its discretion in a sentencing hearing on defendant's second-degree murder plea by granting the State's motion to quash the subpoena of one of the prosecutors at the hearing on defendant's guilty plea. A recitation of the factual basis for a guilty plea is not a judicial admission. Therefore, the prosecutor's statements regarding the State's acceptance of defendant's guilty plea to second-degree murder did not establish his guilt as merely an aider and abettor rather than an active participant in the murder.

3. Evidence—SBI agent testimony—no prejudice—sentencing

The trial court did not err in a second-degree murder sentencing hearing by overruling defendant's objection and motion to strike

an SBI agent's testimony. The agent explained that where no DNA match is found, the person in question could not have committed the crime. Contrary to defendant's contention, the agent did not affirmatively state that when a DNA match is found, the subject definitely committed the crime. Even assuming, without deciding, that the testimony lacked relevance, defendant failed to show that any such error was prejudicial.

4. Sentencing—mitigation phase—admission of exhibit—preference for live testimony

The trial court did not err during the mitigation phase of sentencing by excluding defendant's exhibit — a notebook prepared for the previous sentencing proceedings in the same case that contained recitations of another individual's multiple confessions, a forensic blood spatter expert report, and medical reports regarding defendant's alcohol consumption. Instead, the trial court informed defendant of its preference for live testimony and admitted parts of the notebook. Furthermore, defendant failed to show how the trial court's refusal to admit the exhibit in its entirety deprived him of the opportunity to present evidence of a mitigating factor.

Appeal by defendant from judgment entered 4 April 2008 by Judge Thomas D. Haigwood in Caldwell County Superior Court. Originally heard in the Court of Appeals 1 October 2009, with opinion filed 16 November 2010. An opinion reversing the decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 27 June 2013.

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

Staples Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

This case is before this Court on remand from the Supreme Court of North Carolina. Our Supreme Court held that for the reasons stated in *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156 (2013), Defendant's rights under the Confrontation Clause were not violated. *State v. Hurt*, ___ N.C. ___, 743 S.E.2d 173 (2013). On remand, we address Defendant's remaining arguments.

David Franklin Hurt ("Defendant") appeals from a judgment imposing a sentence in the aggravated range for second-degree murder. Specifically, Defendant alleges the trial court erred by (1) denying his motion to dismiss the aggravating factor due to the State's failure to establish that the offense was especially heinous, atrocious, or cruel as to him; (2) quashing the subpoena of a former prosecutor, thereby denying Defendant the opportunity to elicit the State's prior judicial admissions and depriving him of his rights to due process, trial by jury, presentation of a defense, and compulsory process; (3) overruling Defendant's objection and motion to strike testimonial evidence from a State Bureau of Investigation ("SBI") agent; and (4) refusing to admit one of Defendant's exhibits at the mitigation phase of his sentencing hearing. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence tending to show the following facts: On 26 February 1999, law enforcement officers found Howard Nelson Cook ("Mr. Cook") dead in his home in Caldwell County. Mr. Cook had sustained blunt force trauma, 12 major stab wounds, and various other "cutting wounds" and abrasions. Earlier that morning, Deputies Jason Beebee ("Deputy Beebee") and Joel Fish ("Deputy Fish") of the Catawba County Sheriff's Office responded to a call from Nancy and Jody Hannah about a white van that appeared to be stuck in their backyard. William Parlier ("Mr. Parlier") — Mr. Cook's nephew — and Defendant had been driving the van. As the deputies approached the scene, they encountered Mr. Parlier, who appeared to be intoxicated, walking in the road. The deputies also observed a white van parked in front of a house they later learned belonged to Paula Calloway ("Ms. Calloway"), Defendant's girlfriend.

The deputies arrested Mr. Parlier on an outstanding warrant and transported him to the Catawba County Jail. The deputies discovered four one-dollar bills with reddish-brown stains on Mr. Parlier's person. Deputy Fish returned to the location of the white van while other officers went to check on Mr. Cook at his house based on Mr. Parlier's statement that "[t]he man inside that house killed my uncle." Deputy David Bates of the Caldwell County Sheriff's Office found the door of Mr. Cook's house open and the body of Mr. Cook lying on the floor in a large puddle of blood.

Earlier that evening, Defendant and Mr. Parlier had arrived at Ms. Calloway's home in a white van. Ms. Calloway and Defendant went to sleep and when they awoke, Mr. Parlier was leaving in the van. Defendant

and Ms. Calloway went looking for the van and found it stuck in a yard. Defendant freed the van and drove it back to Ms. Calloway's house. Soon thereafter, law enforcement officers came to Ms. Calloway's house, and Deputy Fish found Defendant in Ms. Calloway's bed, under the covers, wearing white pants with darkened reddish-brown stains. Defendant's sweatshirt and boots were also tarnished with reddish-brown spots. The SBI later conducted a DNA analysis on Defendant's sweatshirt and boots and determined that both of these items contained Mr. Cook's blood.

On 15 March 1999, Defendant was indicted by a grand jury in Caldwell County for first-degree murder, burglary, and robbery. Mr. Parlier was also charged with the first-degree murder of Mr. Cook. Pursuant to a plea bargain, Mr. Parlier pled guilty to first-degree murder and received a sentence of life in prison. After Mr. Parlier reneged on his promise to testify against Defendant, the State agreed to negotiate a plea with Defendant, and on 26 August 2002, Defendant pled guilty to second-degree murder in exchange for the dismissal of the remaining charges.[1] The trial judge sentenced Defendant to the maximum aggravated range of 276 to 341 months imprisonment.

Defendant appealed, and on 6 April 2004, this Court vacated and remanded, concluding that the trial court erred in utilizing the fact that Defendant joined with *one* other person in committing the offense as an aggravating factor. *State v. Hurt*, 163 N.C. App. 429, 430, 594 S.E.2d 51, 52 (2004). We explained that N.C. Gen. Stat. § 15A-1340.16(d)(2) provides grounds for sentencing a defendant to the aggravated range in circumstances where despite joining *with more than one person* to commit the offense, the defendant was not charged with committing a conspiracy. *Id.* at 434, 594 S.E.2d at 55. Because the evidence indicated Defendant only conspired with one person — Mr. Parlier — we held that N.C. Gen. Stat. § 15A-1340.16(d)(2) did not apply. *Id.* We further concluded that Defendant's participation with Mr. Parlier was not a proper non-statutory aggravating factor because the General Assembly "carefully crafted the statutory language to require that a defendant join with *more than one* other person to support the finding of an aggravating factor on these grounds." *Id.* at 435, 594 S.E.2d at 55.

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1. In the prosecutor's submission to the trial court of the factual basis for Defendant's plea to second-degree murder, he indicated that without Mr. Parlier's testimony against Defendant, the State's evidence that Mr. Parlier was the one who committed the stabbing was much stronger than the evidence against Defendant and that was the basis for proceeding against Defendant only on a charge of second-degree murder.

Our Supreme Court reversed the decision of this Court, concluding that the fact that Defendant joined with one other person in the commission of an offense yet was not charged with conspiracy was reasonably related to the purposes of sentencing and was thus a proper nonstatutory aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(20). *State v. Hurt*, 359 N.C. 840, 844, 616 S.E.2d 910, 913 (2005). The Court remanded for resentencing on different grounds in accordance with *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403 (2004), because Defendant's sentence exceeded the statutory maximum and the upward durational departure from the presumptive range was based solely on judicially-found facts. *Id.* at 845-46, 616 S.E.2d at 913-14. Upon reconsideration, our Supreme Court vacated its earlier opinion in part and remanded the case with instructions to remand to the trial court for a new sentencing hearing. *State v. Hurt*, 361 N.C. 325, 332, 643 S.E.2d 915, 919 (2007). The Supreme Court explained that "[i]f the State seeks an aggravated sentence upon remand, the trial court can consider the evidence then presented to determine which aggravating factors may be submitted to the jury." *Id.*

A jury was empaneled for the purpose of determining the presence of aggravating factors on 2 December 2007 in Caldwell County Superior Court. A mistrial was declared due to misconduct by a juror. A new trial commenced on 31 March 2008. At the outset of the trial, the trial judge informed the jury that Defendant had previously entered a guilty plea for second-degree murder and that the State was now seeking to establish the existence of the aggravating factor that the offense to which Defendant had pled guilty was especially heinous, atrocious, or cruel.

The State presented evidence that Defendant had participated with Mr. Parlier in the vicious beating and stabbing of Mr. Cook. The State's evidence tended to show that (1) Defendant drove himself and Mr. Parlier to Mr. Cook's house; (2) Defendant's clothing and boots tested positive for Mr. Cook's blood; (3) a cigarette butt found outside Mr. Cook's door tested positive for blood and Defendant's DNA; and (4) Defendant drove Mr. Parlier and himself away from the crime scene and to his girlfriend's house.

Special Agent David Freeman ("Special Agent Freeman") of the DNA unit of the forensic biology section of the SBI testified that the end of the cigarette butt containing saliva found outside Mr. Cook's house matched Defendant's DNA and that a pair of blue jeans found in the van had Mr. Cook's blood on them as did Defendant's shirt and boots. The State also presented evidence regarding the specific manner of Mr. Cook's death. Dr. Patrick Lantz, a forensic pathologist and a

medical examiner for Forsyth County, explained that six of the twelve major stab wounds struck vital organs. He further testified that each of these wounds would have been painful and would have caused bleeding both inside and outside of Mr. Cook's body. Dr. Lantz noted, however, that none of the wounds would have caused an immediate loss of consciousness, meaning that Mr. Cook likely would have been awake for approximately five to ten minutes before he lost consciousness due to blood loss. Dr. Lantz then opined that an additional five to ten minutes probably passed between the time Mr. Cook lost consciousness and the time he died.

