235 N.C. App.—No. 2 Pages 222-426

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 12, 2016

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 5 AUGUST 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Interlocutory orders and appeals—discovery sanctions—dismissal—A sanctions order that dismissed plaintiff's complaint for not complying with discovery was interlocutory because it left unresolved the question of defendant's entitlement to monetary damages on his counterclaims. However, it was immediately appealable because it affected a substantial right. **Keesee v. Hamilton, 315.**

Interlocutory orders and appeals—dismissal—Defendant's appeal from interlocutory orders denying his motion for summary judgment directed to plaintiff's equitable distribution claim and granting plaintiff's motion for summary judgment with respect to one of the grounds upon which defendant sought to challenge the validity of her equitable distribution claim was dismissed. **Holbert v. Holbert, 277.**

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Preservation of issues—failure to raise issue—Although respondent argued that the trial court erred by failing to make a finding about Katherine Carmichael's capacity in a case regarding her renunciation of her interest in real property, this issue was not preserved. Respondent's motion for summary judgment, as well as respondent's response to the petition for partition, failed to raise the issue of her lack of capacity. **Carmichael v. Lively, 222.**

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Prison letter—written in Crip code—admissible—The trial court did not err in a prosecution for robbery and murder by admitting a letter defendant wrote while in jail that was in Crip code and by allowing the State to ask him on cross-examination whether he was in a gang. The letter itself was relevant and not unfairly prejudicial because defendant solicited in the letter the murder of one of the State's primary witnesses against him. Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter. **State v. Jackson, 384.**

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Renunciation of real property—effective when filed with register of deeds—The trial court did not err by concluding that the renunciation of real property dated June 11, 2004, and filed with the clerk of court on 4 November 2004 did not take effect until filed with the register of deeds on 15 June 2006. **Carmichael v. Lively, 222.**

Rescission of renunciation—revocation—The trial court did not err by concluding that the rescission of renunciation executed by Katherine Carmichael on 28 December 2004 and filed with the clerk of court and register of deeds on 29 December 2004 rescinded and revoked the 11 June 2004 renunciation as to the real property owned by the decedent. **Carmichael v. Lively, 222.**

Quitclaim deed—renunciation filed subsequently had no effect—The trial court did not err by concluding that as of the date of the quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property. Because a copy of the renunciation was not filed with the register of deeds until 15 June 2006, subsequent to the filing of the quitclaim deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property. **Carmichael v. Lively, 222.**

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to allow a former member of the coaching staff to testify that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The excluded testimony did not tend to show the existence or non-existence of a pertinent character trait. **State v. Clapp, 351.**

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judgment for plaintiff (the officer) was reversed and the case was remanded for further action on defendant's counter-claims. Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries and, considering a number of other factors such as the terrain, the speed limit, the population and the time of day of the pursuit, there was a high probability of injury to the public despite the absence of significant law enforcement benefits. **Truhan v. Walston, 406.**

Employment termination—civil service hearing—not a probationary officer after consolidation—finding supported by evidence—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department (CMPD), the trial court's finding that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal) was supported by evidence that plaintiff had been to some degree under the supervision of the CMPD since shortly after his initial hire. **Mazzeo v. City of Charlotte, 325.**

Employment termination—civil service hearing—oath retaken after consolidation—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, competent evidence existed to support a finding of fact that plaintiff was "re-sworn" as an officer with the Charlotte-Mecklenburg Police Department Airport Division, so that he was entitled to a civil service hearing. Both oaths were identical and both oaths were administered by the Deputy City Clerk of the City of Charlotte. **Mazzeo v. City of Charlotte, 325.**

Employment termination civil service hearing—not a probationary officer after consolidation—conclusion—supported by finding—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, the evidence supported the trial court's findings of fact which supported its conclusion that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal). **Mazzeo v. City of Charlotte, 325.**

SEXUAL OFFENDERS

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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.

CARMICHAEL v. LIVELY

[235 N.C. App. 222 (2014)

CHARLES R. CARMICHAEL, PETITIONER
v.
DAVID LIVELY, RESPONDENT

No. COA13-1429

Filed 5 August 2014

1. Appeal and Error—preservation of issues—failure to raise issue

Although respondent argued that the trial court erred by failing to make a finding about Katherine Carmichael's capacity in a case regarding her renunciation of her interest in real property, this issue was not preserved. Respondent's motion for summary judgment, as well as respondent's response to the petition for partition, failed to raise the issue of her lack of capacity.

2. Deeds—renunciation of real property—effective when filed with register of deeds

The trial court did not err by concluding that the renunciation of real property dated June 11, 2004, and filed with the clerk of court on 4 November 2004 did not take effect until filed with the register of deeds on 15 June 2006.

3. Deeds—rescission of renunciation—revocation

The trial court did not err by concluding that the rescission of renunciation executed by Katherine Carmichael on 28 December 2004 and filed with the clerk of court and register of deeds on 29 December 2004 rescinded and revoked the 11 June 2004 renunciation as to the real property owned by the decedent.

4. Deeds—quitclaim deed—renunciation filed subsequently had no effect

The trial court did not err by concluding that as of the date of the quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property. Because a copy of the renunciation was not filed with the register of deeds until 15 June 2006, subsequent to the filing of the quitclaim deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property.

Appeal by respondent from order entered 25 July 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2014.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin and Alexander W. Warner, for respondent-appellant.

Winfred R. Ervin, Jr. for petitioner-appellee.

McCULLOUGH, Judge.

Respondent David Lively appeals from an award of summary judgment in favor of petitioner Charles R. Carmichael. After careful and thoughtful review, we affirm the order of the trial court.

I. Background

The evidence in the record indicates that on 28 May 2004, Edna Frank Ward Lively's ("Edna Lively") Last Will and Testament was probated in Mecklenburg County Superior Court. Edna Lively's Last Will and Testament devised her home, located at 1446 Townes Road, Charlotte, North Carolina ("Townes Road Property") equally to her daughter Katherine Carmichael and her step-grandson, respondent David L. Lively, "if they survive me." On 4 March 2004, Edna Lively died. Both Katherine Carmichael and respondent survived Edna Lively.

On 11 June 2004, Katherine Carmichael signed a "Notice of Renunciation and Qualified Disclaimer" ("Renunciation") stating that she was "renouncing her interest in the [Townes Road Property]." On 4 November 2004, the Renunciation was filed in the Office of the Clerk of Mecklenburg County Superior Court.

On 24 November 2004, respondent filed an Executor Deed in the Mecklenburg County Register of Deeds. The Executor Deed provided that respondent was the sole beneficiary of the Townes Road Property "because Katherine G. Carmichael executed and filed a qualified disclaimer and renunciation[.]" It also provided that respondent, serving as executor of the estate of Edna Lively, "does grant, bargain, sell and release to" respondent, in his individual capacity, the Townes Road Property "TO HAVE AND TO HOLD all in singular, the aforesaid undivided interest[.]"

On 28 December 2004, Katherine Carmichael signed a "Notice of Revocation/Rescission of Notice of Renunciation and Qualified Disclaimer." ("Rescission") In the Rescission, Katherine Carmichael stated the following:

> 3. The undersigned . . . has been suffering from significant health problems for several years that have been

the subject of medical evaluation and diagnosis. Due to those problems, the undersigned has for approximately the past two years been unable to handle her affairs without assistance. For approximately the past two years, the undersigned has attended to her financial affairs and other personal matters with substantial assistance from her husband, [petitioner] Charles Carmichael.

4. Due to the undersigned's medical problems she felt unable to assume the role of Executrix of [Edna Lively's estate], and for that reason renounced her right to serve as Executrix of the Estate on April 27, 2004 and did so with [petitioner]'s assistance.

5. In late May of 2004 [respondent], Executor of the [Edna Lively estate] told the undersigned that she needed to appear at an attorney's office to meet with him and the Estate attorney to sign some papers concerning this Estate. On or about June 8, 2004, [petitioner] drove the undersigned to the law office of Elizabeth Blake, an attorney then representing [respondent]. Ms. Blake at that time did not represent the undersigned, nor did the undersigned consult with or retain the services of counsel concerning the document(s) presented to her in Ms. Blake's office.

6. On or about June 8, 2004 (in the law offices of Ms. Blake) the undersigned was presented an unsigned copy of the [Renunciation] . . . to sign, and she did so. The undersigned did meet in private with Ms. Blake for some period of time before she left Ms. Blake's law office, but cannot now recall what was discussed. In fact the undersigned does remember that she signed a document in Ms. Blake's office, but does not independently recall the terms or nature of that document and only now remembers the document signing and some of those surrounding circumstances after having been provided a copy of [the Renunciation] that was filed with the Clerk of Superior Court in November of 2004.

7. After now reading [the Renunciation], the undersigned now realizes (because she has now been advised as to the nature of the document) that the

> effect of that document, if valid and subsisting, is to divest the undersigned of any interest in [Edna Lively's estate]. The undersigned does not now, nor has she ever intended that to occur, contrary to the wishes of [Edna Lively].
>
> . . . .
>
> 10. The undersigned hereby confirms her interest in the [Townes Road Property].

The Rescission was filed in the Register of Deeds on 29 December 2004.

Also on 29 December 2004, Katherine Carmichael filed a Quitclaim Deed with the Register of Deeds ("Quitclaim Deed"), wherein she conveyed her interest in the Townes Road Property to herself and petitioner as tenants by the entireties.

Subsequently, on 15 June 2006, a copy of the Renunciation was filed in the Mecklenburg County Register of Deeds. Katherine Carmichael died on 11 March 2009.

On 23 November 2009, petitioner filed a "Petition (To Partition Real Property)" against respondent. The petition alleged that petitioner and respondent each owned a one-half undivided interest in the Townes Road Property. It also provided the following, in pertinent part:

> 8. The Towne[s] Road Property is a single residential subdivision lot upon which is situated a detached single family residence[.] . . . [T]he current single family residential usage of the Towne[s] Road Property is its highest and best allowable use.
>
> 9. An actual partition of the Towne[s] Road Property . . . would result in rendering the respective interest(s) of each of the parties in said property to be of substantially less monetary value than their respective monetary interests resulting from a Partition Sale of that property as sought by Petitioner herein; an actual partition of the Towne[s] Road Property cannot be made without injury to all of the parties interested (the Petitioner and the Respondent).

As such, petitioner argued that it was entitled to an order of sale of the Townes Road Property pursuant to Article II of Chapter 46 of the North Carolina General Statutes.

On 6 January 2010, respondent filed a "Response to Petition to Partition Real Property" denying that petitioner and respondent owned the Townes Road Property as tenants-in-common and asserting that respondent was the sole owner of the Townes Road Property. Respondent argued that he was the sole owner pursuant to the Renunciation and the Executor Deed. Respondent requested that the court dismiss with prejudice the petition to partition real property or, in the alternative, transfer the matter to Mecklenburg County Superior Court.

On 20 April 2011, respondent filed a "Memorandum and Motions to Dismiss, Motion In Limine, and/or Motion for Summary Judgment." Following a hearing held on 10 May 2011, the trial court entered an order on 29 August 2011 denying respondent's motion to dismiss. The trial court also transferred the special proceeding to Mecklenburg Superior Court for the determination of the following issue:

> As of the recording of Katherine Carmichael's [Quitclaim Deed] dated December 29 2004 (and recorded in MCPR book 18183, at page 559) did Katherine Carmichael and [petitioner] own a ½ undivided interest in the real property that was the subject of that deed, or did the renunciation document effectively divest Katherine Carmichael of any interest in said real property?

On 22 July 2013, petitioner filed a motion for summary judgment. The trial court held a hearing at the 22 July 2013 term of Mecklenburg County Superior Court, for the determination of respondent's motion to dismiss and cross motions for summary judgment. On 25 July 2013 the trial court entered an order, making the following findings of fact:

1. Edna Frank Ward Lively died testate on March 4, 2004.
2. At the time of her death, Decedent owned [the Townes Road Property].
3. Decedent by will signed January 22, 1992 devised her residence to [Katherine Carmichael and respondent].
4. Katherine Carmichael signed a notice of renunciation of her interest in said real property by document signed June 11, 2004 which was recorded in the office of the Clerk of Court of Mecklenburg County on November 4, 2004.
5. Katherine Carmichael filed a rescission of said renunciation by document filed with the Clerk of Court on

December 28, 2004 and recorded in the Register of Deeds on December 29, 2004.

6. Katherine Carmichael executed a quitclaim deed December 29, 2004 to [petitioner] in said real property, said deed being recorded December 29, 2004 in the office of the Register of Deeds.

7. The renunciation dated June 11, 2004 was recorded in the office of the Register of Deeds June 15, 2006.

8. N.C.G.S. 31B-2(c) in 2004 provided in part, "The renunciation shall be filed with the clerk of court of the county in which the proceedings have been commenced. . . ."

9. N.C.G.S. 31B-2(d) in 2004 provided in part, "If real property or an interest therein is renounced, a copy of the renunciation shall also be filed for recording in the office of the register of deeds of all counties wherein any part of the . . . interest renounced is situated. . . . The renunciation of an interest, or a part thereof, in real property shall not be effective to renounce such interest until a copy of the renunciation is filed for recording in the office of the register of deeds. . . ."

The trial court then concluded that

1. The renunciation dated June 11, 2004, and filed with the Clerk of Court November 4, 2004 did not take effect until filed with the Register of Deeds on June 15, 2006.

2. The rescission of renunciation executed by Katherine Carmichael on December 28, 2004 and filed with the Clerk of Court and Register of Deeds on December 29, 2004 rescinded and revoked the June 11, 2004 renunciation as to the real property owned by the decedent.

Based on the foregoing, the trial court effectively granted petitioner's motion for summary judgment and held that as of the recording of Katherine Carmichael's 29 December 2004 quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property.

From the 25 July 2013 order, respondent appeals.

II. Standard of Review

The standard of review for an order granting summary judgment is *de novo*. *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87, 747 S.E.2d 220, 225-26 (2013). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the nonmoving party." *Vulcan Materials Co. v. Iredell Cnty.*, 103 N.C. App. 779, 781, 407 S.E.2d 283, 285 (1991) (citation omitted).

III. Discussion

On appeal, respondent argues that the trial court erred by effectively granting petitioner's motion for summary judgment. Respondent argues that the trial court erred by: (A) failing to enter any findings of fact regarding Katherine Carmichael's capacity at the time she was signing the documents at issue; (B) concluding that the Renunciation did not take effect until it was filed with the Register of Deeds; (C) concluding that the Rescission rescinded and revoked the Renunciation; and (D) concluding that as of the recording of the Quitclaim Deed, petitioner and Katherine Carmichael owned a one-half undivided interest in the Townes Road Property.

A. Katherine Carmichael's Capacity

[1] First, respondent argues that the trial court erred by failing to enter a finding of fact regarding Katherine Carmichael's capacity in 2004 to execute various relevant documents.

"We note that ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991). "However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." *Vulcan Materials Co.*, 103 N.C. App. at 781, 407 S.E.2d at 285 (citation omitted).

In the case *sub judice*, the trial court entered nine findings of fact and two conclusions of law. Although the trial court did not enter any findings of fact regarding Katherine Carmichael's capacity to execute documents in 2004, we do not believe that the trial court was required to

do so because this issue was not properly before the court. The only issue before the trial court at the summary judgment hearing was whether as of the recording of the Quitclaim Deed on 29 December 2004, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property or whether the Renunciation effectively divested Katherine Carmichael of any interest in the Townes Road Property.

At the beginning of the summary judgment hearing, respondent's counsel conceded that "[t]he only issue is whether or not the Petitioner owns an interest in the real estate, Judge. They have raised [the capacity] issue in the past; that has been addressed, but it's not before – [the capacity issue is] not properly before the Court." *See Byrd v. Hancock*, 86 N.C. App. 564, 568, 358 S.E.2d 557, 559 (1987) (where the defendant's "forecast of proof [at the summary judgment hearing] did not call into question" the defendant's argument on appeal, the "plaintiff was not obliged to make any showing whatever with respect to these matters" and the argument was irrelevant to the issues raised at the hearing). Furthermore, respondent's motion for summary judgment, as well as respondent's response to the petition for partition, fails to raise the issue of Katherine Carmichael's lack of capacity. *See* N.C. R. App. P. 10(a)(1) (2014) (stating that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). Based on the foregoing reasons, we reject respondent's argument that the trial court erred by failing to make a finding about Katherine Carmichael's capacity.

B. The Renunciation

[2] In his next argument, respondent asserts that the trial court erred by making the following conclusion:

> 1. The renunciation dated June 11, 2004, and filed with the Clerk of Court November 4, 2004 did not take effect until filed with the Register of Deeds on June 15, 2006.

As previously stated, we re-emphasize that the trial court was not required to enter *any* conclusions of law in its summary judgment order and generally, they are disregarded on appeal. *See Sunamerica Financial Corp.*, 328 N.C. at 261, 400 S.E.2d at 440. However, we find that the challenged conclusion of law sheds light on our review of the trial court's reasoning to render summary judgment for petitioner.

Specifically, respondent argues that the statutory method of renunciation outlined in Chapter 31B of the North Carolina General Statutes is not an exclusive method of accomplishing a renunciation. Respondent also contends that in light of the "very specific timing requirements for a renunciation filing under § 31B-2(a)[1] and § 31B-2(b)[2], . . . it would appear that the General Assembly did not intend for there to be a similar requirement" applicable to N.C. Gen. Stat. § 31B-2(d) (2004).

"[W]hen construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *In re Estate of Mangum*, 212 N.C. App. 211, 213, 713 S.E.2d 18, 20 (2011) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citation omitted).