At the conclusion of the State's evidence, Defendant made a motion to dismiss the jury's consideration of the aggravating factor that this offense was especially heinous, atrocious, or cruel, arguing that the State had not presented sufficient evidence that Defendant had participated in the actual killing of Mr. Cook. Defendant contended that the State's evidence may have placed Defendant at the crime scene but that it did not establish Defendant's actual participation in the murder itself. The trial court denied Defendant's motion, and Defendant did not present any evidence at this proceeding.

On 3 April 2008, the jury returned a verdict finding that the offense was especially heinous, atrocious, or cruel. The trial court then heard evidence regarding mitigating factors, at which time Defendant argued that the State had offered evidence showing only that he brought Mr. Parlier to Mr. Cook's house, was present at the front door, and had driven himself and Mr. Parlier away from the scene of the crime. The trial court rejected the argument that Defendant was a passive participant in the murder and declined to find any non-statutory mitigating factors. The court found three statutory mitigating factors: (1) that Defendant supported his family; (2) that Defendant had a support system in the community; and (3) that Defendant had a positive employment history or was gainfully employed. The trial court found that the aggravating factor outweighed the factors in mitigation and that an aggravated sentence was therefore appropriate. The trial court imposed a sentence in the maximum aggravated range of 276 to 341 months, and Defendant appealed.

Defendant raised five arguments on appeal. In *State v. Hurt*, 208 N.C. App 1, 702 S.E.2d 82 (2010), this Court held that the introduction of certain forensic evidence violated Defendant's rights under the Confrontation Clause, and, therefore, Defendant was entitled to a new sentencing hearing. For this reason, we declined to address Defendant's remaining arguments on appeal. *Id.* at 6, 702 S.E.2d at 87. Discretionary review was allowed, and our Supreme Court reversed, holding that

for the reasons stated in *Ortiz-Zape* no violation of the Confrontation Clause had occurred. Therefore, we now consider Defendant's remaining four issues on appeal.

Analysis

I. Denial of Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss due to the State's failure to introduce substantial evidence that the offense was especially heinous, atrocious, or cruel. We disagree.

Questions of sufficiency of the evidence are reviewed under the substantial evidence test. *See State v. Brewington*, 352 N.C. 489, 525-26, 532 S.E.2d 496, 517-18 (2000), *cert. denied*, 531 U.S. 1165, 148 L.Ed.2d 992 (2001). In determining whether sufficient evidence supported the trial court's submission of the especially heinous, atrocious, or cruel aggravator to the jury, the reviewing court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), *cert. denied*, 526 U.S. 1135, 143 L.Ed.2d 1015 (1999). "If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then it is for the jurors to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt." *State v. Campbell*, 359 N.C. 644, 682, 617 S.E.2d 1, 24 (2005) (citations, quotation marks, and brackets omitted), *cert. denied*, 547 U.S. 1073, 164 L.Ed.2d 523 (2006).

> To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being adequate to support a conclusion. For purposes of a motion to dismiss, evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt.

State v. Butler, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002) (citation and internal quotation marks omitted). The inquiry into whether substantial evidence has been presented examines "the sufficiency of the evidence presented but not its weight." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation omitted).

A defendant's role or presence is simply one of the circumstances of a murder to be considered when viewing the evidence in the light most favorable to the State. Evidence showing a less active role by a defendant or absence from the scene does not preclude submission of the aggravating factor to the jury as a matter of sufficiency of the evidence

but rather goes to the weight that the jury might put toward its consideration of the aggravating factor. *Brewington*, 352 N.C. at 525, 532 S.E.2d at 517 (holding that lack of participation does not preclude submission to jury of especially heinous, atrocious, or cruel aggravating factor).

Defendant contends that the State presented no evidence establishing that he directly participated in the killing of Mr. Cook as no evidence was presented regarding his role in the actual perpetration of the homicide. Accordingly, Defendant argues that the State's failure to submit any evidence that Defendant played an active role in the actual murder precludes a finding by the jury beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel as to Defendant.

However, our Supreme Court has held that lack of presence at or participation in a codefendant's gruesome murder does not preclude the submission to the jury of the especially heinous, atrocious, or cruel aggravating factor. Rather, it is a matter for the jury to consider in determining the weight to give the aggravating factor. *Id.*

In *Brewington*, the defendant was convicted of first-degree murder, conspiracy to commit murder, and arson. *Id.* at 493, 532 S.E.2d at 499. On appeal, he argued that the jury had impermissibly found the existence of the especially heinous, atrocious, or cruel aggravating factor based on the actions of his codefendants. He conceded that the murders for which he was convicted were especially heinous, atrocious, or cruel. *Id.* at 523, 532 S.E.2d at 516. However, he maintained that although he had planned the murders, the jury could not have found the existence of the aggravating circumstance as to him because there was no evidence that he was personally responsible for the manner in which they were carried out or that he was actually present at the time they were committed. *Id.* Our Supreme Court rejected this argument, explaining that "[t]he fact that defendant was not present when the murders occurred, and that a codefendant actually committed the murders, is a matter that a jury would properly consider in determining the *weight* to give an aggravating circumstance and in balancing the aggravating and mitigating circumstances." *Id.* at 525, 532 S.E.2d at 517.

Similarly, in the present case, Defendant does not dispute the fact that the manner in which Mr. Cook was murdered was sufficient to support the submission of the especially heinous, atrocious, or cruel aggravating factor to the jury. Instead, Defendant asserts that the aggravating factor was erroneously submitted to the jury as to him.

Recognizing that a defendant need not be physically present for the commission of the crime in order for this aggravating factor to be

submitted to the jury, we believe that in this case, when viewing the evidence in the light most favorable to the State, a reasonable inference can be drawn that Defendant did actively participate in the murder of Mr. Cook. Unlike in *Brewington*, where the evidence established that the defendant was not physically present for the commission of the murders, the circumstantial evidence presented here permits a reasonable inference that Defendant had a personal role in the murder of Mr. Cook in that (1) Defendant had Mr. Cook's blood on him; (2) Defendant drove Mr. Parlier and himself away from the scene of the murder and to his girlfriend's house; and (3) a cigarette butt with blood and Defendant's saliva on it was found at Mr. Cook's home. *See, e.g.*, *State v. Demery*, 113 N.C. App. 58, 61-64, 437 S.E.2d 704, 707-08 (1993) (holding that circumstantial evidence including blood typing and hair analysis was sufficient to submit to jury question of whether defendant was perpetrator of murder). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

II. Motion to Quash Subpoena

[2] Defendant next contends that the trial court erred in granting the State's motion to quash the subpoena of Jason Parker ("Mr. Parker"), one of the prosecutors at the 2002 hearing on Defendant's guilty plea. A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion.[2] *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986). An abuse of discretion occurs only where a trial court's ruling was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citation and quotation marks omitted), *cert. denied*, 527 U.S. 1026, 144 L.Ed.2d 779 (1999).

At the hearing, Defendant sought to have Mr. Parker testify about the factual basis the State proffered at Defendant's plea hearing — that the State believed Mr. Parlier killed Mr. Cook and that the State had no physical evidence placing Defendant inside the house when the murder occurred. Defendant argues that Mr. Parker's statements regarding the State's acceptance of Defendant's guilty plea to second-degree

2. In his brief, Defendant argues that the trial court's ruling on this issue deprived him of his constitutional rights to due process, trial by jury, presentation of a defense, and compulsory process. However, Defendant did not raise these constitutional claims in the trial court. Therefore, any such constitutional issues have been waived. *State v. Moses*, 205 N.C. App. 629, 635, 698 S.E.2d 688, 693 (2010).

murder established his guilt as merely an aider and abettor rather than an active participant in the murder. However, Defendant mischaracterizes Mr. Parker's statements at his plea hearing as judicial admissions. A recitation of the factual basis for a guilty plea is not a judicial admission. Rather, a prosecutor's summary of the facts supporting the plea is merely one procedural mechanism by which a judge may find that a factual basis exists for the plea. *See* N.C. Gen. Stat. § 15A-1022(c) (2013) (prohibiting trial judge from accepting guilty plea "without first determining that there is a factual basis for the plea" which may be based on "[a] statement of the facts by the prosecutor").

A judicial admission, conversely, is "a formal concession made by a party . . . in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 509, 648 S.E.2d 531, 535 (2007) (citation omitted). Mr. Parker's statements were not "concessions," nor were they offered "for the purpose of withdrawing a particular fact from the realm of dispute." Consequently, we are not persuaded by Defendant's contention that the trial court's decision to quash the subpoena deprived him of the opportunity to elicit binding admissions on the State.

Defendant has failed to demonstrate that the trial court abused its discretion in quashing the subpoena of Mr. Parker. The trial court allowed the State's motion to quash after the State argued there was no compelling reason for Mr. Parker's live testimony and that requiring Mr. Parker to testify in person was unduly burdensome and unreasonable. In quashing the subpoena, the trial court expressly noted that there were other ways for Defendant to show the absence of the especially heinous, atrocious, or cruel aggravator without calling the original prosecutor for Defendant's case to the stand.

Indeed, we note that during the mitigation phase, Defendant was able to introduce the statements previously made by Mr. Parker in his recitation during the plea hearing through the admission of Defendant's Exhibit 9, which contained Mr. Parker's statements as transcribed from the plea hearing. While Defendant maintains that he nonetheless suffered prejudice because Mr. Parker's statements were never before the jury, Defendant does not dispute the fact that he could have introduced this exhibit during the aggravation phase of the proceeding. As such, we cannot say that the trial court abused its discretion in quashing the subpoena.

III. Denial of Motion to Strike Special Agent Freeman's Testimony

[3] Defendant next argues that the trial court erred in overruling his objection and motion to strike Special Agent Freeman's testimony regarding the general percentages of cases in which the SBI laboratory is able to find a DNA match. Defendant contends that this testimony was irrelevant and undependable "as the jury could not have reliably determined [Defendant's] role from the fact that blood matching the victim was found on his clothing" and that Special Agent Freeman "essentially told the jury that a DNA match establishes that a person committed an offense, whereas the absence of a match establishes that a person did not."

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Although a trial court's relevancy determinations are not discretionary and, therefore, are not reviewed for abuse of discretion, this Court gives such determinations great deference on appeal. *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.R. Evid. 403. A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of that discretion. *Campbell*, 359 N.C. at 674, 617 S.E.2d at 20.

At Defendant's sentencing hearing, Special Agent Freeman was asked in what percentage of cases the SBI was able to find a DNA match, and he testified as follows:

> Of the cases the [sic] we obtain approximately seventy percent of them are able to determine a match. In approximately thirty percent then we'll say that there isn't a match and that person couldn't have committed the crime.

Even assuming, without deciding, that this testimony lacked relevance, Defendant has failed to show that any such error was prejudicial. *State v. Oliver*, 210 N.C. App. 609, 615, 709 S.E.2d 503, 508 ("The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. Further, it is the defendant's burden to show prejudice from the admission of evidence." (citations and quotation marks omitted)), *disc. review denied*, 365 N.C. 206, 710 S.E.2d 37 (2011).

This portion of Special Agent Freeman's testimony was from the preliminary stages of his direct examination, during which he was asked about his qualifications, the nature of DNA, and the process by which DNA matching is done in the laboratory. Special Agent Freeman had not yet begun testifying about Defendant's case in particular; rather, he was speaking generally about the nature of his work.

Moreover, Defendant misconstrues Special Agent Freeman's testimony. Defendant asserts that, in essence, Special Agent Freeman told the jury that a DNA match indicates the person whose DNA was tested actually committed the offense. However, that is not what Special Agent Freeman stated in his testimony. Rather, he explained that where no match is found, the person in question could not have committed the crime. He did *not* affirmatively state that when a match is found, the subject definitely committed the crime.

Defendant has failed to show prejudicial error by the trial court in allowing this testimony. Accordingly, this argument is overruled.

IV. Refusal to Admit Notebook Offered by Defendant

[4] Defendant's final argument on appeal is that the trial court erred in excluding Defendant's Exhibit 3 — a notebook prepared for the 2002 sentencing proceedings that contained recitations of Mr. Parlier's multiple confessions, a forensic blood spatter expert report, and medical reports regarding Defendant's alcohol consumption — during the mitigation phase of sentencing.

N.C. Gen. Stat. § 15A-1340.16(a) requires a trial court to consider evidence of aggravating and mitigating factors during sentencing. The trial court is given wide latitude in conducting sentencing hearings, including the ability to weigh the credibility of the evidence in determining the existence of mitigating factors. *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011). A defendant who seeks a sentence in the mitigated range bears the burden of persuading the court by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.16(a) (2013).

"Although the formal rules of evidence do not apply in sentencing hearings, evidence offered at sentencing must be both pertinent and dependable. While the court *may* base its sentencing decision on reliable hearsay, [a] defendant is not entitled to consideration of hearsay evidence that is of doubtful credibility." *State v. Reed*, 93 N.C. App. 119, 125, 377 S.E.2d 84, 88 (internal citations and quotation marks omitted and emphasis added), *disc. review denied*, 324 N.C. 580, 381 S.E.2d 779 (1989). The trial court's failure to find a mitigating factor when evidence

is offered in support of that factor will not be overturned on appeal unless the supporting evidence "is uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985).

Defendant argues that the trial court committed reversible error when it refused to consider his "mitigation report" because it deprived him of the opportunity to present mitigating evidence. We disagree. The trial court declined to admit the notebook marked as Defendant's Exhibit 3 and instead asked that Defendant call live witnesses from his witness list. In reaching this decision, the trial judge expressed his concerns about considering Defendant's written documents over live in-court testimony, stating as follows:

> [J]ust simply handing something up, a piece of paper writing, unsupported, unauthenticated, over objection — when you handed me a list of ten or fifteen witnesses that you were going to call. . . who have information set forth in this report on mitigation, some of which were brought back from prison units and are in facilities here adjacent to the courtroom and courthouse that could be produced. I'm going to sustain the [State's] objection. These people are going to be produced in this courtroom.

Thus, the trial court did not refuse to consider Defendant's mitigation evidence. Instead, the trial court was simply informing Defendant of its preference for live testimony. Furthermore, our review of the transcript reveals that Defendant was, in fact, allowed to introduce certain portions of the documents contained in Defendant's Exhibit 3, including (1) the affidavit of Mr. Parlier; and (2) parts of the plea hearing. Defendant also offered live testimony from Mr. Parlier and testified on his own behalf during the mitigation phase. Defendant has failed to show how the trial court's refusal to admit Exhibit 3 in its entirety deprived him of the opportunity to present evidence of a mitigating factor. Therefore, Defendant's argument on this issue lacks merit.

Conclusion

For these reasons, we conclude that Defendant received a fair trial free from prejudicial error and affirm the sentence imposed by the trial court.

NO PREJUDICAL ERROR; AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
JOSHUA NEAL KING

No. COA13-1402

Filed 15 July 2014

1. Witnesses—qualification as expert by court—implicit in admission of testimony

The trial court's qualification of a doctor as an expert in pediatric medicine as well as in the evaluation and treatment of child sexual abuse was implicit in the trial court's admission of her testimony regarding common behaviors in children who have suffered from sexual abuse.

2. Appeal and Error—preservation of issues—no objection at trial—plain error review not requested—no error

Defendant abandoned his argument concerning a written medical report in a prosecution for rape of a child and other offenses where he did not object at trial, did not request plain error review, and did not make the report a part of the record on appeal.

3. Evidence—characteristics of sexually abused children—no opinion on credibility

There was no error in a prosecution for the rape of a child and other offenses in the trial court allowing the testimony of a doctor which defendant contended presumed that the victim was telling the truth. The testimony properly provided common characteristics the doctor observed in sexually abused children and a possible basis for those characteristics, and not opinion testimony on this victim's credibility.

4. Constitutional Law—effective assistance of counsel—contempt hearing against counsel during trial

Defendant received effective assistance of counsel even though he argued that his counsel's representation was prejudiced by the trial court's failure to grant an adjournment until the next day after defense counsel was the subject of a contempt hearing. The record did not reveal a conflict of interest between defendant and his counsel, defendant neither pointed to an error committed as a result of the criminal contempt hearing nor asserted a burden that would have been alleviated by an overnight recess, counsel was not found

to be in contempt of court, and defendant was found not guilty on twenty-five of twenty-six charges considered by the jury.

Appeal by defendant from judgment entered 14 January 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2014.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Where a physician testified to common characteristics she had observed in sexually abused children, the trial court did not err in allowing her testimony, and where the trial court denied the State's motion to hold defense counsel in criminal contempt, defendant did not receive ineffective assistance of counsel.

On 12 September 2011, a Buncombe County Grand Jury indicted defendant on thirteen counts of indecent liberties with a child, two counts of rape of a child by an adult, and eleven counts of statutory rape. Each indictment alleged that the victim was Kimberly[1], a girl age twelve or thirteen years old depending on the date of the offense. A jury trial commenced during the 7 January 2013 Criminal Session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding.

The evidence presented tended to show that Kimberly was born in 1997 and that she had two younger brothers. From the time she was six months old, Kimberly lived with her paternal grandmother. In 2009, when she was twelve years of age, Kimberly left her grandmother's residence and went to live with her mother and two brothers. Kimberly's mother was living with defendant Joshua Neal King, whom she later married. Living with her mother provided Kimberly with more freedom: "I got to go out with my friends a lot more. They got to come over a lot more. I used to drink and do drugs." Kimberly testified that she and her mother used drugs together.

1. Pursuant to Rule 3.1(b) of our Rules of Appellate Procedure, we use a pseudonym to protect the identity of the juvenile.

On the evening of 16 March 2010, Kimberly's mother was at work; Kimberly was at home with defendant and her two brothers.

> A. . . . I went to bed earlier that night and woke up and [defendant] was on top of me, and I had all my clothes off and I was in their bed.
>
> . . .
>
> Q. Do you remember what he had on?
>
> A. A shirt.
>
> . . .
>
> Q. And what happened?
>
> A. He did what I said he did.
>
> Q. Okay. Is that when you said that he put his penis in your vagina?
>
> A. Yes.
>
> Q. What did you do?
>
> A. I yelled for my brother.

Kimberly testified that defendant had her perform sexual acts on many occasions from March through August 2010.

Detective David Shroat, working in the Criminal Investigations Unit of the Buncombe County Sheriff's Department, became involved with the case on 30 August 2010 after receiving a report from the Department of Social Services. Detective Shroat testified that per the report, "[Kimberly's] mother was working nights and [Kimberly] went to bed. And at some point in time, she woke up and [defendant] was on top of her, and she screamed." Detective Shroat spoke with defendant on 21 September 2010. After having his statement transcribed and read back to him, defendant verbally acknowledged his words and signed his name to the statement. The statement was admitted at trial.