Chapter 31B of the North Carolina General Statutes is entitled "Renunciation of Property and Renunciation of Fiduciary Powers Act." Section 31B-2 (2004), in effect at the time the Renunciation was executed, was entitled, "Time and place of filing renunciation." The 25 July 2013 order directed our attention to N.C. Gen. Stat. § 31B-2, subsections (c) and (d), in its findings of fact. Subsection (c) of section 31B-2 stated that "[t]he renunciation shall be filed with the clerk of court of the county in which proceedings have been commenced for the administration of the estate of the deceased owner[.]" N.C.G.S. § 31B-2(c) (2004). Subsection (d) of section 31B-2 provided, as follows:

> (d) If real property or an interest therein is renounced, a copy of the renunciation shall also be filed for recording in the office of the register of deeds of all counties wherein

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1. N.C. Gen. Stat. § 31B-2(a) (2004) provided that "[t]o be a qualified disclaimer for federal and State inheritance, estate, and gift tax purposes, an instrument renouncing a present interest shall be filed *within the time period* required under the applicable federal statute for a renunciation to be given effect as a disclaimer for federal estate and gift tax purposes. If there is no such federal statute the instrument shall be filed not later than *nine months* after the date the transfer of the renounced interest to the renouncer was complete for the purpose of such taxes." N.C.G.S. § 31B-2(a) (2004) (emphasis added).

2. N.C. Gen. Stat. § 31B-2(b) (2004) provided that "[a]n instrument renouncing a future interest shall be filed not later than *six months* after the event by which the taker of the property or interest is finally ascertained and his interest indefeasibly vested and he is entitled to possession even though such renunciation may not be recognized as a disclaimer for federal estate tax purposes." N.C.G.S. § 31B-2(b) (2004) (emphasis added).

> any part of the interest renounced is situated. . . . The renunciation of an interest, or a part thereof, in real property *shall not be effective to renounce such interest until a copy of the renunciation is filed for recording in the office of the register of* deeds in the county wherein such interest or part thereof is situated.

N.C. Gen. Stat. § 31B-2(d) (2004) (emphasis added).

An examination of N.C. Gen. Stat. § 31B-2(d) reveals that the language used by the General Assembly is clear and unambiguous. The mandatory language of subsection 31B-2(d) demonstrates that the legislature intended that a renunciation of an interest in real property *shall not be effective* until a copy of the renunciation is filed in the office of the register of deeds in the county where such interest in situated. "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citation omitted).

Giving effect to the plain meaning of the words used, we are compelled to agree with the trial court that although the Renunciation was dated 11 June 2004 and filed with the Clerk of Clerk on 4 November 2004, it was not effective to renounce Katherine Carmichael's interest in the Townes Road Property until a copy of the Renunciation was filed in the Register of Deeds. Because a copy of the Renunciation was not filed with the Mecklenburg County Register of Deeds until 15 June 2006, an undisputed fact, the language used in subsection 31B-2(d) mandates that the Renunciation would not have taken effect until 15 June 2006. Accordingly, we hold that the trial court did not err by making this conclusion and find respondent's arguments unpersuasive.

C. The Rescission

[3] Next, respondent argues that the trial court erred by concluding the following:

> 2. The rescission of renunciation executed by Katherine Carmichael on December 28, 2004 and filed with the Clerk of Court and Register of Deeds on December 29, 2004 rescinded and revoked the June 11, 2004 renunciation as to the real property owned by the decedent.

Respondent first argues that the Rescission was ineffective because the Renunciation was irrevocable based on the following language contained within the Renunciation: "WHEREFORE, the undersigned does hereby completely, irrevocably and without qualification renounce and

disclaim his rights in the [Townes Road Property[.]" Respondent then asserts that the Executor Deed effectively transferred the Townes Road Property to respondent, making him the sole owner, prior to the filing of the Quitclaim Deed.

It is important to note that the merit of both of respondent's arguments rests on the assumption that the Renunciation was in effect prior to the 24 November 2004 Executor Deed and the 29 December 2004 Rescission. Because we have previously held that the Renunciation would not have been effective in renouncing Katherine Carmichael's interest in the Townes Road Property until it was filed in the Register of Deeds on 15 June 2006, respondent's arguments necessarily fail.

D. Quitclaim Deed

[4] In his last argument, respondent contends that the trial court erred by concluding that as of the date of the Quitclaim Deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property.

The record establishes that the Quitclaim Deed, filed in the Mecklenburg County Register of Deeds on 29 December 2004, conveyed Katherine Carmichael's one-half undivided interest devised to her by Edna Lively's Last Will and Testament in the Townes Road Property, to Katherine Carmichael and petitioner as tenants by the entireties. Because a copy of the Renunciation was not filed with the Register of Deeds until 15 June 2006, subsequent to the filing of the Quitclaim Deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property. Therefore, we reject respondent's argument that the trial court erred by reaching this conclusion and entering summary judgment in favor of petitioner.

IV. Conclusion

For the reasons discussed above, we affirm the 25 July 2013 order of the trial court, granting summary judgment in favor of petitioner.

Affirmed.

Judges ELMORE and DAVIS concur.

FAZZARI v. INFINITY PARTNERS, LLC

[235 N.C. App. 233 (2014)]

JOSEPH FAZZARI, ET AL., PLAINTIFFS
v.
INFINITY PARTNERS, LLC, ET AL., DEFENDANTS

No. COA13-1303

Filed 5 August 2014

1. Mortgages and Deeds of Trust—inflated appraisals—action against lenders—summary judgment for lenders

The trial court did not err by granting summary judgment for the lenders on claims arising from a failed land development plan that involved inflated appraisals where those claims were based in common law negligence and the Mortgage Lending Act (MLA). In North Carolina, there is no cause of action for negligent underwriting of loans for the purchase of real estate; even if there were, plaintiffs could not show justified reliance because they forecast no evidence that they made independent inquiries into the values of the lots or were prevented from doing so. The MLA did not apply because the loans were to finance the purchase of lots as investments and not for residential use.

2. Unfair Trade Practices—summary judgment—failure to show misrepresentations or reliance

The trial court properly granted summary judgment on unfair and deceptive trade practice (UDTP) claims against certain of the plaintiffs (the Fifth Third Bank plaintiffs) in an action arising from a failed real estate development and inflated appraisals. The Fifth Third plaintiffs were not able to show either misrepresentations or reliance on the allegedly negligent appraisals.

Appeals by Plaintiffs[1] from orders entered 8 and 22 March 2012 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 May 2014.

Ellis & Parker PLLC,[2] *by L. Neal Ellis, Jr., and Nathaniel Parker, for Plaintiffs.*

1. The specific plaintiffs appealing from each order are identified in our discussion of the procedural history of this case.

2. Plaintiffs' brief styles their appellate counsel as "Ellis & Anthony" while their reply brief lists "Ellis & Parker, PLLC[.]" Both briefs name the same two individual attorneys.

McGuireWoods LLP, by H. Landis Wade, Jr., and Steven N. Baker, for Defendant Fifth Third Bank.

Robinson Bradshaw & Hinson, P.A., by Douglas M. Jarrell and Ty E. Shaffer, for Defendant Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from the 2007 failure of Grandfather Vistas, a real estate development located in Caldwell County. In 2006, approximately 1,000 acres of land in Caldwell County was purchased for $10.9 million, which Defendants Infinity Partners, LLC; Infinity Real Estate Partners, LLC; Source One Communities LLC; Prudential Source One, LLC; and Peerless Real Estate Services, Inc.,[3] planned to develop. The purchase was financed through a "land banking" program in which the developers sold approximately sixty ten-acre lots for $500,000 each ("the founders' lots"), with "buyback" contracts that guaranteed the developers would repurchase each lot for $625,000 within one year. The purchase contracts for the founders' lots also included provisions for the developers to pay the purchasers' interest from closing until the repurchase. The purchase contracts stated that purchasers would obtain fixed rate financing on a thirty-year term at an initial interest rate not to exceed 7.5% per annum with a loan-to-value ratio of at least 90%.[4] Following repurchase of the founders' lots, the developers planned to subdivide the lots into one-acre retail parcels for resale. Defendant Blue River Ridge at Blowing Rock, LLC was formed by Peerless and Source One to purchase, own, and develop Grandfather Vistas and to eventually buy back the founders' lots.

The developers used a real estate company to market the founders' lots, and the real estate company, in turn, created a marketing plan that relied on preferred lender arrangements with First Charter Bank

3. The defendants noted here are referred to collectively as "the developers."

4. However, as discussed herein, no Plaintiff obtained a loan on these terms. Rather, all of their loans for purchase of the founders' lots were of much shorter terms, many for as little as two years.

of North Carolina;[5] Wachovia Bank, N.A.;[6] and SunTrust Banks, Inc.[7] (collectively, "the lenders"). Beginning in May 2006, the developers began selling founders' lots, and Plaintiffs were among the purchasers. SunTrust and Fifth Third used Defendant A. Greg Anderson, d/b/a Anderson & Associates, ("Anderson") exclusively to perform appraisals of the founders' lots in connection with those sales. Wells Fargo did not employ Anderson for any appraisals at issue in this appeal, using several other appraisers instead ("the Wells Fargo appraisers"). Anderson and the Wells Fargo appraisers valued every founder's lot at $500,000, regardless of the lot's specific qualities or location in Grandfather Vistas. That value was the exact minimum amount needed in order to meet the loan-to-value provision of the purchase contracts. The actual value of the lots ranged from $40,000 to $81,000.[8]

Little of the money raised through sales of the founders' lots was invested in Grandfather Vistas, and by 2007, all development activity had ceased. None of the founders' lots were ever repurchased from Plaintiffs. As a result, on 16 December 2008, Plaintiffs initiated a lawsuit in file number 08 CVS 27336 against various defendants, including, *inter alia*, the developers, the lenders, and Anderson. Plaintiffs' complaint included claims against the lenders for fraud, fraud in the inducement, negligence, negligent misrepresentation, conversion, civil conspiracy, and unfair and deceptive trade practices ("UDTP") pursuant to Chapter

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5. First Charter Bank was acquired by Fifth Third Bank, N.A., which, following a merger on 30 September 2009, became known as Fifth Third Bank. Throughout this opinion, unless otherwise specified, defendants Brian Kiser and Jeff Collins, former loan officers with what was then First Charter Bank, are included in all references to "Fifth Third" or "the lenders."

6. Wachovia Bank, N.A., was a subsidiary of Wachovia Corporation. On 31 December 2008, Wachovia Corporation merged with Wells Fargo & Company. We refer to this defendant hereafter as "Wells Fargo."

7. The proper party was actually SunTrust Mortgage, Inc., a wholly owned subsidiary of SunTrust Banks, Inc.

8. Anderson was later suspended by the North Carolina Appraisal Board because of his involvement in another land development scheme gone awry which likewise resulted in lawsuits and subsequent appeals to this Court. This Court affirmed summary judgment for Anderson and another appraiser in that matter. *See Williams v. United Cmty. Bank*, __ N.C. App. __, 724 S.E.2d 543 (2012). Fifth Third, Peerless, and several of the individual developer defendants were also involved in that land development/investment scheme. In an opinion filed 6 December 2011, this Court affirmed summary judgment in favor of Fifth Third against the *Williams* plaintiffs on, *inter alia*, Chapter 75 claims. *See In re Fifth Third Bank, N.A.*, 217 N.C. App. 199, 719 S.E.2d 171 (2011), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

75 of our General Statutes.[9] Claims brought against Anderson included fraud, fraud in the inducement, negligence, negligent misrepresentation, conversion, civil conspiracy, and UDTP.[10] The lenders filed answers in February and March 2009, asserting various defenses and counterclaims, including default by Plaintiffs on promissory notes securing their loans.[11]

On 15 July 2011, Anderson moved for summary judgment on all remaining claims against him,[12] asserting, *inter alia*, that Plaintiffs could not show reliance on any of his alleged misrepresentations. On the same date, the lenders filed motions for summary judgment as to all remaining claims against them,[13] on their counterclaims against Plaintiffs, and for attorneys' fees. On 16 February 2012, the court[14] entered summary judgment in favor of Anderson on all claims against him ("the Anderson summary judgment order"). On 8 March 2012, the trial court entered an order which (1) granted the lenders' motions for summary judgment, (2) dismissed with prejudice all remaining claims against the lenders, (3) denied Plaintiffs' motion to amend their complaint to add UDTP claims against Wells Fargo and SunTrust,[15] and (4) taxed costs against

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9. Plaintiffs did not bring claims for fraud, fraud in the inducement, or UDTP against Wells Fargo or SunTrust Bank.

10. On 19 May 2009, the Chief Justice designated the case in file number 08 CVS 27336 and a related case in file number 09 CVS 6239 as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. The Honorable Timothy L. Patti, resident Superior Court Judge in Gaston County, was designated to preside over the cases. The case in 09 CVS 6239 appears to involve a lawsuit by two additional purchasers of founders' lots against Anderson, the lenders, the developers and others involved in the investment scheme.

11. By order entered 27 July 2009, Plaintiffs were permitted to file an amended complaint, and the lenders filed amended responsive pleadings thereafter.

12. From our review of the extraordinarily extensive record in these appeals, it appears that some of the original plaintiffs settled or withdrew their claims, or otherwise dropped out of the case before the lenders and Anderson filed their motions for summary judgment.

13. In the motions, Wells Fargo listed Plaintiffs' remaining claims against it as negligence, negligent misrepresentation, conversion, and civil conspiracy.

14. As noted *supra*, the Chief Justice designated Judge Patti to preside over the matter. Judge Patti signed orders entered in the matter through September 2010. Following Judge Patti's retirement, the Honorable W. Erwin Spainhour presided over the matter and signed all orders entered by the court from July 2011 on, including the lenders' summary judgment order and Anderson's summary judgment order.

15. *See* footnote 9, *supra*.

Plaintiffs ("the lenders' summary judgment order"). On the same day, the court entered judgments in favor of the lenders on their counterclaims against Plaintiffs Joseph Fazzari (Fifth Third); Danuta K. McIvor (Fifth Third); Scott W. McQuay (Fifth Third); Charles H. Owens (Fifth Third); William Decker (Fifth Third); Carol H. Harris (Wells Fargo); Roscoe E. Harris (Wells Fargo); Renee C. Miller, as Trustee of Renee C. Miller Living Trust (Wells Fargo); Darryl Strack (Wells Fargo); Kathryn M. Strack (Wells Fargo); Christa S. Tighe (Wells Fargo); and James K. Tighe, Jr. (Wells Fargo). On 19 March 2012, the court entered an order allowing Anderson's verified bill of costs. On 22 March 2012, the court entered orders allowing the lenders' verified bills of costs.

In June 2013, Plaintiffs filed a motion for default judgment against Defendants Kevin J. Foster, Neil O'Rourke, and Anthony Porter. Orders of default had previously been entered against these defendants, who had key roles in managing Peerless, one of the Grandfather Vistas development entities. The motion also sought voluntary dismissals with prejudice of the remaining claims against Defendants P. Marion Rothrock; Rothrock Engineering; Blue River Ridge at Blowing Rock, LLC; Grandfather Vistas, LLC; Infinity Partners, LLC; and Infinity Real Estate Partners, LLC. On 10 July 2013, the trial court entered a final order in the matter which (1) granted Plaintiffs' motion for default judgment jointly and severally against Foster, O'Rourke, and Porter in the amount of $22,588,156.07, and (2) granted Plaintiffs' motion to voluntarily dismiss with prejudice and without costs the other remaining defendants.

On 8 August 2013, Plaintiffs Joseph Fazzari; K. Scott Fischer; Thomas L. Barnhardt; Kimberly Barnhardt; Windspirit Properties, LLC; William Decker; Douglas M. Ellis; Kelly Ellis; Lynn Falero; Ralph Falero; Kenneth Fischer; Carol H. Harris; Roscoe E. Harris; Scott W. McQuay; Renee C. Miller, as Trustee of Renee C. Miller Living Trust; Charles H. Owens; Danuta K. McIvor; Darryl Strack; and James K. Tighe, Jr., gave notice of appeal from the 8 March 2012 lenders' summary judgment order and the 22 March 2012 lenders' cost orders.[16] On the same date, Plaintiffs Joseph Fazzari; Danuta K. McIvor; Scott W. McQuay; Charles H. Owens; William B. Decker; Carol H. Harris; Roscoe E. Harris; Renee C. Miller; Darryl J. Strack; Kathryn M. Strack;[17] Christa S. Tighe; and James K. Tighe, Jr.,

16. On 5 March 2014, Plaintiffs' counsel notified this Court that K. Scott Fischer and Kenneth Fischer, the only remaining appellants as to SunTrust, had reached a final settlement of all matters at issue in this appeal, and moved to dismiss SunTrust from the appeal. That motion was allowed by order of this Court entered 7 March 2014. Accordingly, in the discussion section of this opinion, "the lenders" refers only to Wells Fargo and Fifth Third.

17. Kathryn M. Strack withdrew her notice of appeal on 26 September 2013.

gave notice of appeal from the 8 March 2012 judgments entered against them on the various lenders' counterclaims.[18]

On 16 December 2013, Wells Fargo moved to dismiss the appeals in COA13-1303 of Darryl Strack; James K. Tighe, Jr.; Christa S. Tighe; and Renee Miller (collectively, "the bankruptcy appellants"). The motion was referred to this panel by order entered 6 January 2014. In June and July 2012, the bankruptcy appellants filed cases under Chapter 7 of the United States Bankruptcy Code. In September and October 2012, all of the bankruptcy appellants' obligations to Wells Fargo arising from the costs order and the judgments on Wells Fargo's counterclaims were discharged. Wells Fargo asserts that the bankruptcy appellants could recover a windfall if this Court resolves this appeal in Plaintiffs' favor. In light of the result reached in this matter, resolving all issues in favor of the lenders as discussed below, we dismiss as moot Wells Fargo's motion to dismiss.