Per his statement, defendant "drunk probably a twelve pack" one night; he told the children to go to sleep; and he went to bed. At some point, defendant thought his wife had gotten into the bed. "I discovered it was [Kimberly] . . . I told her to go back to her room. . . . I did rub on her under the blanket with my penis. I don't know if I penetrated her or not." Defendant did not admit to any other instance of sexual contact or activity with Kimberly.

Pediatrician Dr. Sarah Monahan-Estes, working at the Mission Children's Hospital, examined Kimberly on 29 August 2012. Dr. Monahan-Estes testified to the results of her examination and in part to common characteristics she had observed in sexually abused children.

Following the close of the evidence, the jury found defendant not guilty on twenty-five charges and found defendant guilty on one count of indecent liberties with a child occurring on 16 March 2010. The jury also found as an aggravating factor that "Defendant took advantage of a position of trust or confidence . . . to commit the offense." The trial court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of 16 to 20 months. Defendant appeals.

On appeal, defendant raises the following issues: (I) whether the trial court erred by allowing a physician to testify; and (II) whether defendant received ineffective assistance of counsel.

I

[1] Defendant first argues that the trial court erred in allowing Dr. Monahan-Estes, the pediatrician who examined Kimberly following her report of sexual assaults, to testify as to Kimberly's veracity. Specifically, defendant contends that Dr. Monahan-Estes' written report, which was published to the jury, explained why Kimberly did not initially tell the whole truth and that Dr. Monahan-Estes' testimony presumed Kimberly was telling the truth and presumed a history of sexual abuse. We disagree.

Defendant cites the opinion of this Court in *State v. Ryan* for the proposition that "[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." ___ N.C. App. ___, ___, 734 S.E.2d 598, 604 (2012) (citation and quotations omitted), *rev. dismissed*, 366 N.C. 433, 736 S.E.2d 188, *and writ denied*, *rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

Initially, we note that Dr. Monahan-Estes was not formally qualified as an expert. To address this discrepancy, we find guidance in the opinion of our Supreme Court in *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988), wherein the defendant challenged the admission of testimony from two witnesses addressing the typical characteristics of sexually abused children. One witness, a Department of Social Services' case worker, having been employed as such for fourteen years, had investigated between twenty-five and thirty cases of child sexual

abuse. The victim confided in the witness about the abuse the defendant had inflicted. The second witness, a Sheriff's Department juvenile investigator, had been employed as such for seven years and had investigated over one hundred cases of child sexual abuse. *Id.* at 820-21, 370 S.E.2d at 677. The defendant argued on appeal that the evidence was improper because "the witnesses were not qualified as experts and [] their testimony fail[ed] as lay opinion because it was not rationally based on the perceptions of the witness." *Id.* at 820, 370 S.E.2d at 677. Our Supreme Court reasoned that "[i]t [was] evident that the nature of their jobs and the experience which [the witnesses] possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.* at 821, 370 S.E.2d at 677. The Court went on to hold that "the finding that [each] witness [was] an expert is implicit in the trial court's ruling admitting the opinion testimony." *Id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013) ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . .").

Dr. Monahan-Estes' testimony began with her educational background, including where she completed her undergraduate studies, her medical school education, where she completed her pediatric residency, and where she completed an additional two-year fellowship in child abuse pediatrics – during which she saw only sexually abused, physically abused, or neglected children. Dr. Monahan-Estes testified that she currently worked in a child abuse clinic seeing children who are suspected of having any history of sexual abuse, physical abuse or neglect. During the course of the investigation into allegations of sexual abuse, Dr. Monahan-Estes interviewed Kimberly.

At trial, Dr. Monahan-Estes testified that when a child is suspected of suffering from abuse, "you want to assure that they don't have any injuries or issues that are resulting because of that abuse that need medical attention or mental health attention." Dr. Monahan-Estes testified to the typical process she goes through in performing a child medical evaluation, with specific regard to an evaluation done where sexual abuse is suspected. She also testified to the limitations of the examination and common behaviors she has observed in her experience.

> [W]e very rarely see kids who [sic] the abuse or trauma has occurred and then they immediately tell someone so we can examine them. . . . In the cases that I typically see

> in clinic, these disclosures have occurred days, weeks, months, years after the sexual abuse has occurred . . . .
>
> . . .
>
> [W]e see all kinds of behavioral and emotional dysfunction or disorders in children who have a history of sexual abuse. These kids typically have an increased frequency of being depressed or having mental health issues, substance abuse. They tend to act out, aggressive behavioral issues in school. They have increased risk of school failure. These children typically get in trouble with the law, delinquency, they'll be arrested, they sexually act out. There's a whole host of issues that are increased in children who have a history of sexual abuse.

We hold that the trial court's qualification of Dr. Monahan-Estes as an expert in pediatric medicine as well as the evaluation and treatment of child sexual abuse is implicit in the trial court's admission of her testimony regarding common behaviors in children who have suffered from sexual abuse.

[2] In challenging the admission of Dr. Monahan-Estes' written report into evidence, defendant contends that Dr. Monahan-Estes "explained why [Kimberly] didn't initially tell the entire truth." We first note that defendant did not object to the admission of the report at trial. Thus, the admission of this evidence would be subject to plain error review only, and upon the request of defendant. Defendant has failed to request plain error review of this issue. Further, defendant has failed to make Dr. Monahan-Estes' report a part of the record on appeal. Therefore, we are precluded from considering the contents of the report, and we must consider defendant's argument abandoned. *See* N.C. R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal . . . ."); *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 161, 356 S.E.2d 912, 915 (1987) ("This Court may not consider documents which have not properly been made a part of the record on appeal." (citing *Elliott v. Goss*, 254 N.C. 508, 119 S.E.2d 192 (1961))).

[3] Defendant challenges Dr. Monahan-Estes' testimony as presuming that Kimberly was telling the truth. Specifically, defendant challenges the following:

> Q. . . . In your training and experience, are there reasons that you have personally observed that children may not always tell all of the allegations to start?

. . .

> THE WITNESS: Yes. It's very common that a child either does not initially disclose or only partially discloses.
>
> One of the biggest issues is frequently the alleged perpetrator is a parent or a parental figure or someone that they love and trust, so they don't want to get them in trouble. They're ashamed, they're afraid, they've been threatened or bribed to try not to disclose.
>
> If another family member who is not the alleged perpetrator, but say another parent or another parental figure doesn't believe the child, then they'll frequently encourage them not to tell, or children sometimes – there will be negative consequences to their disclosure. So they tell a little bit about what happens and then all kinds of things come into play. They're taken out of their home, they're taken away from their siblings, they're taken away from both of their parents. And they see these negative consequences and they don't want them to continue, so they'll only tell little bits of what happened.

In *State v. Hall*, our Supreme Court, analyzing its prior opinion in *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), stated

> that expert testimony on the symptoms and characteristics of sexually abused children is admissible to assist the jury in understanding the behavior patterns of sexually abused children. Furthermore, [the Court] allowed evidence that a particular child's symptoms were consistent with those of sexual or physical abuse victims, but only to aid the jury in assessing the complainant's credibility.

State v. Hall, 330 N.C. 808, 817, 412 S.E.2d 883, 887 (1992) (citation omitted); *compare State v. Stancil*, 355 N.C. 266—67, 559 S.E.2d 788, 789 (2002) ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred . . . such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." (citing *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992)) (citations omitted)).

We view Dr. Monahan-Estes' testimony as properly providing common characteristics she observed in sexually abused children and a possible basis for those characteristics, and not opinion testimony on Kimberly's credibility. Therefore, as there was no error by the trial court in allowing the testimony of Dr. Monahan-Estes, defendant's argument is overruled.

II

[4] Next, defendant argues he was denied effective assistance of counsel. Specifically, the trial court's denial of defense counsel's request for an evening recess following defense counsel having to defend himself against a criminal contempt charge prejudiced defense counsel's ability to represent defendant. We disagree.

"The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest." *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citations and quotations omitted). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Augustine*, 359 N.C. 709, 718, 616 S.E.2d 515, 524 (2005) (quoting *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985)).

> In order to meet this burden defendant must satisfy a two part test.
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 694 (1984)); *see also*, *e.g.*, *Choudhry*, 365 N.C. at 219, 717 S.E.2d at 352 ("[W]hen the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest . . . a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief." (citations omitted)).

Defendant's argument is predicated on the assertion that defense counsel was burdened by a conflict of interest; however, the record does not reveal such a conflict.

On 9 January 2010, in the morning of the third day of trial, the prosecutor filed a motion requesting that defense counsel be held in criminal contempt as well as a corresponding motion for a mistrial following defendant's cross-examination of the victim the day before. In its motion, the prosecutor contended that following an in camera hearing to address the admissibility of evidence in light of Rule 412, "Rape or sex offense cases; relevance of victim's past behavior," and the trial court's exclusion of the evidence proffered, defendant proceeded to question Kimberly about her prior sexual encounters in violation of the court's order. A hearing on the State's motion was held that morning. A review of the trial transcript reveals a brief hearing. The State presented its motion; defense counsel introduced an attorney who would represent him; defense counsel's attorney notified the court that he was unfamiliar with any of the underlying facts – including the allegations in the State's motion, and asked that if the trial court was "seriously considering" the motion that the hearing be postponed. The State consented to a postponement of the hearing; at which point, the trial court declared that the State's motion was one for direct contempt and that the court had reviewed the transcript of defense counsel's examination. The trial court ruled that defense counsel "did not act willfully or with gross negligence, and the acts were not done deliberately and purposefully in violation of the law without regard or justification or excuse, and [this court] fails to find him in contempt of court." The trial court subsequently denied the State's motion for a mistrial. Following this denial, defense counsel asked for an adjournment: "I'm very offended by this and it's sort of knocked me off my game, if you will. And I don't want to be sitting here thinking about my issues about this when I'm supposed to be giving my best interest to my client." Defense counsel requested an adjournment until the next morning "to kind of calm down and get over this[.]" At 11:38 a.m., the trial court called a recess until 2:00 p.m.

We see no conflict of interest between trial counsel and defendant. Furthermore, defendant neither points to an error committed as a result of trial counsel's participation in the criminal contempt hearing nor asserts what burden would have been alleviated by an overnight recess. Even though counsel was the subject of a contempt hearing during his representation of defendant, counsel was found to be not in contempt of court. There is nothing in the record to support defendant's assertion of a conflict of interest. On the contrary, defendant was found not guilty

on twenty-five of twenty-six charges considered by the jury. Defense counsel's zealous representation of defendant, clearly revealed in the record, can in no way be deemed ineffective based on a conflict of interest or any other theory. Defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. *See Braswell*, 312 N.C. at 561—62, 324 S.E.2d at 248. Accordingly, we overrule defendant's argument.

No error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
SHANEEQUAH NICOLE WALL, DEFENDANT

No. COA14-176

Filed 15 July 2014

Jurisdiction—subject matter jurisdiction—appeal from judgment entered in district court—conviction on magistrate's order—no legal authority in superior court

The superior court lacked legal authority and, therefore, was without subject matter jurisdiction to try defendant on the offense alleged in the misdemeanor statement of charges when defendant was appealing from the judgment entered in district court after a conviction on a magistrate's order. Defendant's conviction for resisting a public officer was vacated.

Appeal by defendant from judgment entered 9 October 2013 by Judge Mark E. Klass in Richmond County Superior Court. Heard in the Court of Appeals 3 June 2014.

Attorney General Roy Cooper, by Senior Deputy Attorney General Robert T. Hargett, for the State.

Michelle FormyDuval Lynch, for defendant.

ELMORE, Judge.

On 9 October 2013, a jury found Shaneequah Nicole Wall ("defendant") guilty of resisting a public officer. The trial court sentenced defendant to 45 days imprisonment, suspended, and placed her on supervised probation for 12 months. Defendant gave notice of appeal in open court. We hold that the Richmond County Superior Court lacked legal authority and, therefore, was without subject matter jurisdiction to try defendant on the offense alleged in the misdemeanor statement of charges when defendant was appealing from the judgment entered in district court after a conviction on a magistrate's order. We vacate defendant's conviction.

I. BACKGROUND

Based on the record evidence, which is conflicting on occasion, the facts of this case are as follows: On 18 September 2012, the Richmond County Sheriff's Office received a warrant for the arrest of William Wall, Sr. ("Wall Sr.") and an emergency child custody order for William Wall, Jr. ("Jr."), Wall Sr.'s minor child, from the Osceola County Sheriff's Office in Florida. The child custody order was based on allegations of abuse or neglect and indicated that Richmond County was to take immediate custody of Jr., who was 20 months old. The custody order stated that Jr. could be found at 127 Logan Park in the city of Rockingham.

Deputy Cory Jones ("Deputy Jones") with the Richmond County Sheriff's Office was dispatched to the Logan Park address. As Deputy Jones entered Wall Sr.'s neighborhood, he spotted Wall Sr. driving out. Deputy Jones stopped the truck and arrested Wall Sr. Deputy Jones informed passenger Felicia Wall, (Wall Sr.'s daughter) of the arrest warrant for her father and of the child custody order for Jr. Felicia Wall drove Wall Sr.'s truck to the Logan Park residence as Deputy Jones followed in a marked patrol car.

When he arrived at the residence, Deputy Jones stood in the doorway and identified himself as a sheriff's deputy to Rosa Wall, Jr.'s paternal grandmother and the apparent home owner. Deputy Jones informed Rosa Wall of the warrant and of the child custody order. Meg Demayo with the Richmond County Department of Social Services and Lieutenant Mike Burns ("Lieutenant Burns") met Deputy Jones at the residence. Defendant and Felicia Wall were present as well.

Lieutenant Burns testified that there were two minor children in the home. Lieutenant Burns asked Rosa Wall to identify Jr. Initially, Rosa Wall said that Jr. was not in the residence. However, she later

confirmed that Jr. was in the residence, that he was "fine," and that he was "not going nowhere." The record discloses that defendant, Felicia Wall, and Rosa Wall each refused to identify Jr. when asked to do so by law enforcement. Pointing to the child later identified as Jr., Deputy Jones specifically asked defendant; "Whose baby is that?" Defendant responded; "His mama is on the way." Lieutenant Burns warned: "If I find out that either of these two children in this home is in fact the child William Wall, Jr. that I'm looking for, everybody in the residence will go to jail." After approximately two hours, Florida authorities transmitted a photograph of Jr. and the officers were able to identify him and place him in DSS custody.

The video footage illustrates, and Deputy Jones admits, that the officers never presented the emergency child custody order to defendant, Rosa Wall, or Felicia Wall. Lieutenant Burns testified that he had the emergency child custody order in his possession; however, he stated that he did not feel it was necessary to show it until one of the women affirmatively identified Jr.

Defendant, Felicia Wall, and Rosa Wall were each arrested based on their refusal to identify Jr. Lieutenant Burns told the women; "We're arresting you for resisting—for lying to us." On 6 December 2012, a magistrate's order charged defendant with resisting a public officer, § 14-223, and giving fictitious information to a public officer, § 20-29, for the 18 September 2012 incident. Defendant was tried on the magistrate's order and found guilty of resisting a public officer on 6 December 2013. The fictitious information charge was dismissed.

Defendant appealed the district court judgment to Richmond County Superior Court for a trial *de novo*. On 2 July 2013, the State filed a misdemeanor statement of charges in superior court. Defendant was tried on the misdemeanor statement of charges and found guilty of resisting a public officer on 9 October 2013. Defendant now appeals.

II. ANALYSIS

Defendant argues that the superior court lacked subject matter jurisdiction to try her on a misdemeanor statement of charges filed in superior court for an alleged 18 September 2012 violation of § 14-223 because defendant was tried and convicted on a magistrate's order in district court. We agree.

A "statement of charges" is governed, in relevant part, by the following provisions of N.C. Gen. Stat. § 15A-922 (2013):

> (d) Statement of Charges upon Determination of Prosecutor.–The prosecutor may file a statement of charges upon his own determination at any time prior to arraignment in the district court. It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate's order or additional or different offenses.
>
> (e) Objection to Sufficiency of Criminal Summons; Warrant for Arrest or Magistrate's Order as Pleading.–If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate's order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but a statement of charges filed pursuant to this authorization may not change the nature of the offense.
>
> (f) Amendment of Pleadings prior to or after Final Judgment.–A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

N.C. Gen. Stat. § 15A-922 (2013).

The crux of defendant's issue is that the State's filing of the misdemeanor statement of charges was untimely and therefore impermissible. We agree. Subsection (d) of N.C. Gen. Stat. § 15A-922 clearly provides that "[t]he prosecutor may file a statement of charges upon his own determination at *any time prior to arraignment in the district court.*" After arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient. N.C. Gen. Stat. § 15A-922(e). While subsection (f) allows the charging instrument to be amended prior to or after a final judgment is entered, this does not grant the State authority to change the form of the charging instrument; i.e., the State cannot "amend" a magistrate's order by filing a misdemeanor statement of charges. Doing so would change the nature of the original pleading entirely. Accordingly, the State has a limited window in which it may file a statement of charges on its own accord, and that is prior to arraignment.

To further illustrate this point, we look to *State v. Killian*, 61 N.C. App. 155, 158, 300 S.E.2d 257, 259 (1983), a case in which the State similarly filed a statement of charges in superior court after the defendant was tried and convicted on a warrant in district court. On appeal, this Court vacated the superior court's judgment for want of jurisdiction on the basis that the statement of charges alleged a separate statutory violation than that charged in the warrant. *Id.* at 158, 300 S.E.2d at 259. However, assuming *arguendo* that the statement of charges did not change the nature of the offense charged, this Court opined that the State's filing in superior court was nevertheless "untimely and thereby without legal authorization." *Id.* at 157, 300 S.E.2d at 259. We noted that the record contained no motion by the defendant objecting to the sufficiency of the original warrant and held, "[t]he statement of charges was filed by the prosecutor 'upon his own determination'; and that could only be done 'prior to arraignment in the district court,' not upon trial *de novo* on appeal to superior court." *Id.*

Here, the State did not file the statement of charges prior to defendant's arraignment in district court. As in *Killian*, the record similarly discloses that no motion was made by defendant objecting to the sufficiency of the magistrate's order. Thus, the trial court was not afforded the opportunity to rule on whether the magistrate's order was sufficient. Nonetheless, the prosecutor "upon his own determination" filed the misdemeanor statement of charges seven months after defendant appealed the district court judgment to superior court. This filing was "untimely and thereby without legal authorization." Thus, the superior court had no jurisdiction to try defendant for the new offense alleged in the statement of charges. Defendant's conviction must be vacated. Defendant's remaining issues on appeal are moot.

Vacated.

Judges McGEE and HUNTER, Robert C., concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEROY WILLIAMS

No. COA13-1280

Filed 15 July 2014

1. Appeal and Error—writ of certiorari—notice of appeal

Defendant's petition for writ of certiorari was denied and the Court of Appeals proceeded to the merits of his appeal. Defendant's written notice of appeal from the order directing his enrollment in a satellite-based monitoring program was not fatally defective since defendant's intent to appeal could be fairly inferred and the State provided no indication it was misled by defendant.