Discussion

Plaintiffs argue that the trial court erred in granting the lenders' motion for summary judgment on the claims for (1) negligence and negligent misrepresentation and (2) UDTP.[19] We affirm.

I. Standard of review

> It is well settled that summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as

18. On 8 August 2013, in COA13-1304, various plaintiffs gave notice of appeal from the 16 February 2012 Anderson summary judgment order and the 19 March 2012 cost order. On 18 November 2013, some of those plaintiff-appellants gave notice that they were withdrawing their appeals as to the Anderson summary judgment order, but did not withdraw their appeals from the cost order. However, on 30 April 2014, the remaining plaintiff-appellants gave notice to this Court that they had reached a final settlement of all claims against Anderson, rendering the appeal in COA13-1304 moot. They moved to dismiss that appeal, and this Court granted that motion and dismissed the appeal in COA13-1304 by order entered 30 April 2014.

19. Plaintiffs have abandoned their appeals as to the trial court's grant of summary judgment on their claims for fraud and civil conspiracy by failing to argue them in their brief. *See* N.C.R. App. P. 28(a).

> a matter of law. The record is considered in the light most favorable to the party opposing the motion.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP, 350 N.C. 214, 219-20, 513 S.E.2d 320, 324 (1999) (citations, internal quotation marks, and emphasis omitted).

II. Negligence and negligent misrepresentation claims

[1] Plaintiffs first contend that the trial court erred in granting summary judgment on their negligence and negligent misrepresentation claims against the lenders. We disagree.

> North Carolina expressly recognizes a cause of action in negligence based on negligent misrepresentation. It has long been held in North Carolina that the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.

Walker v. Town of Stoneville, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (citations and internal quotation marks omitted).

In general, "a lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999) (holding lender owed no duty to borrower with respect to inspection or appraisal of its collateral); *see also Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268, 551 S.E.2d 920, 923 (2001) (holding lender owed borrower no duty to inspect house being built with loan proceeds); *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 150, 493 S.E.2d 814, 818 (1997) (holding lender owed no duty to ensure loan proceeds were used for a specific purpose in the absence of an express contract provision); *Wells v. N.C. Nat'l Bank*, 44 N.C. App. 592, 596, 261 S.E.2d 296, 298 (1980) (holding lender had no duty "to attend to details of the plaintiff's [land] purchase other than the financial services it offered").

Plaintiffs acknowledge that the lenders did not violate any duties expressly provided for in their loan agreements, but contend that the lenders owed them duties which "flow from at least two sources: [(1)] a common law negligence duty and [(2)] the Mortgage Lending Act." We are unpersuaded by either contention.

> A fiduciary duty arises when 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. However, an ordinary debtor-creditor relationship generally does not give rise to such a special confidence: the mere existence of a debtor-creditor relationship between the parties does not create a fiduciary relationship. This is not to say, however, that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances.

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 60-61, 418 S.E.2d 694, 699 (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

Plaintiffs cite this Court's opinion in *Dallaire v. Bank of Am., N.A.*, for the proposition that, "when a financial institution undertakes to provide a customer with a service *beyond that inherent in the creditor-debtor relationship*, it must do so reasonably and with due care." __ N.C. App. __, __ n.5, 738 S.E.2d 731, 735 n.5 (2012) (emphasis added). In *Dallaire*, we reversed and remanded a grant of summary judgment in favor of the bank because there existed a question of fact "as to whether or not [the lender] sought to give legal advice to [the investment purchasers]." *Id.* Likewise, Plaintiffs assert that the lenders here went beyond the role of commercial lending when they acted as "cheerleaders" and "promoters" of Grandfather Vistas by using Anderson and other appraisers to "churn[] out 'cookie cutter' appraisals," "interfered with the usual appraisal process," and "falsified loan documents and concealed the true purpose of the loans from underwriters[.]"[20]

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20. As noted *supra*, Anderson performed all the appraisals of founders' lots for SunTrust and Fifth Third, but Wells Fargo used other appraisers in its underwriting process and did not employ Anderson. In his appraisals, Anderson used only other lots within Grandfather Vistas as comparable properties, or "comps," a crucial part of the valuation process. Plaintiffs assert that the lenders withheld information about the buyback and other provisions in the purchase contracts in an effort to manipulate the appraisal process to ensure inflated values. Plaintiffs also argue that Anderson's use of other Grandfather Vistas' lots as comps shows that the appraisal process was "rigged" toward inflated values. However, at least two of the Wells Fargo appraisers testified that they were aware of the buyback provision and considered the provision in performing their appraisals. One of those appraisers took the further step of using properties located from 16 to 23 miles outside of Grandfather Vistas as comps in his appraisal. *The Wells Fargo appraisers still valued each founder's lot at $500,000.* Accordingly, even if there were a cause of action for negligent underwriting of loans for the purchase of real estate, Plaintiffs would be unlikely to prevail since the actions complained of (concealment of contract agreement provisions and the use of Anderson for numerous appraisals) do not appear to have had *any* impact on the appraised values of the founders' lots.

However, our Supreme Court has recently reversed this Court's decision in *Dallaire*, reaffirming that, "[g]enerally, the home loan process is regarded as an arm's length transaction between parties of equal bargaining power and, absent exceptional circumstances, will not give rise to a fiduciary duty." *Dallaire v. Bank of Am., N.A.*, __ N.C. __, __, __ S.E.2d __, __ (2014), *available* at 2014 N.C. LEXIS 408. The Supreme Court went on to hold that, even in an exceptional circumstance where a loan officer owes a borrower some duty beyond the terms of the loan agreement, "a borrower cannot establish a claim for negligent misrepresentation based on a loan officer's statements . . . if the borrower fails to make reasonable inquiry into the validity of those statements." *Id.* at __, __ S.E.2d at __. Thus, where the borrowers

> put forth no evidence that they made [such an] inquiry or were prevented from doing so, they have failed to demonstrate the justified reliance necessary to support their negligent misrepresentation claim. . . . [and] the trial court [does] not err in granting summary judgment for [the lender on the borrowers'] negligent misrepresentation claim.

Id. at __, __ S.E.2d at __.

Here, far from being exceptional circumstances outside the normal creditor-debtor relationship, appraisals and underwriting are integral parts of the commercial lending process. Plaintiffs cite no case from this State in which courts have found that a lender had a common law duty to the borrower regarding the manner in which the lender undertook appraisals or underwriting in connection with making loans. To the contrary, our State's case law is clear that such appraisals and underwriting are for the benefit of the lenders, not for the borrowers. *See*, *e.g.*, *Camp*, 133 N.C. App. at 559, 515 S.E.2d at 913. Simply put, in North Carolina, there is no cause of action for negligent underwriting of loans for the purchase of real estate. Further, even were there such a claim under the law of this State, Plaintiffs have forecast no evidence that they undertook their own independent inquiries into the values of the lots (such as obtaining their own independent appraisals) or were prevented from doing so. Accordingly, Plaintiffs could not demonstrate the justified reliance necessary to support a negligent misrepresentation claim.

We find Plaintiffs' reliance on the lenders' alleged violations of the Mortgage Lending Act ("MLA")[21] equally unavailing. Plaintiffs cite *Guyton v. FM Lending Servs., Inc.*, for the proposition that the MLA

21. The MLA was repealed effective 31 July 2009. N.C. Sess. Laws 2009-374, s. 1.

provides a source of duties for tort-based causes of action because "the relevant statutory language [of the MLA] expressly prohibits misrepresentation or concealment of the material facts likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan." 199 N.C. App. 30, 43, 681 S.E.2d 465, 475 (2009) (citations, internal quotation marks, ellipsis, and some brackets omitted)). In *Guyton*, the plaintiffs alleged that the lender defendant "actively and intentionally withheld the information that the property lay in a flood plain — including retention of surveys and certifications that contained relevant information and affirmative obstruction of [the p]laintiffs' access to important information — in order to induce [the p]laintiffs to purchase the property." *Id.* at 42-43, 681 S.E.2d at 475.

We reject Plaintiffs' reliance on the MLA on two bases. First, the MLA applied only to loans taken by natural persons "*primarily for personal, family, or household use*, primarily secured by either a mortgage or deed of trust on residential real property located in North Carolina." N.C. Gen. Stat. § 53-243.01(15) (2005) (emphasis added). Here, it is undisputed that the loans taken out by Plaintiffs were to finance the purchase of founders' lots as *investments* and not for residential use by the investment purchasers. The founders' lots were explicitly marketed as investment vehicles. The evidence in the record is that *no* Plaintiff took out a loan to purchase a founder's lot "primarily for personal, family, or household use[.]" *Id.* Plaintiffs' own complaint describes the sale of the founders' lots as an "Investment Scheme" and consistently refers to the investment purchasers as "investors." The investment purchasers, who purchased the founders' lots *explicitly* and intentionally for investment purposes, cannot now claim the protection of a statutory scheme *explicitly* intended to govern residential rather than investment real estate mortgages.

Despite the fact that the loans were indisputably for investment purposes, Plaintiffs urge that the lenders are estopped from avoiding the applicability of the MLA on this basis because "[t]he lenders treated the loans as residential or home loans in order to avoid their own commercial/investment guidelines which would have prevented these loans from meeting the 90% [loan-to-value] financial condition in the purchase contracts. The lenders' guidelines for investment loans would permit loans only in the range of 65% to 80% [loan-to-value]." Plaintiffs defeat their own argument on this point. The lenders' internal guidelines regarding permitted loan-to-value ratios for various types of loans are not intended to protect Plaintiffs or any other borrowers. Rather, those policies are intended to protect the *lenders* and presumably reflect an

assessment of the relative riskiness of residential versus commercial real estate loans. The MLA applied to residential loans and was intended to protect residential borrowers. *See* N.C. Gen. Stat. § 53-243.01(15). As noted *supra*, Plaintiffs were *not* residential borrowers and their loans were *not*, in fact, residential loans. No labeling or treatment by the lenders in their internal underwriting process altered the loans' true nature so as to bring them under the ambit of the MLA.

Second, as discussed *supra*, even if the MLA did apply to Plaintiffs' loans such that it could be the source of duties for their negligence-based causes of action, for the reasons previously stated, Plaintiffs could not demonstrate the justified reliance required to prevail on those claims. In sum, we reject both of Plaintiffs' arguments and conclude that the trial court did not err in granting summary judgment for the lenders on the negligence-based claims.

III. UDTP claims

[2] Plaintiffs Decker, Fazzari, McIvor, McQuay, and Owens[22] (collectively, "the Fifth Third plaintiffs") also contend that the trial court erred in granting summary judgment on their UDTP claims against Fifth Third. We disagree.

It is well established that

> [a] claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75.1-1 must allege that: (1) the defendant committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to the plaintiff's business. Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which [the] plaintiff complains.

Sunset Beach Dev., LLC v. Amec, Inc., 196 N.C. App. 202, 211, 675 S.E.2d 46, 53 (2009) (citations, internal quotation marks, and brackets omitted). "Actual reliance is demonstrated by evidence [the] plaintiff acted

22. Plaintiffs did not assert any claims under Chapter 75 against Wells Fargo. In addition, the appeal in COA13-1303 as to SunTrust was dismissed by order of this Court entered 7 March 2014. The five plaintiffs named here are the only Fifth Third borrowers remaining in this appeal.

or refrained from acting in a certain manner due to [the] defendant's representations." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663, 464 S.E.2d 47, 57 (1995) (citation omitted). Where a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendants is proper. *Sunset Beach Dev., LLC*, 196 N.C. App. at 212, 675 S.E.2d at 54.

On appeal, the Fifth Third plaintiffs allege that they relied on misrepresentations by Fifth Third and the appraisals by Anderson in making their decisions to take out the loans on which they later defaulted. The Fifth Third plaintiffs also assert that Fifth Third wrongfully withheld the buyback agreements from their underwriters and Anderson in an effort to inflate the appraisals.

As for the alleged misrepresentations, our review of the record reveals that Decker, Fazzari, McIvor, and McQuay all testified that Fifth Third did not make any misrepresentations to them in regard to their loans. Owens testified that an employee of Fifth Third told him that Grandfather Vistas was "beautiful, that it should do well" and vouched that the developers were the "real deal."[23] However, even if these statements could be construed as factual misrepresentations as opposed to mere expressions of opinion, the remarks were made *after* Owens signed the purchase agreement, and, not surprisingly, Owens testified that he did not rely on the statements in deciding whether to buy his lot.

In regard to the assertion that Fifth Third withheld the buyback agreements from Anderson, the Fifth Third plaintiffs fail to note that Anderson testified to having a copy of at least one contract which included the buyback agreement. Further, as noted in footnote 20 *supra*, appraisers for Wells Fargo who *were* provided with copies of the buyback agreement still reached a value of $500,000 for each of the founders' lots they appraised.

As for the Fifth Third plaintiffs' alleged reliance on Anderson's appraisals, we find this appeal governed by the same reasoning employed in *In re Fifth Third Bank, N.A.*, and *Williams*, and in light of the virtually identical facts presented here, we reach the same result. As noted *supra*, those appeals involved, *inter alia*, UDTP claims by investors who took out loans from Fifth Third to purchase lots in a development

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23. The Fifth Third plaintiffs quote an additional alleged affirmative misrepresentation made by an agent of the bank to another borrower, but that borrower is not a party to this appeal. Accordingly, the statement is irrelevant in resolving the appeal of the Fifth Third plaintiffs.

called the Villages of Penland as part of an investment scheme.[24] *In re Fifth Third Bank, N.A.*, 217 N.C. App. at 202, 719 S.E.2d at 173-74. In the Penland cases, as here, the plaintiffs were purchasers of lots in another real estate investment scheme in which Anderson (and another appraiser) appraised a large of number of lots at an identical, inflated value to meet the loan-to-value conditions required to obtain bank loans. *Id.* at 207-08, 719 S.E.2d at 177. The Penland scheme, like that here, involved contracts that promised repurchase of lots with a guaranteed profit for the investors. *Id.* at 207, 719 S.E.2d at 177. As with Grandfather Vistas, the development was never completed, and investors were left with large loans and lots worth only a fraction of their appraised values. *Id.* at 202, 719 S.E.2d at 174.

In *Williams*, we noted that, "[w]here a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendants is proper[,]" __ N.C. App. at __, 724 S.E.2d at 549 (citation omitted), and then observed:

> All of the evidence shows that [the p]laintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the Anderson[] appraisals. Even had . . . Anderson[] appraised the lots differently, [the p]laintiffs would still have been obligated to purchase them at the prices agreed to in the purchase contracts. [The p]laintiffs cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions. Because [the p]laintiffs forecast no evidence that they actually relied on the appraisals in deciding to make their investments, the trial court properly granted summary judgment to . . . Anderson[].

Id. at __, 724 S.E.2d at 550. Likewise, in *In re Fifth Third Bank, N.A.*, in considering summary judgment for Fifth Third on UDTP claims, we concluded that "no evidence tend[ed] to show that [the p]laintiffs' decision to invest . . . bore any relation to the appraised value of the lots which they purchased or that [the p]laintiffs relied in any way upon the allegedly defective appraisals which [Fifth Third] procured when they decided to invest . . . ." 217 N.C. App. at 211, 719 S.E.2d at 179. As a result,

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24. *Williams* was an appeal from the grant of summary judgment in favor of Anderson, while *In re Fifth Third Bank, N.A.*, arose from a summary judgment order in favor of the lender. We refer to the appeals collectively as "the Penland cases."

we affirmed summary judgment in favor of Fifth Third on the plaintiffs' UDTP claims. *Id.* at 213, 719 S.E.2d at 180.

Here, just as in the Penland cases, the purchase contracts were not subject to any appraisal contingencies.[25] Just as in the Penland cases, the Fifth Third plaintiffs signed their purchase contracts, obligating them to go forward with the purchase of the founders' lots, *before Anderson had even performed the appraisals* in question. Thus, just as in the Penland cases, the Fifth Third plaintiffs "cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions" to sign the purchase contracts.[26] *See Williams*, __ N.C. App. at __, 724 S.E.2d at 550. We are utterly unable to distinguish the relevant circumstances here from those presented in the Penland cases, and thus we reach the same result. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). In light of the Fifth Third plaintiffs' inability to show either misrepresentations or reliance on the allegedly negligent appraisals, the trial court

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25. The Fifth Third plaintiffs assert that the purchase agreements *did* contain an appraisal contingency condition, to wit, language stating that a buyer "must be able to obtain a conventional loan at a fixed rate in the principal amount of 90% [loan-to-value] for a term of 30 years at an initial interest rate not to exceed 7.5% per annum . . . ." However, *none* of the purchasers obtained 30-year conventional loans on the terms specified in this language. Rather, each of the loans involved much shorter terms and higher rates of interest.