2. Satellite-Based Monitoring—natural life—due process—rational relation

The trial court did not err in a second-degree rape case by imposing upon defendant enrollment in a satellite-based monitoring program for his natural life. Continuous monitoring as a result of defendant's participation in a satellite-based monitoring program did not violate defendant's substantive due process rights and the monitoring was rationally related to a legitimate governmental purpose.

Appeal by defendant from order entered 19 August 2013 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

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

BRYANT, Judge.

Because continuous monitoring as a result of defendant's participation in a satellite-based monitoring program does not violate defendant's substantive due process rights and because the monitoring is rationally related to a legitimate governmental purpose, we affirm the order of the trial court imposing upon defendant enrollment in a satellite-based monitoring program for his natural life.

On 27 April 2007 in Mecklenburg County Superior Court, defendant Robert Leroy Williams entered an *Alford* plea to two counts of second-degree rape. The State dismissed one count of first-degree sex offense, one count of first-degree kidnapping, one count of second-degree kidnapping, and two counts of first-degree rape. The trial court entered a consolidated judgment in accordance with defendant's plea and sentenced defendant to an active term of 58 to 79 months.

On 27 April 2012, the State filed a motion to determine whether defendant was required to enroll in the sex offender satellite monitoring program. A satellite monitoring bring-back hearing was held before the Honorable Robert C. Ervin on 19 August 2013 during the criminal session of Mecklenburg County Superior Court.

During the hearing, the State presented the following background for defendant's second-degree rape conviction. Defendant and his victim were neighbors. The victim had previously rejected defendant's advances and request for a date. Defendant invited the victim to his residence to watch a video. Once inside, defendant extended a further invitation to view hats in his bedroom. In his bedroom, defendant kissed the victim, and the victim attempted to pull away. Defendant then produced a knife and later a gun. Defendant forced the victim to perform fellatio and engage in sexual intercourse. When allowed to leave, the victim immediately reported the forced sexual assault.

In an order entered 19 August 2013, the trial court made judicial findings that defendant's conviction for second-degree rape was a reportable conviction as defined by G.S. 14-208.6(4) and that his was an aggravated offense. Defendant was ordered to enroll in satellite-based monitoring for the remainder of his natural life. Defendant appeals.

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[1] We first note that although defendant filed a written notice of appeal from the order directing his enrollment in a satellite-based monitoring program, defendant filed with this Court a petition for writ of certiorari to allow review of the trial court order, asserting that his written notice of appeal was defective. Specifically, defendant states that his notice of appeal fails to indicate to which court his appeal was to be taken and that he served his notice on the State via email. For the reasons stated herein, we determine defendant's notice of appeal is not fatally defective; therefore, we deny defendant's petition for writ of certiorari and proceed to the merits of his appeal.

> Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure.

N.C. Gen. Stat. § 1-279.1 (2013). As to the content of the notice of appeal, our Rules of Appellate Procedure state that the notice "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and *the court to which appeal is taken* . . . ." N.C. R. App. P. 3(d) (2013).

"The 'fairly inferred' doctrine ensures that a violation of Rule 3(d) results in dismissal only where the appellee is prejudiced by the appellant's mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). In *Phelps Staffing*, the plaintiff failed to designate within the notice of appeal the court to which the appeal was to be taken.

> Plaintiff's notice of appeal does not designate *any* court as the proper venue for its appeal. Plaintiff's error is a complete omission of the content requirement as set forth in Rule 3(d). However, this Court has liberally construed this requirement and has specifically held that a plaintiff's failure to designate this Court in its notice of appeal is not fatal to the appeal where the plaintiff's intent to appeal can be fairly inferred and the defendants are not mislead by the plaintiff's mistake.

Id. at 410, 720 S.E.2d at 791.

Here, the State's response to defendant's petition for writ of certiorari does not indicate that it was misled by defendant's failure to indicate the court to which the appeal was to be made. The State does not contest defendant's right to appeal and even suggests that despite the cited defects, this Court may grant a writ of certiorari to review the matter.

As to the service of his notice of appeal upon the opposing party, defendant acknowledges that he served his notice of appeal on the State by email.

"The requirement of timely filing and service of notice of appeal is jurisdictional . . . ." *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979) (citation omitted). However, a dissenting opinion adopted by our Supreme Court held that "the service of the Notice of Appeal

is a matter that may be waived by the conduct of the parties." *Hale v. Afro-Am. Arts Int'l*, 110 N.C. App. 621, 625, 430 S.E.2d 457, 459 (Wynn, J., dissent), *rev'd for the reasons stated in the dissenting opinion*, 335 N.C. 231, 436 S.E.2d 588 (1993). The dissenting opinion proposed that the service of the notice of appeal was akin to the service of a complaint conferring personal jurisdiction upon a trial court. "When the defendant has been duly served with summons personally within the State, or has accepted service *or has voluntarily appeared in court*, jurisdiction over the person exists and the court may proceed to render a personal judgment . . . ." *Id.* at 625, 430 S.E.2d at 460 (citation and quotations omitted). "[B]y analogy . . . where the appellee failed, by motion or otherwise, to raise [an] issue as to service of notice in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case, . . . [the appellee] has waived service of notice [of appeal] . . . ." *Id.* at 626, 430 S.E.2d at 460.

Here, in its response to defendant's petition, the State acknowledges that defendant's notice of appeal was served via email but does not further contest the service. Furthermore, the State filed a brief addressing the merits of defendant's arguments presented on appeal. Thus, the State has waived service of notice of appeal. *See id.*

Accordingly, as defendant's intent to appeal can be fairly inferred and the State provides no indication it was misled by the defendant's mistake, we do not dismiss defendant's appeal on the basis of a defect in the notice of appeal. *See Phelps Staffing, LLC*, ___ N.C. App. at ___, 720 S.E.2d at 791. And, as the State has waived service of the notice of appeal, *see Afro-Am. Arts Int'l, Inc.*, 110 N.C. App. at 625, 430 S.E.2d at 460 (Wynn, J., dissent), we deny defendant's petition for writ of certiorari and proceed to the merits of his appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197—98, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal. . . . [However,] [w]e stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." (citations omitted)).

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[2] On appeal, defendant argues that the imposition of lifetime satellite-based monitoring violates his substantive due process rights by continuous government monitoring or in the alternative, by failing to be rationally related to the purpose of protecting the public from recidivism.

Defendant first argues that, as applied to him, North Carolina General Statutes, section 14-208.40B(c), violates substantive due process by impermissibly infringing upon his right to be free from government monitoring of his location when monitoring is not narrowly tailored to the purpose of protecting the public from recidivism, and lifetime monitoring was imposed without consideration of defendant's low risk for reoffending. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted).

Pursuant to the United States Constitution, "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., amend. XIV, § 1. The North Carolina Constitution provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. Our Supreme Court has held that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and quotations omitted).

The Due Process Clause provides two types of protection – substantive and procedural due process. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

> "Substantive due process" protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. "Procedural due process" protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.

Id.

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were

> sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L. Ed. 2d 772, 787-88 (1997) (citations and quotations omitted). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field." *Id.* at 720, 138 L. Ed. 2d at 787 (citation and quotations omitted).

Defendant argues that General Statutes, section 14-208.40B(c), the statute authorizing the court to compel defendant's enrollment in a lifetime satellite-based monitoring ("SBM") program, impermissibly infringes upon his fundamental right to be free from continuous surveillance.

In support of his contention, defendant cites Justice Alito's concurrence in *United States v. Jones*, 565 U.S. ___, 181 L. Ed. 2d 911 (2012). The *Jones* Court considered whether a law enforcement agency's monitoring of a vehicle while on public streets by benefit of an attached GPS locator amounted to a search within the meaning of the Fourth Amendment. The majority concluded that the agency had conducted a search, and because the intrusion occurred in the absence of a valid warrant, it was a violation of Fourth Amendment prohibitions against unreasonable searches and seizures. In his concurrence, Justice Alito proposed that, as opposed to short-term monitoring, long-term GPS monitoring and cataloguing of a vehicle's every movement impinged upon society's expectation of privacy. *Id.* at ___, 181 L. Ed. 2d at 934 (Alito, J., concurrence). We note that as to the application of the Fourth Amendment in the context of SBM, our Court has declared *United States v. Jones* to be inapposite. *See State v. Jones*, ___ N.C. App. ___, ___, 750 S.E.2d 883, 886 (2013) (citing *State v. Martin*, ___ N.C. App. ___, 735 S.E.2d 238 (2012) (holding SBM is not a violation of the defendant's Fourth Amendment right to be free from unreasonable searches and seizures)).

We also note that in *United States v. Jones*, the Court was analyzing an event that took place in the context of a law enforcement agency's investigation of narcotics trafficking. The concerns articulated in Justice Alito's concurrence are distinguishable from the circumstance for which defendant seeks our review: the continuous monitoring of a person who has been convicted and sentenced for an aggravated offense, as defined by section 14-208.6. *See* N.C. Gen. Stat. § 14-208.6(1a) (2013) (" 'Aggravated offense' means any criminal offense that includes

either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.").

Defendant's participation in an SBM program following his conviction for an aggravated offense – forcible rape – does not infringe upon any fundamental right. *See Jones*, ___ N.C. App. ___, 750 S.E.2d 883; *Martin*, ___ N.C. App. ___, 735 S.E.2d 238. Defendant's asserted "fundamental right to be free from continuous government surveillance" is not one we have ever recognized in the context of SBM. On the contrary, "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded." *State v. Bare*, 197 N.C. App. 461, 467, 677 S.E.2d 518, 524 (2009) (citation and quotations omitted). Therefore, defendant cannot establish that his participation in an SBM program infringes upon a fundamental right. We overrule this portion of defendant's substantive due process argument.