26. As in the Penland cases, the Fifth Third plaintiffs' lack of reliance on the appraisals is not surprising since neither the developers nor the purchasers of the lots were concerned about the actual value of the founders' lots. The purchase of the lots by the Fifth Third plaintiffs was simply a necessary step in an investment scheme which they believed would guarantee them a quick $125,000 profit. Under the scheme, the profit for the Fifth Third plaintiffs had nothing to do with the value of the lots themselves; all that mattered was the promise in the purchase contract for the developers to (1) pay the interest on the purchase loans and (2) repurchase each lot for $125,000 more than the sales price in one year. Indeed, it is unclear whether the sales of the founders' lots were more accurately characterized as securities transactions, which fall outside the provisions of Chapter 75. *See In re Fifth Third, N.A.*, 217 N.C. App. at 211 n.6, 719 S.E.2d at 179 n.6 ("The fact that the purchase price that [the p]laintiffs paid for the lots in question was identical and bore no apparent relation to the actual value of the relevant lots in their undeveloped state may cut against, instead of in favor of, [the p]laintiffs' position. The fact that each lot was appraised and priced at the same value may suggest that the investments in question amounted to a securities transaction not subject to the UDTP [Act], rather than a loan.") (citations omitted).

properly granted summary judgment on their UDTP claims. Accordingly, the Fifth Third plaintiffs' UDTP arguments are overruled.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

EARL WAYNE FORTNER AND HENRY FORTNER, CO-ADMINISTRATORS OF THE ESTATE OF JOHNNIE H. FORTNER, SR., PLAINTIFFS
v.
JONATHAN A. HORNBUCKLE AND LYNDA HORNBUCKLE FORTNER, DEFENDANTS AND THIRD PARTY PLAINTIFFS
v.
EARL WAYNE FORTNER AND HENRY FORTNER, THIRD PARTY DEFENDANTS

No. COA13-1209

Filed 5 August 2014

1. Gifts—retained deeds—intent retain control—jury question

The trial court did not err by denying defendant's motion for a directed verdict in an action involving the apportionment of estate tax liability where the decedent had executed five deeds conveying real property but retained the deeds; the deeds were executed after his death; plaintiffs, the personal representatives of the estate, filed this action seeking to recover the apportioned share of the estate taxes; and defendant contended that the transfers had been gifts. The evidence was sufficient to raise a question for the jury as to whether the decedent intended to retain control over the properties at issue.

2. Taxation—apportionment of estate tax—instructions

A case involving the apportionment of estate tax liability was remanded for an error in the instructions where the decedent executed deeds to transfer real property but held the deeds, the deeds were recorded after his death, and defendants contended that the transfers had been gifts. The confusion arose from the trial court's simultaneous and condensed discussion of the doctrines of completed gifts (requested by defendants) and retained interests (requested by plaintiffs). The two doctrines are related but have distinct elements and required separate consideration by the jury.

3. Estates—administration—need for funds in joint checking account—factual issue for jury

The trial court erred by failing to properly instruct the jury on the issue of whether funds contained in a joint checking account were necessary to satisfy the claims against the estate. It is clear from the jury instructions that the trial court failed to direct the jury to determine whether the funds were actually needed to satisfy claims against the estate. Although plaintiffs argued that the error was cured by the trial court's insertion of language in the judgment, the question of whether the estate needed the funds to satisfy claims against the estate was a factual issue for the jury.

Appeal by defendants from judgment entered 8 April 2013 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 20 February 2014.

Moody & Brigham, PLLC, by Fred H. Moody, Jr., for plaintiffs-appellees.

McGuire, Wood & Bissette, P.A., by Mary E. Euler, Joseph P. McGuire, and Starling B. Underwood III, for defendants-appellants.

DAVIS, Judge.

Jonathan A. Hornbuckle ("Jonathan") and Lynda Hornbuckle Fortner ("Lynda") (collectively "Defendants") appeal from the trial court's entry of judgment upon a jury verdict awarding Earl Wayne Fortner ("Earl") and Henry Fortner ("Henry") (collectively "Plaintiffs"), co-administrators of the Estate of Johnnie H. Fortner, Sr. ("the Estate"), an apportioned share of the Estate's estate tax liability. On appeal, Defendants contend that the trial court erred by (1) denying their motion for a directed verdict; and (2) failing to appropriately instruct the jury. After careful review, we vacate the judgment and remand for a new trial.

Factual Background

Lynda and Johnnie H. Fortner, Sr. ("Johnnie") lived together and held themselves out to the public as husband and wife — although they were not actually married — from 1976 until 1988 and then from 1998 until Johnnie's death on 23 January 2007. Johnnie died intestate and two of his sons, Earl and Henry, were appointed as co-administrators of the Estate. At the time of his death, Johnnie owned a number of parcels of real property, five of which are pertinent to the present case. Also, in

2005, Johnnie and Lynda opened a joint checking account ("the Joint Checking Account") with a right of survivorship at the State Employees' Credit Union in Bryson City, North Carolina.

In August and October of 2006, Johnnie executed three general warranty deeds to Jonathan, Lynda's son, encompassing (1) a 154-acre tract known as the "Round Hill Property"; (2) an 11.14-acre tract known as "Conley's Creek Property"; and (3) a 2.95-acre tract known as the "Macktown Property." Johnnie also executed two general warranty deeds to Lynda for a 14.74-acre tract known as the "Galbraith Creek Property" and a 9.3-acre tract known as the "Shoal Creek Property."

In October of 2006, Johnnie placed all five deeds in a manila envelope, which he handed to Lynda while the two of them were alone in his office. He then instructed her to "take [them] home, put [them] up and keep [her] mouth shut." Lynda took the deeds home and placed them in a dresser drawer in her bedroom. On 23 January 2007, Johnnie died intestate. The five deeds were recorded in the Jackson and Swain County Register of Deeds offices on 5 February 2007.

Plaintiffs subsequently filed an action in Swain County Superior Court on 7 June 2011 alleging, in pertinent part, as follows:

> 4. That during his lifetime, Johnnie H. Fortner, Sr. executed five (5) certain deeds purporting to convey real property located in Swain and Jackson Counties, North Carolina, to the Defendants without consideration.
>
> . . . .
>
> 7. That the fair market values of said tracts or parcels of land were require[d] to be included in the gross estate of Johnnie H. Fortner, Sr. for purposes of estate . . . taxes.
>
> 8. That the Plaintiffs have paid or will pay from the assets of the Estate of Johnnie H. Fortner, Sr., estate . . . taxes upon the gross taxable Estate of Johnnie H. Fortner, Sr., including taxes attributable to the parcels of real property herein described.
>
> 9. That the Plaintiffs, as personal representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from the Defendants an apportioned share of the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr., which share shall be an amount which bears the same ratio to the total tax paid as the value of such tracts or parcels of land bear to the taxable estate.

10. That the Plaintiffs are also entitled to recover from the Defendants an apportioned share of any and all interest and penalty on the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr.

11 That at the time of the death of Johnnie H. Fortner, Sr., he and the Defendant, Lynda Hornbuckle Fortner, as joint tenants with right of survivorship, owned account #3003309 at the State Employees Credit Union, Bryson City, N.C.

12. That at the time of the death of Johnnie H. Fortner, Sr., said account had a balance of $249,121.63.

13 That, to the information and belief of the Plaintiffs, all of the funds included in said account had been contributed to said account from the funds of Johnnie H. Fortner, Sr.

14 That, to the information and belief of the Plaintiffs, the assets of the Estate of Johnnie H. Fortner, Sr. are not sufficient to pay the debts of said estate.

15. That the Plaintiffs are entitled to recover of the Defendant, Lynda Hornbuckle Fortner, the sum of $249,121.63 to be used solely for the payment of debts of the Estate of Johnnie H. Fortner, Sr., which are not payable from the other assets of the Estate.

16. That, alternatively, if the Plaintiffs are not able to recover the sum of $249,121.63 from the Defendant Lynda Hornbuckle Fortner, said sum was required to be included in the gross estate of Johnnie H. Fortner, Sr. for purposes of estate . . . taxes and the Plaintiffs have paid or will pay from the assets of the Estate of Johnnie H. Fortner, Sr. estate . . . taxes upon the gross taxable estate of Johnnie H. Fortner, Sr. including taxes attributable to the bank account hereinabove referred to and are entitled to recover from the Defendant Lynda Hornbuckle Fortner an apportioned share of the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr., which share shall be an amount which bears the same ratio to the total tax paid as the value of said account bears to the taxable estate and are entitled to recover from the Defendant, Lynda Hornbuckle Fortner an apportioned share of any and all interest and penalty on the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr.

Defendants filed an answer, counterclaim, and third-party complaint[1] on 17 August 2011. With regard to the five deeded properties, Defendants asserted that the transfers to Lynda and Jonathan constituted completed gifts and that as a result (1) the five properties were not properly includable in the Estate for purposes of calculating its tax liability; and (2) Plaintiffs were therefore not entitled to recover an apportioned share of the Estate's tax liability from Defendants attributable to those properties. Defendants also contended that the Estate should not be permitted to use any funds in the Joint Checking Account to pay the debts of the Estate.

A jury trial was held in Swain County Superior Court on 6 March 2013. The jury returned a verdict in favor of Plaintiffs, responding to the issues on the verdict sheet as follows:

> WE, THE JURY, AS OUR UNANIMOUS VERDICT, ANSWER AS FOLLOWS:
>
> 1. Are the Plaintiffs as representatives of the estate of Johnnie H. Fortner, Sr. entitled to an apportioned share of the federal and state estate taxes and interest on the asset referred to as:
>
> | | |
> |---|---|
> | Round Hill Property | Answer: yes |
> | 1a. If so, what amount? | $541,275.69 |
> | 2. Conley's Creek Property | Answer: yes |
> | 2a. If so, what amount? | $58,210.18 |
> | 3. Macktown Property | Answer: yes |
> | 3a. If so, what amount? | $23,968.90 |
> | 4. Galbraith Creek Property | Answer: yes |
> | 4a. If so, what amount? | $128,273.12 |
> | 5. Paul Cooper/ Shoal Creek Property | Answer: yes |
> | 5a. If so, what amount? | $129,853.48 |

1. The counterclaim (brought against Earl and Henry in their capacities as co-administrators of the Estate) and the third-party complaint (brought against Earl and Henry individually) both alleged a breach of fiduciary duty resulting from their alleged overstatement of the tax liability owed by the Estate and failure to sell real property to produce sufficient funds to pay the debts of the Estate.

> 6. What amount, if any, are the Plaintiffs as representatives of the estate of Johnnie H. Fortner, Sr. entitled to recover from the joint account with right of Survivorship at the State Employees Credit Union having an approximate balance of $248,322.00 at the time of Mr. Fortner, Sr.'s death?
>
> ANSWER: $248,322.00 = 100%
>
> 7. If none, what is the amount of the apportioned share of the federal and state estate taxes and interest that is attributable to the State Employees Credit Union account that the Plaintiffs, as representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from Lynda Hornbuckle Fortner?
>
> ANSWER: _____.

Defendants filed a timely notice of appeal to this Court.

Analysis

I. Denial of Motion for Directed Verdict

[1] Defendants initially argue that the trial court erred in denying their motion for a directed verdict based on their contention that the transfer of the five deeded properties constituted a completed gift such that the Estate was not entitled to an apportioned share of its tax liability attributable to these properties. We disagree.

In reviewing the denial of a motion for a directed verdict, we examine

> 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. In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant. The non-movant is given the benefit of every reasonable inference which may legitimately be drawn from the evidence, resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Trantham v. Michael L. Martin, Inc., ___ N.C. App. ___, ___, 745 S.E.2d 327, 331 (2013) (internal citations, quotation marks, and brackets omitted).

The elements required to show the valid delivery of a deed in the form of a completed gift are "(1) an intention by the grantor to give the instrument legal effect according to its purport and tenor; (2) evidence of that intention by some word or act which discloses that the grantor put the instrument beyond his legal control; and (3) acquiescence by the grantees in such intention." *Penninger v. Barrier,* 29 N.C. App. 312, 315, 224 S.E.2d 245, 247, *disc. review denied*, 290 N.C. 552, 226 S.E.2d 511 (1976) (emphasis omitted).

"A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite of a gift inter vivos. The intention may be inferred from the relation of the parties and from all the facts and circumstances." *McLean v. McLean*, 323 N.C. 543, 550, 374 S.E.2d 376, 381 (1988) (citation, quotation marks, brackets, and ellipses omitted).

Therefore, if the intent of the grantor is not to actually part with title to the property at issue but rather to retain an interest in it, there can be no completed transfer of the property. Accordingly, where evidence is introduced that calls into question the intention of the grantor, an issue of fact exists for resolution by the jury and the entry of a directed verdict on that issue is improper. *See Lerner Shops of N.C., Inc. v. Rosenthal*, 225 N.C. 316, 320, 34 S.E.2d 206, 208-09 (1945) ("There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with the intent that it shall be taken by the grantee or by someone for him. Both the intent and act are necessary for a valid delivery. *Whether such existed is a question of fact to be found by the jury.*" (citation and quotation marks omitted and emphasis added)).

We find instructive our decision in *Penninger*. In *Penninger*, the decedent, approximately three years prior to his death, executed three deeds conveying property to the defendants. *Penninger*, 29 N.C. App. at 314-15, 224 S.E.2d at 246. The decedent, without informing the defendants of the existence of these deeds, instructed his attorney to keep possession of them and to deliver the deeds to the defendants after his death. *Id.* at 314, 224 S.E.2d at 246.

The plaintiff, the decedent's next of kin and heir at law, filed an action to have the deeds declared null and void on the ground that the decedent "never at any time prior to his death released control over either of said deeds . . . and said deeds were never, in contemplation of law, delivered to the grantees or to anyone else for the use and benefit of the grantees

with the intention at said time that title should pass as the instruments become effective as a conveyance." *Id.* at 313, 224 S.E.2d at 246.

The decedent's attorney — who had drafted the deeds and then kept them in his possession at the decedent's direction — testified that had the decedent ever requested that he modify the deeds, "I imagine I would have but I don't know. . . . I did whatever he instructed me to do" and that "I would have done what he wanted with these deeds to comply with his wishes." *Id.* at 314, 224 S.E.2d at 246.

This Court emphasized in *Penninger* that the dispositive factor for whether a completed transfer of a deed has occurred is the intention of the grantor at the time of the execution of the deeds. *Id.* at 315, 224 S.E.2d at 247. Applying this principle, we held that the testimony by the decedent's attorney "would certainly justify a reasonable inference that the grantor retained ultimate control over the deeds until his death. So long as a deed is within the control and subject to the authority of the grantor there is no delivery, without which there can be no deed." *Id.* (citation and quotation marks omitted).

In the present case, Lynda testified, in pertinent part, as follows:

> Q. Okay. And when did you first see those deeds?
>
> A. I'm going to have to think here just a minute because all this is running together. I got these deeds — he gave me these deeds — we were at the office and it was in October.
>
> Q. Was it October 25, the date that's on those latest deeds?
>
> A. I'm pretty sure it was.
>
> Q. And how did he give you those deeds?
>
> A. They were in a manilla [sic] folder, just stuck in it.
>
> Q. And he handed it to you?
>
> A. He handed it to me from — he was sitting in his chair and they were to the side of him. He pulled it out that way.
>
> Q. And he may've said something to you, and I don't want to ask you what he said, but he may've said something to you?
>
> A. He said — yeah, he said a few words.
>
> Q. And what did you do with the envelope and the deeds?

A. I looked at them and seen what they were and I just — we were standing up, we was getting ready to go out of the office. And I just pitched them — the file over to my desk. And when we got to the door, he asked me a question and I said, it's right there on the desk. And I was instructed to get it, take it home, put it up and keep my mouth shut.

Q. And did you do that?

A. I done that.

Q. Where did you put the manilla [sic] envelope and the deeds?

A. I put them in a dresser drawer in the bedroom.

. . . .

Q. Ms. Fortner, let me ask you this: If on October the 26th, or sometime after that, Johnny [sic] Fortner had asked you to go bring him that manilla [sic] envelope with those deeds in it, would you have done that?

MS. EULER: Objection.

THE COURT: Overruled.

BY THE WITNESS: (Resuming)

A. Yeah, I would have.

We are satisfied that sufficient evidence existed to support the denial of Defendants' motion for a directed verdict. Lynda's testimony creates a reasonable inference that Johnnie lacked the intent to fully relinquish control of the deeded properties at the time he handed the deeds to her — a key element of the delivery of a deed by a donor.

This conclusion is also supported by evidence presented by Plaintiffs at trial tending to show that Johnnie did not substantially alter his control and use of the deeded properties at issue after handing the deeds to Lynda. He continued to reside on the Galbraith Creek Property and to receive rental income from the Round Hill Property, the Macktown Property, and the Shoal Creek Property — just as he had before handing the deeds to Lynda. Lynda also testified that Johnnie was considering making improvements to the Conley's Creek Property.

This evidence was sufficient to raise a question for the jury as to whether Johnnie intended to retain control over the properties at

issue. "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by grantee or some one for him. Both the intent and the act are necessary to the valid delivery. Whether such existed is a question of fact to be found by the jury." *Huddleston v. Hardy*, 164 N.C. 210, 212-13, 80 S.E. 158, 159 (1913) (citation and quotation marks omitted).

Defendants contend that Johnnie's donative intent was established by the fact that he gave the deeds directly to Lynda, one of the donees, instead of to a third party. However, in *Huddleston*, the Supreme Court emphasized that "the controlling test of delivery is the intention of the grantor to part with the deed and put it beyond his control, and that *this intent is an issue of fact, to be passed on by a jury*." *Id.* at 213, 80 S.E. at 160 (emphasis added). Therefore while the giving of a deed from the donor directly to the donee may constitute *some* evidence of donative intent for a completed gift, it does not establish as a matter of law that a completed gift did, in fact, occur where evidence also exists tending to show that the donor did not intend to put the deed beyond his legal control.

We also reject Defendants' argument that evidence of Johnnie's subsequent actions regarding the properties is irrelevant to his intent at the time he handed the deeds to Lynda. We believe such actions could properly be used by the jury to ascertain Johnnie's intent at the time he gave Lynda the deeds. The weight to be given this evidence was for the jury to decide. Accordingly, the trial court properly denied Defendants' motion for a directed verdict.

II. Jury Instructions

[2] Defendants next make a series of arguments challenging the trial court's jury instructions.

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

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

Our Supreme Court has stated that "jury instructions should be as clear as practicable[.]" *Swink v. Weintraub*, 195 N.C. App. 133, 157, 672 S.E.2d 53, 69 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 812, 693 S.E.2d 352 (2010). This is because

> [t]he chief purposes to be attained or accomplished by the court in its charge to the jury are clarification of the issues, elimination of extraneous matters, and declaration and explanation of the law arising on the evidence in the case. These are essential in cases requiring the intervention of a jury. The jury should see the issues stripped of all redundant and confusing matters, and in as clear a light as practicable. The chief object contemplated in the charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved.

Stern Fish Co. v. Snowden, 233 N.C. 269, 271, 63 S.E.2d 557, 559 (1951) (internal citations and quotation marks omitted).

Defendants contend that the trial court committed reversible error in its jury instructions both as to the deeded properties and as to the Joint Checking Account. We address each of their arguments in turn.

A. Deeded Properties

The trial court's instructions to the jury with regard to the deeded properties consisted of the following:

> Members of the jury, there are a number of issues you'll be called upon to consider, and let's look at the first five. They're broken down in five prospective tracts of land that were deeds signed by Mr. Fortner, Sr., to Lynda Fortner for her and/or Jonathan Hornbuckle. And the principles that I give you with regard to what the plaintiff must prove by the greater weight of the evidence will apply on each of these tracts. I'm not going to go over all of them, the same five times. You'd run me off if I did that. I'm not going to run that risk. But you will consider each of these tracts separate and apart, one from the other. If you answer one or more a certain way, that does not bind

you to answer the remainder of them a certain way. The contrary is true.

Now, on each of these issues the burden of proof is upon the plaintiffs, the Fortners, as administrators of the father's estate, to satisfy from the evidence and by its greater weight that you should answer that issue in their favor.

The issue essentially states as to each tract: Are the plaintiffs, as representatives of the estate of John H. Fortner, Sr., entitled to an apportioned share of the federal and state estate taxes and interest on the asset referred to as — and it goes down to each one, each one of those properties.

The plaintiff says and contends that Mr. Fortner executed those deeds and transferred the property by doing so but yet retained the interest in the land and each tract of land, each, some or all of them. And the defendants, on the other hand, say and contend — the defendants on the other hand say that he did not retain the interest but rather that they received it as a gift from him, that he did not retain control and ownership of the property.

Now, transferring real estate or any asset, more specifically here real estate, but retaining ownership of that property may consists [sic] of control, possession, living or occupying the property in question, deriving and collecting for his individual benefit any income that the property produced and any other facts and circumstances that you find from the evidence to the extent of by its greater weight that may give rise to the contention that he retained ownership of the property albeit he'd given deeds for it.

On the other hand, with regard to the defendant's contentions, that if he had transferred the property and not retained ownership of it, that he had given title to it. A gift means that Mr. Fortner intended to give up all his ownership and control of the property immediately, not contingent. And intent is a mental attitude seldom proven by what's called direct evidence, the evidence of an eyewitness. Intent is proven by circumstances which it may be inferred. And every person regardless of what they've

done is presumed to have intended the natural and probable consequences of their voluntary actions as opposed to involuntary.

And furthermore, the defendants contend that Mr. Fortner actually or he constructively transferred the property in the form of a gift. An actual delivery occurs when there is a direct transfer to another of ownership or control of something. And constructive delivery occurs when, although there is no actual delivery ownership and control of something is indirectly transferred.

Therefore, as to each of those issues on the numerical, 1, 2, 3, 4 and 5 parts of it, if you find from the evidence and by its greater weight, and the plaintiffs have satisfied you to that extent considering each of them separate and apart, one from the other, that Mr. Fortner, Sr. transferred that deed or those deeds, as the case may be, to the property yet retained ownership, control and/or possession of the property, and that he intended to do so, and did not intend to convey it as a gift either actually or constructively, then it would be your duty to answer that issue yes, in favor of the administrators of the estate and against the recipients of the property, the defendants.

On the other hand, if you fail to so find those things and the plaintiffs have not satisfied you by the greater weight of the evidence to that extent, then — or you cannot say what the truth is, then you would answer that issue against the party who has the burden of proof or otherwise answering it no, then it'd be in favor of the recipients of the property and against the administrators of the estate.

To the extent that you answer any of them no, then you don't consider the subparts of 1(a), 2(a), 3(a), 4(a) or 5(a). But if you've answered those issues yes, that the estate is entitled to some apportioned share of the federal and state taxes for those — and interest on those properties, then it will be your duty to determine what that amount of taxes — what is the amount of those taxes. And the burden is again upon the representatives of the estate to satisfy you that, first of all, taxes are due and, second, in what amount.

> And I think as the lawyers have explained to you in their final arguments if you decide that no, the estate is not entitled to any apportioned estate taxes, that they were gifts, then the estate bears the burden of paying for the gift tax. If you find that there is some apportioned share due, then it would be the responsibility of the recipients of the property to contribute whatever amount you insert on that blank space. And you have the various testimonies to consider pro or con on these issues. It's for you to say what credibility to give them and what weight to give them if you deem them to be believable by the greater weight of the evidence.
>
> So the Court charges as to any of the first — of the five issues, primary issues, and to the extent that the representatives of the estate have satisfied you that taxes are due, estate taxes are due, and the amount of those taxes, then you will insert that amount in a dollars and cents response, not yes or no, but a dollar and cents response as to issue 1(a), 2(a), 3(a), 4(a) or 5(a), one, some, or all of them as the case may be. On the other hand — and it'll be in some substantial amount in accordance with what the plaintiffs contend the taxes are.
>
> On the other hand, if you're not so satisfied or you cannot say what the truth is, even on that issue, then you may answer at some substantially lesser amount in accordance with what the defendant's [sic] contend.

We are concerned by the lack of clarity in these instructions. Much of the confusion arose from the trial court's simultaneous and condensed discussion of the doctrines of completed gifts (requested by Defendants) and retained interests (requested by Plaintiffs) — two related yet distinct legal doctrines. *See Edwards v. Hardin*, 113 N.C. App. 613, 616, 439 S.E.2d 808, 810 (1994) ("It is misleading to embody in one issue two propositions as to which the jury might give different responses." (citation and quotation marks omitted)), *disc. review improvidently allowed*, 339 N.C. 607, 453 S.E.2d 166 (1995).

As discussed above, in order to show a completed gift through the delivery of a deed, a party must show "(1) an intention by the grantor to give the instrument legal effect according to its purport and tenor; (2) evidence of that intention by some word or act which discloses that the grantor put the instrument beyond his legal control; and

(3) acquiescence by the grantees in such intention." *Penninger*, 29 N.C. App. at 315, 224 S.E.2d at 247 (emphasis omitted).

With regard to the doctrine of retained interests, both parties agree that the most relevant provision of law applying this principle in the context of apportionment of federal estate taxes is 26 C.F.R. § 20.2036-1(a)(3)(i), a tax code regulation promulgated under the authority of 26 U.S.C. § 2036. The test for determining whether an interest in property was retained by the donor is whether before his death the decedent retained or reserved "[t]he use, possession, right to income, or other enjoyment of the transferred property." 26 C.F.R. § 20.2036-1(a)(3)(i) (2013). If so, the property in question is properly includable in the decedent's gross estate for the purpose of calculating federal estate tax liability. *Id.*

The United States Tax Court has held that

> [a]s used in section 2036(a)(1), the term "enjoyment" has been described as synonymous with substantial present economic benefit. Regulations additionally provide that use, possession, right to income, or other enjoyment of transferred property is considered as having been retained or reserved to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit. Moreover, possession or enjoyment of transferred property is retained for purposes of section 2036(a)(1) where there is an express or implied understanding to that effect among the parties at the time of the transfer, even if the retained interest is not legally enforceable. The existence or nonexistence of such an understanding is determined from all of the facts and circumstances surrounding both the transfer itself and the subsequent use of the property.

Estate of Strangi v. Comm'r, 85 T.C.M. (CCH) 1331, 1336 (2003) (internal citations and quotation marks omitted), *aff'd*, 417 F.3d 468 (5th Cir. 2005).

Therefore, while the doctrines of completed gifts and retained interests are not unrelated, they each have distinct elements and required separate consideration by the jury. We believe that the trial court's instructions failed to properly explain these principles to the jurors in a manner sufficient to allow them to understand these concepts and properly apply them to the facts of this case.

The confusion engendered by the jury instructions was then compounded by the manner in which the issues were listed on the verdict sheet. This Court has held with regard to verdict sheets that

> [t]he form and the number of issues submitted to the jury is within the trial court's discretion. However, the issues should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence. It is misleading to embody in one issue two propositions as to which the jury might give different responses.

Godfrey v. Res-Care, Inc., 165 N.C. App. 68, 80, 598 S.E.2d 396, 404-05 (internal citations and quotation marks omitted), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004).

The legal issues raised by the facts and claims for relief in this case required the jury to decide a number of sub-issues before making the ultimate determination of what amounts, if any, Plaintiffs were entitled to recover as an apportioned share of the tax liability attributable to each of the five deeded properties. However, instead of setting out these sub-issues, the verdict sheet instead simply asked the jury to decide — as to each of the five properties — the ultimate issue of whether Plaintiffs were entitled to an apportioned share of the estate tax liability as to that property and, if so, in what amount. As a result, the likelihood of jury confusion was unacceptably high. Furthermore, we have no way of knowing the precise basis upon which the jury reached its verdict as to the deeded properties.

In sum, we conclude that Defendants have sufficiently demonstrated that the trial court's jury instructions and verdict sheet were "likely, in light of the entire charge, to mislead the jury." *See Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177 (citation and quotation marks omitted). Accordingly, we must remand this action for a new trial. *See Edwards*, 113 N.C. App. at 616, 439 S.E.2d at 810 (remanding for new trial where "[t]he ambiguity of the manner in which the instructions were set forth and the uncertainty of the verdict rendered [were] indisputable").

B. Joint Checking Account

[3] Defendants' final argument is that the trial court erred in failing to submit to the jury the issue of whether funds contained in the Joint Checking Account were necessary to satisfy the claims against the Estate. We agree that the trial court's instructions on this issue likewise constituted reversible error, thereby necessitating a new trial.

N.C. Gen. Stat. § 28A-15-10 provides that administrators of an estate can only access funds in a joint deposit account with a right of survivorship in order to satisfy the claims against an estate once all other assets of the estate have been exhausted.

> *When needed to satisfy claims against a decedent's estate*, assets may be acquired by a personal representative or collector from the following sources:
>
> . . . .
>
> (3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise . . . .
>
> . . . .
>
> Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees.

N.C. Gen. Stat. § 28A-15-10(a) (2013) (emphasis added).

Defendants argue that had the jury properly been instructed that the Joint Checking Account could only be accessed as a source of funds by the Estate as a last resort, it could have reasonably concluded either that none of these funds, or that merely some limited portion of these funds, were actually needed to satisfy the claims against the Estate. Defendants further assert that evidence was presented at trial establishing that other assets did, in fact, exist in the Estate that could have been used to satisfy its tax obligations without resort to the funds in the Joint Checking Account.

The question of whether the Estate was entitled to recover funds from the Joint Checking Account was listed as Issue No. 6 on the verdict sheet and the trial court's instructions pertaining to that issue stated as follows:

> Regardless of how you answer the issues 1 through 5 and subparts, you will go and consider issue number 6 which states: What amount, if any, are the plaintiffs, as representatives of the estate of Mr. Fortner, Sr., entitled to recover from the joint account [with] the right of survivorship of the State Employees' Credit Union having an approximate value or balance of $248,322 at the time of Mr. Fortner, Sr.'s death. The burden of proof, again, is upon the representatives of the estate to satisfy you

> from the evidence by its greater weight that the estate is the owner or has the right to claim some portion of that account, and in turn, pay taxes on it.
>
> But the defendants, on the other hand, say and contend that the total of it or a great portion of it was a gift or it had already been established and owned by the defendant, Lynda Hornbuckle Fortner. Therefore, the Court charges if you find from the evidence by its greater weight that the plaintiffs have satisfied you to that extent that some portion or all of that joint account with right of survivorship was retained by Mr. Fortner's estate at the time of his death, then it would be for you to say what that amount is in the answer provided.
>
> At the top it says, what amount, if any. The plaintiffs say and contend it's a substantial amount, if not all of it. The defendants say and contend it's a substantially lessor [sic] amount, if any of it. But if you fail to so find or have a — cannot say what the truth is as to what that issue is, then you'll answer in some substantially lessor [sic] amount in accordance with what the defendants suggest, even to the sum of none.
>
> Now, if you answered in any amount then that ends the lawsuit, or at least that ends the issues. Only if you say that there was none in that account that was attributable to Mr. Fortner's estate, then you'll go and consider issue number 7 . . . .[2]

It is clear from the above-quoted portion of the jury instructions that the trial court failed to direct the jury to determine whether the funds contained in the Joint Checking Account were actually needed to satisfy claims against the Estate. Plaintiffs concede that the trial court erred in

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2. The trial court then proceeded to separately instruct the jury on the issue denominated on the verdict sheet as Issue No. 7, which asked the jury to decide — assuming it determined that Plaintiffs were not entitled to any of the funds in the Joint Checking Account under Issue No. 6 — the following issue: "If none, what is the amount of the apportioned share of the federal and state estate taxes and interest that is attributable to the State Employees' Credit Union account that the Plaintiffs, as representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from Lynda Hornbuckle Fortner?" The manner in which Issue No. 6 and Issue No. 7 were presented to the jury as separate and distinct issues, each asking the jury to determine whether or not Plaintiffs were entitled to recover funds from the Joint Checking Account, also likely served to confuse the jury.

failing to so instruct the jury but argue that the error was cured by the trial court's insertion of language in the third paragraph of the judgment stating that with regard to the sum of $248,322.00 awarded by the jury to Plaintiffs in its verdict as to Issue No. 6, "said sum shall be used solely for the purpose of satisfying claims against the Estate of Johnnie H. Fortner, Sr. which exceed all of the other assets of the Estate of Johnnie H. Fortner, Sr. . . ."

We are unpersuaded by Plaintiff's argument. The question of whether the Estate needed all, or some portion of, the funds in the Joint Checking Account in order to satisfy claims against the Estate was a factual issue for the jury. In the absence of an instruction on this point, the jury would have felt no need to first determine whether the remaining assets of the Estate were sufficient to satisfy all claims against the Estate — as required by N.C. Gen. Stat. § 28A-15-10 — before deciding whether Plaintiffs were entitled to recover any or all of the funds contained in the Joint Checking Account. Accordingly, we conclude that the trial court's failure to instruct the jury on this issue constituted prejudicial error and likewise requires a new trial.

Conclusion

For the reasons stated above, we hold that the trial court did not err in denying Defendants' motion for a directed verdict. However, we conclude that the trial court committed prejudicial error in its instructions to the jury. Therefore, we remand this matter for a new trial.

NEW TRIAL.

Judges CALABRIA and STROUD concur.

GRE PROPERTIES THOMASVILLE LLC, PLAINTIFF-APPELLEE
v.
LIBERTYWOOD NURSING CENTER, INC., DEFENDANT-APPELLANT

NO. COA13-1180

Filed 5 August 2014

1. Landlord and Tenant—summary ejectment—jury instructions

The trial court did not err in denying defendant's request to add a special jury instruction on materiality in a summary ejectment case involving a nursing home. The pattern jury instruction, as applied in this case, sufficiently addressed the required elements for summary ejectment under North Carolina law. Assuming the trial court erred by failing to issue defendant's requested instruction on materiality, defendant was not prejudiced.

2. Appeal and Error—preservation of issues—supporting authority—not sufficient

Plaintiff's argument concerning defendant's attempt to call plaintiff's counsel to testify at trial was deemed abandoned where the sole citation to authority in plaintiff's brief was for the standard of review. Furthermore, there must be compelling reasons for a court to permit a lawyer for a party to testify; the trial court here did not abuse its discretion by denying defendant's request to call plaintiff's counsel to testify concerning the competency and preparation of their witness.

Appeal by defendant from judgment entered 28 December 2012 by Judge April C. Wood in Davidson County District Court. Cross-appeal by plaintiff from order entered 28 January 2013 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 19 March 2014.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr., and Cary B. Davis, and Barnes, Grimes, Bunce & Fraley, PLLC, by D. Linwood Bunce, II, for plaintiff-appellee and cross-appellant.

Nexsen Pruet, PLLC, by David S. Pokela, for defendant-appellant and cross-appellee.

McCULLOUGH, Judge.

Libertywood Nursing Center, Inc. ("defendant"), appeals from the judgment in favor of GRE Properties Thomasville LLC ("plaintiff") in this summary ejectment action. Plaintiff cross-appeals from the order denying its motion for summary judgment. For the following reasons, we find no error.

I. Background

This case arises out of plaintiff's lease of a premises located at 1028 Blair Street in Thomasville, North Carolina, to defendant for the operation of a nursing home. The lease, dated 25 August 2000 and executed by plaintiff's predecessor in interest, Ganot Corporation, and defendant, provided for an initial ten year term commencing 1 October 2000 with options for defendant to extend the lease for two additional five year terms.