However, defendant argues in the alternative that General Statutes section 14-208.40B(c) as applied to him violates substantive due process because it is not rationally related to its purpose of protecting the public from recidivism. Defendant contends that because section 14-208.40B(c) authorizes mandatory lifetime participation without consideration of defendant's risk of reoffending, the statute is constitutionally unsound. We disagree.

"[U]nless legislation involves a suspect classification or impinges upon fundamental personal rights, it is presumed constitutional and need only be rationally related to a legitimate state interest." *Huntington Prop., LLC v. Currituck Cnty.*, 153 N.C. App. 218, 229, 569 S.E.2d 695, 703 (2002) (citation and quotations omitted). "[T]he rational basis standard . . . 'merely' requires that a regulation bear some rational relationship to a conceivable legitimate interest of government." *Bald Head Island, Ltd. v. Vill. of Bald Head Island*, 175 N.C. App. 543, 550, 624 S.E.2d 406, 410—11 (2006) (citation and quotations omitted).

Defendant cites *South Carolina v. Dykes*, 744 S.E.2d 505 (S.C. 2013), for the proposition that South Carolina's SMB statute was deemed unconstitutional to the extent that it imposed upon the defendant lifetime SBM without (1) a determination of her dangerousness prior to being enrolled or (2) an opportunity for judicial review at a later date to address the necessity of her remaining enrolled in the program. The

South Carolina Court held that "[i]n light of the [South Carolina] General Assembly's stated purpose of protecting the public from sex offenders and aiding law enforcement, we find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test." *Id.* at 510. However, "[t]he complete absence of any opportunity for judicial review to assess a risk of re-offending . . . is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." *Id.* (citation omitted).

Because our North Carolina statutory scheme provides for both a determination of dangerousness prior to imposing enrollment in a satellite-based monitoring program *and* the possibility for review for later termination from satellite-based monitoring, any analysis of *Dykes*, 744 S.E.2d 505, is inapposite. We now look to relevant North Carolina General Statutes regarding satellite-based monitoring.

Pursuant to section 14-208.40B(c), when an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court.

> [In this hearing,] the court shall determine if the offender falls into one of the categories described in G.S. 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.
>
> If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

N.C. Gen. Stat. § 14-208.40B(c).

Defendant does not contest that his was a "reportable conviction" as defined by section 14-208.6(4). *See id.* § 14-208.6(4)(a.) (" 'Reportable conviction' means: 'A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting.' "). Defendant also does not challenge the trial court's finding that his was an aggravated offense. *See id.* § 14-208.6(1a) (" 'Aggravated offense' means any criminal offense that includes either of the following: (i) engaging in

a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence . . . ."). Defendant's argument is limited to a purported failure of the North Carolina SBM scheme, as applied here, to assess defendant's risk of reoffending before imposing lifetime SBM and an inadequate process for petitioning to be removed from SBM.

In *State v. Bowditch*, our Supreme Court stated that "[t]he legislature's intent in establishing SBM may be inferred from the declaration in the authorizing legislation that it 'shall be known as "An Act To Protect North Carolina's Children/Sex Offender Law Changes."' Ch. 247, sec. 1(a), 2006 N.C. Sess. Laws at 1066." 364 N.C. 335, 342, 700 S.E.2d 1, 6 (2010). The Court reasoned that it was the intent of our legislature "to protect our State's children from the recidivist tendencies of convicted sex offenders . . . ." *Id.*

Pursuant to section 14-208.40(a),

> [t]he [SBM] program shall be designed to monitor . . . offenders as follows:
>
> (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

N.C. Gen. Stat. § 14-208.40(a)(1) (2013).

It would appear that our General Assembly has determined that an offender convicted of a particular classification of crimes is to be subject to lifetime satellite-based monitoring. Implicit in this statutory scheme is a recognition of an offender's risk of re-offending if he has committed a certain type of offense. This defendant, by statute, is subject to SBM for life. Further, the statutory scheme provides that if the court finds the offense committed is not an aggravated offense (along with other exceptions) *and* the offender is not a recidivist, the court shall conduct a risk assessment to determine whether and for what period of time a defendant should be subject to SBM. *See id.* § 14-208.40A(d),(e). Similar to the South Carolina policy to protect the public from sex offenders as stated by the *Dykes* Court, the North Carolina policy set forth in the SMB statutes is the same, and therefore, we believe the imposition of SBM to be rationally related to the purpose of protecting children and

the more general public. *See K-Mart Corp.*, 358 N.C. at 180-81, 594 S.E.2d at 15 ("[T]he rational basis test or rational basis review applies, and this Court must inquire whether distinctions which are drawn by a challenged statute ... bear some rational relationship to a conceivable legitimate governmental interest. Rational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." (citation and quotations omitted)).

In further response to defendant's argument that there is an inadequate process for petitioning to be removed from SBM, we note that our General Assembly has provided an avenue for petitioners seeking removal from SBM. Per General Statutes, section 14-208.43, "Request for termination of satellite-based monitoring requirement,"

> [a]n offender described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(3) who is required to submit to satellite-based monitoring for the offender's life *may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission.* The request to terminate the satellite-based monitoring requirement and to terminate the accompanying requirement of unsupervised probation may not be submitted until at least one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence.

N.C. Gen. Stat. § 14-208.43(a) (2013). Again, we hold the imposition of SBM as applied to defendant is rationally related to the purpose of protecting children and the general public and does not impermissibly infringe upon defendant's due process rights. Accordingly, defendant's arguments are overruled.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

STATE v. WILLIAMS

[235 N.C. App. 211 (2014)]

STATE OF NORTH CAROLINA
v.
OMARI JIBRI WILLIAMS

No. COA14-1

Filed 15 July 2014

1. Appeal and Error—preservation of issues—failure to move to dismiss

Defendant's argument in a felonious hit and run case that the State did not present sufficient evidence of the crime was dismissed. Defendant failed to move to dismiss the charge at the close of the State's evidence or at the close of all the evidence.

2. Constitutional Law—effective assistance of counsel—failure to move to dismiss—no prejudice

Defendant did not receive ineffective assistance of counsel in a felony hit and run case where his trial counsel did not move to dismiss the charge at either the close of the State's evidence or at the close of all the evidence. Defendant failed to show that there was a reasonable probability that, but for counsel's failure to make a motion to dismiss, the result of the proceeding would have been different where the trial court properly submitted the issue of whether defendant knew or should have known that his vehicle had struck a person.

Upon writ of *certiorari* from judgment entered 15 December 2011 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 22 April 2014.

Roy Cooper, Attorney General, by Kevin G. Mahoney, Assistant Attorney General, for the State.

Craig M. Cooley for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to make a motion to dismiss at the close of all of the evidence, he waived the right to appeal that issue. Where there was substantial evidence presented that defendant should reasonably have known that the crash resulted in serious bodily injury to a person, it was for the jury to determine the weight and credibility of the evidence.

Defendant failed to show prejudice arising from the failure of his counsel to make a motion to dismiss at the close of all of the evidence.

I. Factual and Procedural Background

On the evening of 28 January 2011, Omari Jibri Williams (defendant) had been drinking with friends at several bars in Asheville. Defendant drove home at 2 a.m., on Emma Road, an unlighted and curving road. He was driving a van belonging to a friend. Defendant struck something, and stopped the vehicle, but was unable to ascertain what the vehicle had struck. There was a hole in the windshield, the right front headlight was broken, the antenna bent, the right front signal light was broken, and the front of the vehicle was dented.

The vehicle had struck Richard Leroy McCoy (McCoy), who was walking on the edge of the road, hurling him forty feet to a point twelve feet off of the side of the road. McCoy was found at 8:30 a.m. on 29 January 2011 by a passerby. The investigation by the Highway Patrol found debris from the van. From a part number found on a piece of debris, investigators were able to identify the type of vehicle involved. A surveillance video from a nearby convenience store showed a white van with damage to the right front of the vehicle.

Defendant heard about the accident on the news on 30 January 2011. He contacted the Asheville Police Department, and turned himself in to the Highway Patrol. Defendant waived his *Miranda* rights, and gave statements that he knew he hit something, but did not know what it was at the time.

On 2 May 2011, defendant was indicted for felonious hit and run, and driving while license revoked. Defendant pled guilty to driving while license revoked, but not guilty to felonious hit and run. At trial, defendant stipulated that he had struck McCoy, but that it was an accident, and he lacked knowledge of who or what he had struck. Defense counsel did not move to dismiss the hit and run charge at the close of the State's evidence, nor at the close of all of the evidence.

The jury found defendant guilty of felonious hit and run. Defendant was sentenced to an active term of incarceration of 19-23 months, and ordered to pay $20,348.46 in restitution.

On 1 May 2013 this Court granted defendant's petition for writ of *certiorari*.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the State did not present sufficient evidence of the crime of felonious hit and run. We dismiss this argument.

A. Standard of Review

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1).

B. Analysis

Defendant contends that the State did not present sufficient evidence of felonious hit and run. However, defendant did not move to dismiss that charge either at the close of the State's evidence or at the close of all of the evidence. The question of the sufficiency of the State's evidence is therefore not preserved for appellate review. This argument is dismissed.

III. Ineffective Assistance of Counsel

[2] In his second argument, defendant contends that he was denied effective assistance of counsel. We disagree.

A. Standard of Review

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). In order to meet this burden,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Campbell, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693

(1984)). "Prejudice is established by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Both prongs of this test must be met to prevail on an ineffective assistance of counsel claim." *Id.* at 690, 617 S.E.2d at 29-30 (quotations and citations omitted).