Particularly relevant to this appeal, the lease contained the following provisions:

> SECTION 5.5 Waste Lessee shall not commit, or suffer to be committed, any waste on the Leased Premises nor shall Lessee maintain, commit or permit the maintenance or commission of any nuisance on the Leased Premises or use the Leased Premises for any unlawful purpose. For purposes of the Article 5.5 "waste" as used herein includes, but is not limited to, loss, or serious and imminent threat of loss as reasonably determined in good faith by Lessor, Regarding: (i) the license to operate the leased premises as a nursing home; (ii) any certificate of need rights; or (iii) any other governmental license or certification material to the operation of the Leased Premises as a nursing home, including but not limited to, certification for participation in the Medicare and/or Medicaid Programs under Titles XVIII and XIX of the Social Security Act, as amended. . . .
>
> SECTION 8.1 Lessee assumes the full and sole responsibility for the condition, furnishing, operation, repair and maintenance of the Demised Premises and every portion thereof from and after the Commencement Date of the Term of this Lease and (except as expressly set forth in Section 2.1) Lessor shall not under any circumstances be responsible for the performance of any repairs, replacements, changes or alterations whatsoever or the furnishing of any services in or to the Demised Premises or the Buildings and Lessor shall not be liable for the

cost thereof. Lessee and Lessor agree that, throughout the Term of this Lease, Lessee, at Lessee's sole cost and expense, shall maintain and repair the Demised Premises, the Buildings, and the sidewalks and curbs adjacent or appurtenant thereto, and shall keep or cause the same to be maintained in good order and condition, and promptly at Lessee's own cost and expense, make all necessary repairs, replacements thereto, interior and exterior, structural and non-structural, ordinary as well as extraordinary, foreseen as well as unforeseen, and shall keep and maintain all portions of the Demised Premises and the Buildings and the sidewalks adjoining the same in a clean and orderly condition, free of accumulation of dirt, rubbish, snow and ice. When used in this Article VIII or in Article IX, the Term "repairs" shall include all necessary replacements, renewals, alterations, additions and betterments. All repairs made by Lessee shall be at least equal in quality and class to the original work. The necessity for and adequacy of repairs to the Buildings pursuant to this Section 8.1 shall be measured by the standard which is appropriate for buildings of similar construction, use, class and location, provided that Lessee shall in any event make all repairs necessary to avoid any structural damage or injury thereto.

SECTION 19.1 If during the Term of this Lease Lessee shall:

. . . .

(c) default in fulfilling any of the covenants of this Lease (other than the covenants for the payment of Basic Rent, additional rent and other charges payable by Lessee hereunder), and Lessee shall not within twenty (20) days after the giving to Lessee by Lessor of written notice of such default, have cured such default (or, in the case of default which cannot with due diligence be cured by Lessee within such twenty (20) day period, then provided Lessee in good faith commences such curing within said twenty (20) day period, within such extended period as may be necessary to complete the curing of same with all due diligence); . . . .

. . . .

> Lessor, at its option, may give to Lessee a notice of intention to Terminate this Lease, effective as of the date of the occurrence of an Event of Default, whereupon this Lease and all right, title and interest of Lessee hereunder shall Terminate as fully and completely as if that day were the date herein specifically fixed for the expiration of the Term, and Lessee will then quit and surrender the Demised Premises to Lessor, but Lessee shall remain liable as hereinafter provided.

When defendant took possession of the premises, it did so "as is" with the roof in poor condition and in need of repair. As leaks occurred, defendant would repair them. However, in 2009 defendant began receiving complaints from plaintiff about the condition of the premises. Specifically, on 19 November 2009, defendant received a letter from plaintiff requesting defendant provide a plan to address alleged violations of Article VIII of the lease. These alleged violations included "a number of roof leaks" and "moisture in the walls" that could "develop into serious damage to the building[,]" "deficiencies noted in recent surveys[,]" repairs needed to the parking and roadway, and repairs to the brick veneer. Defendant then received a follow-up letter from plaintiff on 10 December 2009 that noted the dreadful condition of the premises. In the second letter, plaintiff stated the following:

> Within thirty days the roof must be renewed as well as the gutters and downspouts.
>
> All asphalt must be renewed in thirty days. Also a suitable scheduled replacement of all the worn-out furnishings must be approved.
>
> You must diligently tend to a possible mold problem. Brick mortar must be replaced where required as does caulking around windows and doors.

To end the letter, plaintiff noted it "look[ed] forward to [defendant's] response before January 10, 2010."

On 2 February 2010, counsel for plaintiff sent defendant a notice of default. The notice also informed defendant of an inspection and offered defendant the opportunity to submit and implement a plan to cure the defaults and bring the premises into compliance with the terms of the lease. On 23 February 2010, defendant gave notice to plaintiff of its intent to extend the lease for an additional five year term and, on 18 March 2009, responded through counsel to plaintiff's 2 February 2010

notice of default. In defendant's response, defendant denied it was in default of the lease.

By letter dated 1 April 2010, plaintiff terminated the lease and demanded that defendant immediately vacate the premises.

When defendant did not vacate the premises, plaintiff initiated this summary ejectment action to remove defendant from the premises. Plaintiff filed its Complaint in Summary Ejectment in Davidson County Small Claims Court on 14 April 2010. Following a hearing, the magistrate entered a Judgment in Action for Summary Ejectment in favor of plaintiff on 22 April 2010. Defendant appealed that judgment to District Court.

Once in District Court, defendant filed an Answer & Counterclaim on 14 May 2010 to which plaintiff replied on 11 June 2010.

Following a period of discovery, on 11 July 2012, plaintiff moved for summary judgment. In both the motion and a brief filed in support of the motion, plaintiff argued defendant was in default of Section 5.3 of the lease when it gave notice of its intention to exercise the renewal option on 23 February 2010. Thus, plaintiff argued the notice was void and without effect, resulting in the expiration of the lease at the end of the initial 10 year term on 31 October 2010. On 29 August 2012, plaintiff's motion for summary judgment came on for hearing in Davidson County District Court before the Honorable Mary F. Covington, who announced her decision to deny the motion at the conclusion of the hearing.

By Notice of Voluntary Dismissal filed 20 November 2012, defendant dismissed its counter-claim against plaintiff.

On 26 November 2012, the case came on for a pre-trial hearing, during which the court considered a motion in limine by plaintiff to strike the deposition testimony of Mr. John M. Underwood, a former employee of plaintiff's parent company who was deposed in both his individual capacity and as plaintiff's corporate designee pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). At the conclusion of the hearing, the trial court denied plaintiff's motion in limine and entered a Final Order on Pre-trial Conference.

The following day, 27 November 2012, the case was called for jury trial in Davidson County District Court, the Honorable April C. Wood, Judge presiding.

At the conclusion of the trial on 12 December 2012, the jury returned verdicts in favor of plaintiff finding: (1) defendant violated provisions of

the lease and failed to cure those violations after being provided written notice and an opportunity to cure; and (2) plaintiff did not waive defendant's defaults. The trial court then entered judgment for plaintiff ordering defendant be removed from and plaintiff be put in possession of the premises.

On 4 January 2013, defendant filed post-trial motions for judgment notwithstanding the verdict and, alternatively, a new trial. Those motions were denied by order of the trial court filed 18 January 2013. An additional order memorializing the prior denial of plaintiff's 11 July 2012 motion for summary judgment was subsequently filed on 28 January 2013.

Defendant filed Notice of Appeal on 8 February 2013. Plaintiff filed Notice of Cross-Appeal shortly thereafter on 13 February 2013.

II. Discussion

On appeal, defendant contends the trial court erred in (1) failing to instruct the jury that a breach of a commercial lease must be material to warrant forfeiture of the lease and ejectment; and (2) denying it the right to call plaintiff's counsel as witnesses at trial. On cross-appeal, plaintiff contends the trial court erred in denying its motion for summary judgment prior to the jury trial. We address these issues in order.

Jury Instruction

[1] During the charge conference, the parties agreed that the trial judge should instruct the jury pursuant to N.C.P.I.–Civil 845.00, the pattern instruction for summary ejectment when there has been a violation of a provision in a lease. Defendant, however, proposed that the trial judge add the following instruction on materiality to the pattern instruction:

> Fifth, that [d]efendant's default under Section 19.1(c), Section 8.1 and/or Section 5.5 of the Lease was so material that it justified a termination of the Lease[.]

Upon considering defendant's request, the trial judge declined to include the special instruction and noted defendant's objection to the omission prior to instructing the jury. The trial judge then proceeded to issue the following instructions to the jury:

> The first issue reads, is the landlord, GRE, entitled to possession of the leased premises on the ground tenant, Libertywood, violated provisions of the lease and failed to cure those violations after being provided written notice by GRE and an opportunity to cure.

> On this issue the burden of proof is on GRE. This means that GRE must prove by the greater weight of the evidence several things. First, that Libertywood took possession of the premises under a lease with GRE. A lease is a contract for the exclusive possession of a premises. A lease may be written or verbal. Second, that the parties agreed that as part of the lease tenant, Libertywood, . . . A. [w]ould . . . maintain[] the premises and make all necessary repairs and replacements in accordance with section eight point one (8.1) of the lease, and B. would not permit waste as set forth [in] section five point five (5.5) of the lease.
>
> Third, that the parties agreed that the lease would terminate in the event the tenant, Libertywood, violated – sections eight point one (8.1) or five point five (5.5) of the lease and the[n] failed to cure or commence in good faith to cure the violations within twenty days after receiving written notice from GRE as required by section nineteen point one (19.1) of the lease.
>
> Four, that Libertywood violated sections eight point one (8.1), and five point five (5.5) of the lease an[d] failed to cure or commence in good faith to cure the violations within twenty days after receiving written notice from GRE.
>
> Fifth, that GRE terminated the lease as provided by the lease by giving Libertywood written notice of termination on April the first, two thousand ten (4/1/2010) and Libertywood did not vacate the premises.
>
> Finally, as to this issue on which GRE has the burden of proof, if you find that by the greater weight of the evidence, that the landlord is entitled to possession of the leased premises then it would be your duty to answer this issue yes in favor of GRE. If, on the other hand, you fail to so find then it would be your duty to answer this issue no, in favor of Libertywood.

These instructions closely mirror N.C.P.I.–Civil 845.00 and exclude an instruction on materiality.

Now, on appeal, defendant first argues the trial court erred in failing to issue the requested instruction on materiality.

This Court has recognized a four part test to determine if the trial court erred in refusing to give a requested instruction.

> A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury."

Outlaw v. Johnson, 190 N.C. App 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)). In addition, "[f]ailure to give a requested and appropriate jury instruction is reversible error [only] if the requesting party is prejudiced as a result of the omission." *Id.*

Defendant first contends the law requires breaches of a lease to be material to justify summary ejectment. Thus, in accordance with the test set forth in *Outlaw*, defendant asserts the requested instruction on materiality was a correct statement of the law. In support of its argument, defendant cites this Court's decision in *Loomis v. Hamerah*, 140 N.C. App. 755, 538 S.E.2d 593 (2000), as well as cases and treatises that are not binding on this Court.

In *Loomis*, this Court reviewed the trial court's grant of summary judgment in favor of a landlord who brought a summary ejectment action. As this Court explicitly stated in the opinion, the dispositive issue in *Loomis* was "whether there [was] a genuine issue of material fact as to [the d]efendant's breach of the [l]ease[.]" *Loomis*, 140 N.C. App. at 760, 538 S.E.2d at 596. Upon review, this Court agreed with the tenants and held genuine issues of material fact existed as to whether the tenants breached the lease. *Id.* at 761, 538 S.E.2d at 596-97. As a result, this Court reversed the grant of summary judgment in favor of the landlord and remanded the case to the trial court. *Id.* at 761, 538 S.E.2d at 597.

In citing *Loomis*, defendant relies on the following language that this Court reduced to a footnote:

> To the extent there has been a breach of any provision of the [l]ease, not every breach "justifies a cancellation and rescission" of the contract. *Childress v. Trading Post*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957). To justify termination of a lease, the breach "must be so material as in effect to defeat the very terms of the contract." *Id.* (citations omitted)[.]

Id. at 761 n.3, 538 S.E.2d at 597 n.3. Upon review of the *Loomis* opinion, it is clear to us that the above footnoted language was merely dicta and unnecessary to the Court's determination that genuine issues of material fact existed as to whether the tenants breached the lease. Thus, the language is not authoritative. Moreover, we note the case cited in the footnote in *Loomis* is not a summary ejectment case resulting from a breach of a lease, but a construction contract case involving alleged breaches of and variations from an agreement between builder and owner. *See Childress*, 247 N.C. at 156, 100 S.E.2d at 395 ("Not every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract.").

Upon review of *Loomis*, *Childress*, and the other non-binding authorities cited by defendant, we are not persuaded the trial court erred in refusing to issue the requested instruction on materiality.

In North Carolina, "[s]ummary ejectment proceedings are purely statutory[.]" *Marantz Piano Co., Inc. v. Kincaid*, 108 N.C. App. 693, 696, 424 S.E.2d 671, 672 (1993). Among other events, North Carolina's General Statutes allow for summary ejectment "[w]hen the tenant or lessee . . . has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased." N.C. Gen. Stat. § 42-26(a)(2) (2013). "Under [N.C. Gen. Stat. § 42-26(a)(2)], a breach of the lease cannot be made the basis of summary ejectment unless the lease itself provides for termination by such breach or reserves a right of reentry for such breach." *Stanley v. Harvey*, 90 N.C. App. 535, 537, 369 S.E.2d 382, 384 (1988). In the present case, Section 19.1 of the lease provided for termination of the lease upon breach of Sections 5.5 and 8.1.

Upon review of the pattern instructions and the instructions provided in this case, stated above, we hold N.C.P.I.--Civil 845.00, as applied in this case, sufficiently addressed the required elements for summary ejectment under North Carolina law. Therefore, the trial court did not err in denying defendant's request to add a special instruction on materiality.

Moreover, assuming arguendo the trial court erred in failing to issue defendant's requested instruction on materiality, we are not convinced that defendant was prejudiced. The instructions to the jury specifically identified Sections 5.5 and 8.1 as the relevant provisions for deciding whether a breach of the lease occurred. Upon review of the lease, it is clear that Sections 5.5 and 8.1 are not insignificant to the agreement between plaintiff and defendant; thus, we find it unlikely that a breach of either section would be immaterial. Accordingly, even if the requested

instruction on materiality was a correct statement of North Carolina law, defendant was not prejudiced by the omission and the error does not amount to reversible error.

Counsel as a Witness

[2] As noted in the background, during discovery Mr. Underwood, the former director of construction and development for plaintiff's parent company, was deposed in both his individual capacity and as plaintiff's corporate designee pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). Certain portions of Mr. Underwood's testimony were favorable to defendant.

Although plaintiff did not raise concerns about Mr. Underwood's competence during the deposition held in October 2010, months later, after learning Mr. Underwood had been diagnosed with a neurological condition affecting his memory, plaintiff filed a motion in limine pursuant to N.C. Gen. Stat. § 8-81 to exclude his deposition testimony from trial. In support of its motion, plaintiff argued unfair prejudice and lack of personal knowledge under Rules 403 and 602 of the North Carolina Rules of Evidence. Upon considering arguments made during a 26 November 2012 pre-trial hearing, the trial court denied plaintiff's motion in limine.

Thereafter, defendant introduced Mr. Underwood's deposition testimony into evidence at trial and read portions of the testimony to the jury. In response, plaintiff introduced the deposition testimony of Mr. Underwood's neurologist into evidence in order to attack the credibility of Mr. Underwood's deposition testimony. Portions of the deposition testimony by Mr. Underwood's neurologist called Mr. Underwood's memory at the time his deposition was taken into question. Specifically, Mr. Underwood's neurologist stated he believed Mr. Underwood was suffering from mild dementia in October 2010.

In order to rebut plaintiff's assertions that Mr. Underwood was not competent at the time of his deposition, during discussions in chambers, defendant requested it be able to call Julian Wright and Cary Davis, counsel for plaintiff, to testify regarding their preparation of Mr. Underwood for his deposition. The trial judge, however, denied the request in chambers. As a result, defendant was not able to question plaintiff's counsel on Mr. Underwood's competence. Defendant did, however, attempt to make an offer of proof to preserve its right to appeal.

Now, on appeal, defendant argues the trial court erred in denying its request to call plaintiff's counsel as witnesses of Mr. Underwood's

competence in order to bolster Mr. Underwood's deposition testimony. Yet, defendant cites only *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010), for the proposition that issues of relevance are reviewed *de novo* and fails to cite any further legal authority in support of its argument. As a result, we find defendant has abandoned this argument. *See* N.C. R. App. P. 28(b)(6) (2014) ("*The body of the argument* and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.") (emphasis added).

Although defendant's argument is abandoned, we take this opportunity to note

> [t]here is . . . a natural reluctance to allow attorneys to appear in a case as both advocate and witness. Therefore, the decision of whether to permit [it] is within the discretion of the trial court. The circumstances under which a court will permit a lawyer for a party . . . to take the witness stand must be such that a compelling reason for such action exists.

State v. Simpson, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985) (citations omitted).

Where other witnesses could testify to Mr. Underwood's competence, the trial court did not abuse its discretion in denying defendant's request to call plaintiff's counsel as a witness.

Directed Verdict

In addition to responding to defendant's arguments on appeal, plaintiff asserts, as an alternative basis in the law supporting the judgment, that the trial court erred in denying its motion for a directed verdict. Because we find no error in the trial below, we do not address plaintiff's alternative argument.

Summary Judgment

In the event we reversed the judgment based on the jury's verdict, plaintiff filed a cross-appeal contending the trial court erred in denying its motion for summary judgment. Because the judgment based on the jury's verdict stands, we do not address plaintiff's cross-appeal. Furthermore, an appeal of a denial of summary judgment is ordinarily not reviewable on appeal from a final judgment rendered in a trial on the merits. *See Harris v. Walden*, 314 N.C. 284, 286-87, 333 S.E.2d 254, 256 (1985).

III. Conclusion

For the reasons discussed, we find no error in the trial below.

No error.

Judges ELMORE and DAVIS concur.

MARGARITA BELILA HOLBERT, PLAINTIFF
v.
LARRY R. HOLBERT, DEFENDANT

No. COA13-951

Filed 5 August 2014

Appeal and Error—interlocutory orders and appeals—dismissal

Defendant's appeal from interlocutory orders denying his motion for summary judgment directed to plaintiff's equitable distribution claim and granting plaintiff's motion for summary judgment with respect to one of the grounds upon which defendant sought to challenge the validity of her equitable distribution claim was dismissed.

Appeal by defendant from orders entered 18 March 2013 and 4 June 2013 by Judge Peter Knight in Henderson County District Court. Heard in the Court of Appeals 6 January 2014.

Prince, Youngblood & Massagee, PLLC, by Boyd B. Massagee, Jr., for Plaintiff-Appellee.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson and Angela S. Beeker, for Defendant-Appellant.

ERVIN, Judge.

Defendant Larry R. Holbert appeals from orders denying his motion for summary judgment directed to Plaintiff's equitable distribution claim and granting Plaintiff's motion for summary judgment with respect to one of the grounds upon which Defendant sought to challenge the validity of her equitable distribution claim, with the relevant issue being the validity of Defendant's contention that his marriage to Plaintiff Margarita Belila Holbert had been performed by an individual who was not authorized

to perform marriage ceremonies and the extent to which the trial court was precluded from considering that contention on the merits in light of an earlier consent judgment, and denying Defendant's motion for relief from that earlier consent judgment predicated on the theory that the consent judgment failed to accurately reflect the agreement between the parties that it was supposed to memorialize. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that Defendant's appeal should be dismissed as having been taken from unappealable interlocutory orders.

I. Factual Background

A. Substantive Facts

Plaintiff came to the United States from the Philippines on or about 10 December 2000 as Defendant's fiancée. The parties were married on 9 February 2001 by an individual named Earl R. Jones, who was selected to perform that role by Defendant. Although he was "licensed in the Gospel Ministry" at the time that he conducted the parties' marriage ceremony, Mr. Jones had not been "ordained" by the church with which he was affiliated at that time. Mr. Jones was, however, "ordained" on 30 March 2008.

After the performance of the marriage ceremony, Plaintiff and Defendant held themselves out to be husband and wife. The parties' relationship began to deteriorate when Defendant began to curse Plaintiff, state that it would have been cheaper to have her killed, and offer to pay others to marry her. At approximately the time that the parties separated on 16 September 2009, Defendant locked Plaintiff out of the marital residence and changed all of the locks.

B. Procedural Facts

On 6 October 2009, Plaintiff filed a complaint in which she claimed that she had been abandoned by Defendant and sought a divorce from bed and board, post-separation support, alimony, equitable distribution, and an award of attorney's fees. On 20 October 2009, Defendant filed a motion seeking to have Plaintiff's complaint dismissed in reliance upon the parties' premarital agreements and to enforce the provisions of their premarital agreements. On 6 April 2010, the parties filed a memorandum of decision in which Defendant "waive[d] any defense to any cause of action set out in the complaint on the basis of any premarital agreement" and "any defense by virtue of any other premarital agreement not identified in his answer." In return for this commitment and the payment of $50,000, Plaintiff waived all of the claims that she had asserted against

Defendant except for the right to have marital and divisible property equitably distributed. As part of this process, the parties agreed that it would be unnecessary for their signatures to appear on the formal onsent judgment. On 6 May 2010, Judge Athena Fox Brooks entered a consent judgment that provided, in pertinent part, that "[b]oth parties agree that [Plaintiff] is entitled to proceed with her claim of equitable distribution against [Defendant] without any defense thereto"; that Defendant's dismissal motion should be denied; and that the only issue remaining between the parties involved the equitable distribution of their marital and divisible property.[1]

On 6 October 2010, Defendant filed a complaint in a separate action seeking an absolute divorce. On 23 November 2010, the court granted Defendant an absolute divorce.

On 4 February 2011, Defendant filed a motion seeking to have the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment set aside pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (4) and (6). In support of this request, Defendant contended that he had entered into the agreement memorialized in these documents at a time when his cognition was impaired and that he had been unable to understand the contents of the 6 April 2010 memorandum of decision when he signed it. On 11 May 2011 and 8 June 2011, respectively, the trial court entered an order and an amended order denying Defendant's motion on the grounds that he was presumed to be competent when he consented to the agreement memorialized in the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment and that he had failed to present substantial evidence tending to show that he was incompetent at the time that he entered into this agreement.

On 11 October 2012, Defendant, who was now represented by new legal counsel, filed an answer and counterclaim in which he asserted, among other things, that he was entitled to rely on the provisions of the parties' premarital agreement as a defense to Plaintiff's equitable distribution claim, with this assertion resting upon his recent discovery that Mr. Jones was not authorized to conduct marriage ceremonies under North Carolina law, and that he was entitled to have his marriage to Plaintiff annulled, with this assertion resting on a contention that Mr. Jones had not been legally authorized to perform their marriage ceremony and that the parties had never consummated their marriage. In

1. The 6 May 2010 consent judgment also memorialized an agreement between the parties under which Plaintiff agreed to dismiss a domestic violence proceeding that she had initiated against Defendant.

addition, Defendant filed a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) in the action in which he had been divorced from Plaintiff on 16 October 2012 in which he alleged that he had recently learned that Mr. Jones had not been authorized to conduct the parties' marriage ceremony. On 8 November 2012, Plaintiff filed a response to Defendant's filings in the equitable distribution and divorce proceedings in which she asserted a number of affirmative defenses to Defendant's contentions, including, but not limited to, ratification, collateral estoppel, judicial estoppel, waiver, fraud, and statute of limitations.

On 3 December 2012, Defendant filed a motion seeking the entry of summary judgment in his favor with respect to Plaintiff's equitable distribution claim on the grounds that there "was no valid marriage between the parties" given the fact that Mr. Jones had not been "ordained" at the time of the parties' marriage ceremony. On 6 February 2013, Plaintiff moved for partial summary judgment with respect to the issue of whether (1) the parties' premarital agreements barred her equitable distribution claim; (2) Plaintiff had waived her right to assert an equitable distribution claim by executing the parties' premarital agreements, (3) Plaintiff was estopped by the parties' premarital agreements from asserting an equitable distribution claim, (4) the fact that Plaintiff took a salary from Defendant barred her from asserting an equitable distribution claim, and (5) Plaintiff had misappropriated money from Defendant. After a hearing held on 18 February 2013, the trial court entered an order on 18 March 2013 granting Plaintiff's partial summary judgment motion and specifically determining, among other things, that Defendant was barred from asserting the parties' premarital agreement as a defense to Plaintiff's equitable distribution claim by the 6 April 2010 memorandum of decision and 6 May 2010 consent judgment. In addition, the trial court entered another order on the same date denying Defendant's request for an annulment of his marriage to Plaintiff given that he had elected the remedy of absolute divorce rather than annulment with full knowledge of the facts underlying his contention that the parties' marriage had never been consummated; denying Defendant's request for the entry of summary judgment in his favor with respect to Plaintiff's equitable distribution claim on the grounds that the record reflected the existence of genuine issues of material facts concerning the extent to which Mr. Jones had the authority to conduct the parties' wedding ceremony; and granting summary judgment in favor of Plaintiff with respect to the issue of whether Defendant was entitled to assert any defense, including the invalidity of the parties' marriage, in opposition to Plaintiff's equitable distribution claim given the provisions of

the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment. Defendant noted an appeal to this Court from the second 18 March 2013 order on 17 April 2013.

On 16 April 2013, Defendant filed a motion for relief from the 6 May 2010 consent judgment and the second 18 March 2013 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) and (4), or, in the alternative, for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, with both requests for relief predicated on the theory that the language concerning Defendant's waiver of the right to assert any defenses to Plaintiff's equitable distribution claim contained in the 6 May 2010 order was inconsistent with the equivalent provision of the 6 April 2010 memorandum of decision and that this inconsistency between the relevant provisions of the two documents indicated that Judge Brooks lacked jurisdiction to enter the 6 May 2013 order to the extent that it precluded him from asserting any defense to Plaintiff's equitable distribution claim. On 4 June 2013, the trial court entered an order denying Defendant's motion, finding that Defendant's motions were "closely related to the Motions previously heard by the undersigned and certified for immediate review by the Court of Appeals," that there was a "need for a determination of these issues prior to an Equitable Distribution Trial," and that "the undersigned respectfully certifies to the Court of Appeals that there are no just reasons for delay in reviewing these orders." On 5 June 2013, the trial court entered a certification stating that it deemed "it appropriate that the orders entered by him" on 18 March 2013 "be reviewed by the North Carolina Court of Appeals, and further respectfully certifies to the North Carolina Court of Appeals that there is no just reason for delay in so reviewing these orders."[2] On 5 June 2013, Defendant noted an appeal to this Court from the 4 June 2013 order.

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2. We note, in passing, that Defendant never noted an appeal from the first 18 March 2013 order, that the trial court certified the 18 March 2013 orders almost two months after Defendant noted an appeal to this Court from the second 18 March 2013 order, and that the trial court's signature on the attempted certification of the 18 March 2013 orders antedates the date upon which the certification was file-stamped by three days. However, given that Defendant has not advanced any substantive challenge to the validity of the first 18 March 2013 order, that Defendant's failure to advance any arguments in his brief challenging the validity of a particular order precludes us from assessing its validity on appeal, *State v. Garcell*, 363 N.C. 10, 70, 678 S.E.2d 618, 655 (citing N.C. R. App. P. 28(b)(6) and *State v. Raines*, 362 N.C. 1, 26, 653 S.E.2d 126, 142 (2007), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2857, 174 L. Ed. 2d 601 (2009)), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), and that the trial court's attempt to certify the second 18 March 2013 order for immediate review is ineffective for other reasons, we need not comment on the validity of the trial court's attempt to certify the first 18 March 2013 order for immediate review.

II. Substantive Legal Analysis

A. General Principles of Appellate Jurisdiction

As an initial matter, we must address the extent to which this Court has jurisdiction over Defendant's challenges to the second 18 March 2013 and the 4 June 2013 orders. Although Defendant acknowledges that both of the orders that he wishes to challenge on appeal are interlocutory, he contends that both orders are covered by exceptions to the general rule precluding appellate review of interlocutory orders. We are not persuaded by Defendant's arguments.

"An order is either 'interlocutory or the final determination of the rights of the parties.' 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Harbour Point Homeowners' Ass'n v. DJF Enters., Inc.*, 206 N.C. App. 152, 156, 697 S.E.2d 439, 443 (2010) (internal quotation marks and citations omitted) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a), and *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Ordinarily, an appeal will lie only from a final judgment." *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). However, interlocutory orders are appealable under certain circumstances. For example, a party is allowed to take an appeal from an interlocutory order that "affects a substantial right claimed in any action or proceeding," N.C. Gen. Stat. § 1-277(a); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(a), with the extent to which an interlocutory order affects a substantial right requiring "consideration of 'the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). In addition, N.C. Gen. Stat. § 1A-1, Rule 54(b) provides that a "court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment," which "shall then be subject to review by appeal or as otherwise provided by these rules or other statutes." However, the fact "[t]hat the trial court declared [an order] to be a final [order for purposes of N.C. Gen. Stat. § 1A-1, Rule 54(b)] does not make it so," *Tridyn Indus. V. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979), with any certification of an order that is not a final judgment as to a claim or party being ineffective. *Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999). "Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's

acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). As a result, given Defendant's concession that the orders that he seeks to challenge on appeal are interlocutory in nature, we must now consider the extent to which either of these orders are properly before us for review at this time.[3]

B. Analysis of Appealability of Specific Orders

1. Second 18 March 2013 Order

Although the trial court addressed a number of issues in the second 18 March 2013 order, the only portion of that order that Defendant seeks to challenge on appeal at this time is the trial court's decision to grant summary judgment in Plaintiff's favor on the grounds that Defendant waived the right to assert any defenses to Plaintiff's equitable distribution claim in the 6 April 2010 memorandum of decision and the 6 May 2010 consent order. According to Defendant, the trial court's decision to preclude him from asserting any defenses to Plaintiff's equitable distribution claim affects a substantial right.

As an initial matter, Defendant argues, in reliance upon the Supreme Court's decision in *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E.2d 554 (1959), that an order overruling a plea in bar is immediately appealable on substantial right grounds. In *Mercer*, the defendants asserted *res judicata* as a bar to the plaintiff's personal injury claim. *Id.* at 726-27, 107 S.E.2d at 555. However, the trial judge allowed the plaintiff's demurrer to the defendants' *res judicata* defense. *Id.* at 727, 107 S.E.2d at 555. After stating that " '[a] plea in bar is one that denies the plaintiff's right to maintain the action, and which, if established, will destroy the action,' " *id.* at 728, 107 S.E.2d at 556 (quoting McIntosh, N.C. Practice & Procedure, § 523 (1929)) (citing *Brown v. E.H. Clement Co.*, 217 N.C. 47, 51, 6 S.E.2d 842, 845 (1940), and *Solon Lodge Knights of Pythias Co. v. Ionic Lodge Free Ancient & Accepted Masons*, 245 N.C. 281, 287, 95 S.E.2d 921, 925 (1957)), the Supreme Court stated that "[a]n order or judgment which *sustains* a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom." *Id.* (citing N.C. Gen. Stat. § 1-277 and

3. As a result of the fact that Defendant noted his appeals from the second 18 March 2013 and 4 June 2013 orders prior to 23 August 2013 and the fact that neither of the orders that Defendant wishes to challenge on appeal represent a final adjudication of Plaintiff's equitable distribution claim, the provisions of N.C. Gen. Stat. § 50-19.1 do not apply in this instance.

Shelby v. Charlotte Elec. Rwy., Light, and Power Co., 147 N.C. 537, 538, 61 S.E. 377, 378 (1908)). In other words, Defendant contends that any decision to reject a defense that would defeat a claim constitutes a plea in bar and that any order embodying such a decision is immediately appealable on substantial right grounds. We do not find Defendant's argument persuasive given the facts before us in this case.

The concept of a plea in bar arose under and existed in civil procedure systems that antedated the current North Carolina Rules of Civil Procedure.

> What then is a plea in bar? The word "bar" has a peculiar and appropriate meaning in law. In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred–i.e., prevented–the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether.

Murchison Nat'l Bank v. Evans, 191 N.C. 535, 538, 132 S.E. 563, 564 (1926). According to the Supreme Court:

> the following pleas have been held to be pleas in bar: (1) Statute of Limitations. *Oldham v. Rieger*, 145 N.C. 254, [58 S.E. 1091 [1907]. (2) Account stated. *Kerr v. Hicks*, 129 N.C. 141[, 39 S.E. 197 (1901)]; [*Kerr v. Hicks*,] 131 N.C. 90[, 42 S.E. 532 (1902)]; *Jones v. Woote*n, 137 N.C. [421, 49 S.E. 915 (1905)]. (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. *Bank [of Tarboro] v. Fidelity [& Deposit] Co.*, 126 N.C. [320, 35 S.E. 588 (1900)]. (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But [a] plea of sole seizin which by its very terms involves an accounting, is not a good plea. *Duckworth v. Duckworth*, 144 N.C. 620[, 57 S.E. 396 (1907)]. (5) Release. *McAuley v. Sloan*, 173 N.C. [80, 91 S.E. 701 (1917)]. (6) Accord and satisfaction. *McAuley v. Sloan*, 173 N.C. [80, 91 S.E. 701 (1917)]. (7) Estoppel by judgment. *Jones v. Beaman*, 117 N.C. [259, 23 S.E. 248 (1895)].

Id.; *see also* in *Mercer*, 249 N.C. at 727-28, 107 S.E.2d at 555-56 (describing the assertion of a *res judicata* defense as a plea in bar). In view of the fact that a successful plea in bar barred an action from moving forward, *Scott Poultry Co. v. Bryan*, 272 N.C. 16, 19, 157 S.E.2d 693,

696 (1967) (stating that "[t]he effect of a plea in bar is to destroy plaintiff's action"), such pleas played a role in earlier systems of civil procedure similar to that currently filled by affirmative defenses as that term is used in the North Carolina Rules of Civil Procedure.[4] In apparent recognition of that fact, certain decisions of this Court handed down within the first decade after the enactment of the North Carolina Rules of Civil Procedure continued to make references to "pleas in bar" even though that expression does not appear in N.C. Gen. Stat. § 1A-1, Rule 8. *Taylor v. Bailey*, 49 N.C. App. 216, 217, 271 S.E.2d 296, 297 (1980) (treating the affirmative defense of election of remedies as a plea in bar), *appeal dismissed*, 301 N.C. 726, 274 S.E.2d 235 (1981); *T. A. Loving Co. v. Latham*, 20 N.C. App. 318, 319, 201 S.E.2d 516, 517 (1974) (stating that the "[d]efendants filed answer which contained a number of affirmative defenses constituting pleas in bar"); *McKinney v. Morrow*, 18 N.C. App. 282, 283, 196 S.E.2d 585, 586 (noting that the defendant was allowed to "amend his answer to plead that release as an affirmative defense in bar"), *cert. denied*, 283 N.C. 655, 197 S.E.2d 874 (1973). As a result, a plea in bar, like an affirmative defense, represented something that the defendant in a civil action was required to plead and prove. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 560, 253 S.E.2d 277, 279 (1979) (citing N.C. Gen. Stat. § 1A-1, Rule 8(c); *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974)) (stating that "[a] defense based on waiver or release is an a ffirmative defense and, therefore, the defendant bears the burden of proof").