B. Analysis

Defendant contends that trial counsel's failure to make a motion to dismiss at the close of all of the evidence constituted ineffective assistance of counsel.

Defendant was indicted for a violation of N.C. Gen. Stat. § 20-166(a), which provides:

> (a) The driver of any vehicle who knows or reasonably should know:
>
> (1) That the vehicle which he or she is operating is involved in a crash; and
>
> (2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;
>
> shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

N.C. Gen. Stat. § 20-166(a) (2013).

We address defendant's argument, under the second prong of the *Strickland* test, as to whether defendant has shown that there was a reasonable probability that, but for counsel's failure to make a motion to dismiss, the result of the proceeding would have been different. We hold that defendant has failed to meet this burden.

Defendant's argument on appeal is that he repeatedly stated that he did not know what the van struck. He further argues that his assertion was "objectively reasonable[.]" This restricts defendant's argument as to the element of the charge pertaining to whether he knew or should reasonably have known that the vehicle was involved in a collision

resulting in serious bodily injury to a person. Assuming *arguendo* that the issue of the sufficiency of the evidence had been preserved, our standard of review would be whether the State presented substantial evidence of defendant's knowledge of the fact that the crash resulted in serious bodily injury to a person. *See State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Such evidence can be either direct or circumstantial. *See State v. Miles*, ___ N.C. App. ___, ___, 730 S.E.2d 816, 822, *disc. review denied*, 366 N.C. 414, 734 S.E.2d 858 (2012) and *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013). To withstand a motion to dismiss, the evidence, whether direct or circumstantial, must be "substantial;" that is, it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In addition, in considering the evidence upon a defendant's motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State. *See 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). Where the defendant presents evidence, as was done in the instant case, "it is not to be considered by the trial court upon defendant's motion to dismiss unless favorable to the State." *State v. Beam*, 201 N.C. App. 643, 650, 688 S.E.2d 40, 45 (2010).

Applying these legal principles to all of the evidence presented, we conclude that there was sufficient evidence for this case to have been submitted to the jury. Whether defendant's assertion that he did not know that the van struck a person was "objectively reasonable" is not the correct standard of review. The State can establish the knowledge element of the offense of felonious hit and run by showing either that defendant actually knew, or that he reasonably should have known, that the vehicle which he was operating struck a person.

We hold that the analysis contained in the unpublished opinion of *State v. Wemyss*, ___ N.C. App. ___, 722 S.E.2d 14 (unpublished), *disc. review denied*, 366 N.C. 220, 726 S.E.2d 857 (2012), is persuasive on this point:

> Aside from his misplaced reliance upon *Fearing*, Defendant's challenge to the sufficiency of the evidence to support his conviction rests upon the contention that (1) Defendant's own testimony concerning the events surrounding the accident, including his claim to have been unaware that he had hit or harmed Mr. Holder, coupled with the absence of certain specified items of physical evidence should have precluded a finding of guilt given the weakness of the circumstantial evidence presented by the

> State and (2) that Mr. Scott's challenge to the adequacy of the investigation into the collision conducted by the investigating officers completely undermined the State's case. However, as we have previously noted, the weight and credibility to be afforded to the testimony of particular witnesses is a matter for determination by the jury rather than a reviewing court. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999), *cert. denied*, 528 U.S. 1124, 120 S.Ct. 951, 145 L.Ed.2d 826 (2000). For all of these reasons, we do not believe that Defendant's challenge to the sufficiency of the evidence to support his conviction has merit.

Id.

In the instant case, defendant knew that the van that he was operating struck something on Emma Road in the early morning hours of 29 January 2011. This impact caused substantial damage to the right front of the vehicle. Defendant had been drinking that night, was driving without a valid license, and had a prior driving while impaired conviction. Defendant failed to report the collision to law enforcement, and did not turn himself into law enforcement until he saw a report on the television news. McCoy was twelve feet off of the side of the road, where he was found later that morning.

We hold that the question of whether defendant should reasonably have known that he struck a person was properly submitted to the jury. It was for the jury to determine the weight and credibility of the evidence submitted by both the State and defendant.

Given this holding, defendant cannot show prejudice arising out of his counsel's failure to move for the dismissal of the charge at the conclusion of all of the evidence.

This argument is without merit.

DISMISSED IN PART, NO ERROR IN PART.

Judges HUNTER, Robert C., and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JULY 2014)

BOSTIAN v. MARIETTA No. 13-1016	N.C. Industrial Commission (657096)	Affirmed in part, reversed in part, and remanded in part
CEBULA v. GIVENS ESTATES, INC. No. 13-1316	Buncombe (12CVS373)	Affirmed
DEMAYO v. STONE BY LYNCH, LLC No. 14-119	Mecklenburg (12CVS19847)	Affirmed
GRAHAM v. DEUTSCHE BANK NAT'L TR. CO. No. 13-881	Guilford (12CVS4672)	Reversed and Remanded
HUNT v. LONG No. 13-1455	Columbus (12CVD1501)	Reversed and Remanded
IN RE FORECLOSURE OF CORNBLUM No. 13-1247	Swain (09SP77-82) (10SP01) (10SP02) (10SP06)	Vacated
IN RE FORECLOSURE OF HARTY No. 13-1453	Union (12SP1003)	Affirmed
IN RE A.A. No. 14-291	Stokes (11JA27) (11JA28)	Vacated and Remanded
IN RE D.M.G. No. 14-96	Guilford (09JT511)	Affirmed
IN RE E.L.H. No. 14-209	Rutherford (11JT39-40)	Affirmed in part and remanded in part
IN RE L.F.G.K. No. 14-115	Cleveland (09JT128) (10JT125)	Dismissed in part, affirmed in part
IN RE L.G.O. No. 13-1454	Martin (12JA62-63)	Affirmed

IN RE L.L. No. 14-365	Orange (11JA1)	Affirmed
IN RE M.A.G. No. 14-195	Davidson (12JT134)	Affirmed
IN RE O.O. No. 14-106	Mecklenburg (13JA123)	Affirmed; remanded for a correction of a clerical error.
IN RE S.H. No. 14-196	Mecklenburg (09JT304) (10JT449) (12JT647)	Affirmed
KING v. BRYANT No. 13-1003	Cumberland (11CVS8280)	Affirmed
MEDURI v. MEDURI No. 14-107	Buncombe (11CVD1038)	Reversed and Remanded
OSBORNE v. TOWN OF NAGS HEAD No. 13-1123	Dare (12CVS402)	Affirmed
STATE v. ANDERSON No. 14-25	Caldwell (08CRS51489-90)	No Error
STATE v. BOYKIN No. 13-1367	Sampson (10CRS50722)	No Error
STATE v. BROWN No. 13-1265	Cabarrus (11CRS53301) (11CRS709808)	No Error
STATE v. CARROLL No. 14-14	Randolph (10CRS50590-93)	No Prejudicial Error
STATE v. CORBETT No. 13-1398	Johnston (12CRS51009-10)	No Error
STATE v. CRITE No. 14-61	Guilford (10CRS94650) (12CRS84462) (12CRS84464) (12CRS84466) (12CRS84467-69) (12CRS87109-10) (12CRS92372) (13CRS72224)	Affirmed

STATE v. FIGGS No. 14-294	Beaufort (11CRS52674)	No Error
STATE v. HOCUTT No. 14-76	Johnston (03CRS54060)	Affirmed
STATE v. JACOBS No. 14-306	Sampson (07CRS51724)	No Error
STATE v. JAMES No. 14-36	Forsyth (09CRS61925)	Dismissed
STATE v. MASSEY No. 14-27	New Hanover (13CRS5736)	Affirmed
STATE v. McCULLOCH No. 13-472	Wilkes (11CRS1078-1084) (11CRS50057-61) (11CRS50065-67) (11CRS50499-500) (11CRS50501-06)	Affirmed
STATE v. MORROW No. 13-1282	Haywood (10CRS53914) (10CRS53922)	No Error
STATE v. NELSON No. 13-1355	Mecklenburg (10CRS256238)	Affirmed
STATE v. PEARCE No. 13-1359	Mecklenburg (11CRS256463) (12CRS12725)	No Error
STATE v. RICHARDSON No. 13-1331	Wake (13CRS184) (13CRS200086-87)	No Error
STATE v. SLOAN No. 13-1469	Union (10CRS53476-77)	No Error
STATE v. SOUDEN No. 13-1151	Wake (12CRS219919)	No Error
STATE v. SPINKS No. 13-1150	Randolph (11CRS109)	No Error
STATE v. TAYLOR No. 13-1391	Hoke (08CRS52552)	Affirmed
STATE v. THORPE No. 14-37	Mecklenburg (10CRS233832)	Affirmed

STATE v. ROBINSON No. 13-1436	Forsyth (12CRS50342) (12CRS50343)	Affirmed
STEWART v. STEWART No. 14-168	Buncombe (09CVD3134)	Affirmed
TURNER v. AYERS No. 13-1057	Wake (12CVD12054)	Affirmed
WHEELESS v. MARIA PARHAM MED. CTR., INC. No. 13-1475	Vance (11CVS859)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 29 JULY 2014)

JACOKES v. APM BUILDERS, INC. No. 13-1329	Pender (11CVS1081)	Affirmed
STATE v. ATKINS No. 13-1242	Mecklenburg (11CRS210032) (11CRS210034-35)	No Error
STATE v. MEAD No. 14-3	Ashe (12CRS51013)	No Error
STATE v. PARKER No. 13-1381	Durham (11CRS51676)	No Error
STATE v. WALKER No. 13-1356	Wake (12CRS208506)	No Error

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