Assuming, without in any way deciding, that the legal principle affording any party asserting a plea in bar against which a demurrer has been sustained the right to seek immediate appellate relief has survived the enactment of the North Carolina Rules of Appellate Procedure,[5] we do not believe that the principle upon which Defendant relies has any application in this case. As a general proposition, " 'a defense which

4. However, as should be obvious from an examination of the list of pleas in bar set out in *Murchison National Bank* and the non-exclusive list of affirmative defenses set out in N.C. Gen. Stat. § 1A-1, Rule 8(c) (listing "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense" as affirmative defenses), pleas in bar are a subset of, rather than completely equivalent to, modern affirmative defenses.

5. As we read the applicable decisional law, there is substantial basis for questioning whether the principle upon which Defendant relies remains universally valid with respect to all defenses that were formerly treated as pleas in bar. *E.g.*, *Thompson v. Norfolk & S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401, (2000) (holding that "an order denying a party's motion to dismiss based on a statute of limitation does not effect a substantial right and is therefore not appealable").

contests one of the material allegations of the complaint is not an affirmative defense since it involves an element of the plaintiff's prima facie case.'" *Wallace v. Haserick*, 105 N.C. App. 315, 319, 412 S.E.2d 694, 695, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 71 (1992) (quoting Shuford, North Carolina Civil Practice and Procedure, § 8-7 (1988)). The argument that Defendant was precluded from asserting by virtue of the trial court's decision to grant summary judgment in Plaintiff's favor in the second 18 March 2013 order involves, in essence, a denial that the parties were ever legally married. As a general proposition, a party to a void marriage does not have the rights available to a person who has entered into a valid marriage. *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 545-46 (1987) (holding that a "bigamous marriage is a nullity, with no legal rights flowing from it"). For that reason, the statutory provisions governing equitable distribution actions assume that the only persons entitled to obtain an equitable distribution of marital and divisible property are the parties to a valid marriage. Thus, rather than constituting a plea in bar or even an affirmative defense, the contention that the trial court precluded Defendant from asserting in the second 18 March 2013 order amounted to the denial that an element of Plaintiff's equitable distribution claim ever existed. As a result, since the argument that Defendant has been precluded from making does not constitute an affirmative defense, much less a plea in bar, Defendant is not entitled to an immediate appeal from the second 18 March 2013 order based on the principle set out in *Mercer*.

Secondly, Defendant argues that the second 18 March 2013 order affects a substantial right by creating a risk that inconsistent judgments would be reached in the trial court. According to Defendant, Plaintiff's equitable distribution claim and his counterclaim for an annulment based on Mr. Jones' lack of authority to perform the parties' marriage ceremony are "so intertwined that an adjudication of [his] counterclaim could determine the outcome of [her] claim[]."[6] In support of this assertion, Defendant relies on our decision in *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695-96 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997), in which we allowed an interlocutory appeal from an order granting summary judgment in favor of the defendant with respect to the plaintiff's negligence claim even though the defendant's claim for unpaid fees resulting from the provision of his

6. Defendant has not asserted in his brief any other basis for challenging the validity of his marriage, such as his contention that the parties never consummated their marriage, aside from his contention that Mr. Jones lacked the authority to perform their marriage ceremony, so we limit the discussion in the text of this opinion to the contention that Defendant has actually made.

services remained undecided "[b]ecause the possibility of inconsistent verdicts from two trials on the same issues exist[ed]" in cases in which " 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.' " (internal quotation marks omitted) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993)).

Although the legal principle upon which Defendant relies in support of the second of his "substantial right" contentions relating to the second 18 March 2013 order is certainly a valid one, it has no application in this instance. In essence, Defendant's argument rests on the assumption that his counterclaim for annulment was fully resolved in the second 18 March 2013 order. However, the second 18 March 2013 order did not in any way determine that Defendant's annulment claim lacked validity. In fact, the trial court determined that there were genuine issues of material fact concerning the extent to which Mr. Jones was authorized to conduct the parties' marriage ceremony. Instead, the relevant provision of the second 18 March 2013 order simply precludes Defendant from asserting the same facts upon which his annulment claim rests in response to Plaintiff's equitable distribution claim. As a result, since the ruling with respect to Defendant's contention that his marriage to Plaintiff was not valid embodied in the second 18 March 2013 order is not inconsistent with Defendant's assertion that he has the right to have his marriage annulled based on Mr. Jones' lack of authority to conduct their marriage ceremony, Defendant is not entitled to immediate appellate review of the second 18 March 2013 order on substantial right grounds.

Finally, Defendant contends that, even if the second 18 March 2103 order did not affect a substantial right, that order was appealable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). However, Defendant has failed to identify any claim with respect to which the trial court made a final decision in the second 18 March 2013 order. For example, the record clearly establishes that the trial court has not finally decided the merits of Plaintiff's equitable distribution claim. Although Defendant contends that the second 18 March 2013 order "represent[s] a final order on Defendant's counterclaim for annulment," that contention is clearly without merit given that the trial court has never made a determination concerning the merits of Defendant's annulment claim and, in fact, held that the record disclosed the existence of genuine issues of material fact concerning the extent to which Mr. Jones had the authority to marry Plaintiff and Defendant. As we have already noted, the trial court simply held that Defendant had waived the right to assert those facts in

opposition to Plaintiff's equitable distribution claim in light of the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment. Thus, the trial court lacked the authority to certify the second 18 March 2013 order for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). As a result, since Defendant has not established that he is entitled to immediate appellate review of the second 18 March 2013 order on any basis, we have no authority to reach the merits of Defendant's challenge to the trial court decisions embodied in that order and must, instead, dismiss Defendant's attempted appeal from that order.

2. 4 June 2013 Order

According to Defendant, the 4 June 2013 order is subject to immediate appeal despite its interlocutory status on a number of grounds. More specifically, Defendant contends that he is entitled to an immediate appeal from the 4 June 2013 order on the grounds that the order in question rejects a plea in bar, creates a risk of inconsistent judgments, and has been certified for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Once again, we conclude that Defendant's arguments lack merit.[7]

As was the case with respect to his challenge to the second 18 March 2013 order, Defendant contends that the 4 June 2013 order affected a substantial right "to assert a defense and plea in bar to Plaintiff's claims." Assuming, without deciding, that orders rejecting pleas in bar are immediately appealable on the basis of the substantial right doctrine, the 4 June 2013 order did not reject a defense "that denie[d] [Plaintiff's] right to maintain the action, and which, if established, [would have] destroy[ed] the action." *Mercer*, 249 N.C. at 728, 107 S.E.2d at 556. On the contrary, even if Judge Brooks erred by entering a consent judgment that did not accurately reflect the agreement set out in the 6 April 2013 memorandum of decision, a question about which we express no opinion at this point, that fact would simply invalidate the consent judgment rather than bar Plaintiff's equitable distribution claim. As a result, since the trial court did not reject a plea in bar in the 4 June 2013 order, Defendant is not entitled to an immediate appeal from that order based on the principle set out in *Mercer*.

Secondly, Defendant contends that he is entitled to an immediate appeal from the 4 June 2013 order on the grounds that the issues addressed and resolved in that order are intertwined with other

7. As a result of the fact that we have not reached the merits of Defendant's challenges to the 4 June 2013 order, we express no opinion about the extent to which those challenges have been properly asserted or have any substantive validity.

issues that remain to be resolved in this case. As we have previously indicated, an interlocutory order affects a substantial right in the event that there is a risk that the failure to provide immediate appellate review creates a risk that inconsistent judgments will result. However, we are unable to see how a failure to consider the issues raised by Defendant's challenge to the 4 June 2013 order on appeal at this time creates such a risk and Defendant has not satisfactorily explained to us how such a result would come about. Simply put, given that no decision has been reached with respect to the merits of Defendant's claim for annulment, a failure to consider whether the 6 May 2010 consent judgment accurately reflects the agreement between the parties embodied in the 6 April 2010 memorandum of decision poses no risk that inconsistent decisions will be made with respect to any matter at issue in this case.

Finally, Defendant argues that, in the event that he is not entitled to an immediate appeal from the 4 June 2013 order on substantial right grounds, he is entitled to obtain appellate review of that order on an interlocutory basis as a result of the trial court's decision to certify the 4 June 2013 order for immediate appeal. However, the trial court's certification was not effective to allow an immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), given that the 4 June 2013 order did not finally resolve any claim between the parties. Although Defendant contends that the 4 June 2013 order "represents" a final judgment with respect to his annulment claim, the order in question simply does not address, much less finally resolve, the validity of Defendant's annulment claim on the merits. Thus, Defendant is not entitled to immediate appellate review of the 4 June 2013 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). As a result, given that none of the bases upon which Defendant relies in support of his request for immediate appellate review of the 4 June 2013 order have any validity, we must dismiss his appeal from that order as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's appeal has been taken from two unappealable interlocutory orders and is not properly before this Court. As a result, Defendant's appeal should be, and hereby is, dismissed.

APPEAL DISMISSED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Chief Judge MARTIN concurred in this opinion prior to 1 August 2014.

IN RE S.T.B.

[235 N.C. App. 290 (2014)]

IN THE MATTER OF S.T.B., JR. AND O.N.B.

No. COA14-213

Filed 5 August 2014

1. Jurisdiction—subject matter—termination of parental rights—guardian ad litem program functions as team

The trial court did not lack subject matter jurisdiction in a termination of parental rights case. The General Assembly intended for abused, neglected, and/or dependent minor children to be represented by the guardian ad litem program and for the participants in that program to function as a team. Thus, the termination petition in this case was properly filed and verified even though it was not done by a guardian ad litem program specialist and not the volunteer guardian ad litem.

2. Termination of Parental Rights—grounds—failure to pay reasonable portion of costs while in foster care

The trial court did not err by concluding that respondent father's parental rights in the minor children were subject to termination on the grounds that he failed to pay a reasonable portion of the cost of the care they received while in foster care as authorized by N.C.G.S. § 7B-1111(a)(3). Record evidence and the trial court's findings established that respondent had the ability to pay some amount greater than zero for the support of the children but failed to do so.

Appeal by respondent from order entered 6 November 2013 by Judge Deborah Brown in Iredell County District Court. Heard in the Court of Appeals 22 July 2014.

Lauren Vaughan for Iredell County Department of Social Services, petitioner-appellee.

Melanie Stewart Cranford for Guardian ad Litem, petitioner-appellee.

Jeffrey L. Miller for father, respondent-appellant.

ERVIN, Judge.

Respondent-Father S.B. appeals from an order terminating his parental rights in S.T.B., Jr., and O.N.B.[1] On appeal, Respondent-Father contends that the trial court lacked jurisdiction over this case given that the termination petition was filed and verified by a person who lacked the authority to take those actions, that the trial court erred by determining that his parental rights in Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) on the grounds that Opal had not been in foster care pursuant to an order of the court for twelve months as of the date upon which the termination petition was filed, that the trial court erred by terminating his parental rights in Sam pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) on the grounds that the relevant findings of fact lacked adequate evidentiary support and failed to support the trial court's finding that this ground for termination existed, and that the trial court erred by terminating his parental rights in both children pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) on the grounds that the relevant findings of fact lacked adequate evidentiary support and failed to support the trial court's finding that this ground for termination existed. After careful consideration of Respondent-Father's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 23 March 2012, the Iredell County Department of Social Services filed a petition alleging that Sam was a neglected and dependent juvenile based on illegal drug use by Respondent-Mother Samantha K.,[2] Respondent-Mother's incarceration, and the fact that Sam tested positive for cocaine at birth. DSS took nonsecure custody of Sam contemporaneously with the filing of the initial petition, while Opal was in the care of Respondent-Father's mother at that time. Although DSS alleged that Respondent-Father was Sam's father in the initial petition, Sam's paternity had not been scientifically confirmed or judicially established as of the date upon which the initial petition was filed.

After a hearing held on 2 May 2012, Sam was determined to be a dependent juvenile. Following a dispositional hearing held on 3 July 2012, Respondent-Father was determined to be Sam's father based upon

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1. S.T.B., Jr., and O.N.B. will be referred to throughout the remainder of this opinion as "Sam" and "Opal," pseudonyms used for ease of reading and to protect the juveniles' privacy.

2. As a result of the fact that she did not note an appeal to this Court from the trial court's termination order, Respondent-Mother's parental rights in the children have been finally adjudicated.

DNA testing results, Sam was retained in DSS custody, and Respondent-Father was ordered to pay child support, submit to random drug testing, and comply with the provisions of his case plan.

On 1 August 2012, DSS filed a petition alleging that Opal was a neglected juvenile. At a hearing held on 28 August 2012, Opal was adjudicated to be a neglected juvenile based upon a stipulation entered into between the parties. At the conclusion of the resulting dispositional proceeding, Opal was placed in DSS custody and Respondent-Father was ordered to comply with the provisions of his case plan, submit to random drug tests, obtain and maintain stable housing and employment, complete parenting classes, maintain regular contact with DSS, refrain from engaging in criminal activity, and pay child support.

On 20 November 2012, a review and permanency planning hearing was held. At the conclusion of that proceeding, DSS was relieved of further responsibility for attempting to reunify Sam and Opal with their parents and the permanent plan for the two children was changed to adoption.

On 21 May 2013, Kathy K. Martin, a program specialist with the Guardian *ad Litem* program, filed and verified a petition seeking to have Respondent-Mother's and Respondent-Father's parental rights in Sam and Opal terminated on the grounds of neglect as authorized by N.C. Gen. Stat. § 7B-1111(a)(1); leaving the children in foster care for more than twelve months without making reasonable progress toward correcting the conditions that led to the children's removal from the home as authorized by N.C. Gen. Stat. § 7B-1111(a)(2); failing to pay a reasonable portion of the cost of the care that the children had received as authorized by N.C. Gen. Stat. § 7B-1111(a)(3); and willfully abandoning the children as authorized by N.C. Gen. Stat. § 7B-1111(a)(7).

After conducting a hearing concerning the issues raised in the termination petition on 24 July 2013, the trial court entered an order on 6 November 2013 finding that Respondent-Father's parental rights in Sam and Opal were subject to termination on the grounds that he had allowed the children to remain in foster care for more than twelve months without making reasonable progress in addressing the conditions that led to their removal from the home pursuant to N. C. Gen. Stat. § 7B-1111(a)(2) and that he had failed to pay a reasonable portion of the cost of the care that had been provided to the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) and concluding that the termination of Respondent-Father's parental rights would be in the children's best interest. Respondent-Father noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

A. Subject Matter Jurisdiction

[1] In his initial challenge to the trial court's order, Respondent-Father contends that the trial court lacked jurisdiction over the subject matter of this case on the grounds that the petition seeking to have Respondent-Father's parental rights in the children terminated had been filed by a person who had no standing to file or verify such a petition. More specifically, Respondent-Father contends that the trial court lacked the authority to address the issues raised in the termination petition because it was filed and verified by "Kathy K. Martin, Guardian *ad Litem* ("GAL") Program Specialist, by and through the undersigned Attorney Advocate," rather than by David Hartness, who served as the volunteer guardian *ad litem* appointed to represent the children and who did most of the work performed in connection with the representation of Sam and Opal in this proceeding. We do not find Respondent-Father's argument persuasive.

"Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003), *reversed on other grounds*, 358 N.C. 143, 592 S.E.2d 688 (2004)). According to N.C. Gen. Stat. §§ 7B-1103(a)(6) and 7B-1104, a petition seeking the termination of a parent's parental rights in one or more children may be filed by "[a]ny guardian *ad litem* appointed to represent the minor juvenile pursuant to [N.C. Gen. Stat. §] 7B-601 who has not been relieved of this responsibility" and must "be verified by the petitioner[.]" In view of the fact that the extent of a trial court's jurisdiction over the subject matter of a particular case raises a question of law, we will review Respondent-Father's challenge to Ms. Martin's standing to file and verify the termination petition using a *de novo* standard of review. *In re E.J.*, __ N.C. App. __, __, 738 S.E.2d 204, 206 (2013).

As N.C. Gen. Stat. § 7B-601(a) reflects, "[t]he guardian *ad litem* and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed" and must be appointed "pursuant to the program established by Article 12 of this Chapter[.]" N.C. Gen. Stat. § 7B-601(a).

> When read *in pari materia*, these statutes [that address guardian *ad litem* appointment, duties, and administration] manifest the legislative intent that representation of a minor child in proceedings under [N.C. Gen. Stat.

> §] 7B-601 and [N.C. Gen. Stat. §] 7B-1108 is to be . . . by the GAL program established in Article 12 of the Juvenile Code. Under Article 12 volunteer GALs, the program attorney, the program coordinator, and clerical staff constitute the GAL program.

In re J.H.K., 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011); *see also In re A.N.L.*, 213 N.C. App. 266, 269-70, 714 S.E.2d 189, 192 (2011) (holding that a child "was adequately represented by the [guardian *ad litem* p]rogram pursuant to N.C. Gen. Stat. § 7B-601(a)" despite the absence of the volunteer guardian *ad litem* from the hearing given that the attorney advocate "was present . . . during both portions of the proceedings" and "actively participated by questioning witnesses and offering recommendations for adjudication and disposition"). As a result, the Supreme Court has rejected an interpretation of the relevant statutory provisions that failed to recognize the fact that the participants in the guardian *ad litem* program function as a team instead of a collection of individuals, *J.H.K.*, 365 N.C. at 177, 711 S.E.2d at 121, noting that the General Assembly did not specify duties to be performed by each specific member of the team. *Id.* at 176, 711 S.E.2d at 121. The argument that Respondent-Father has advanced in support of his challenge to the trial court's jurisdiction over the subject matter of this case, which lacks support in any specific prior decision of either the Supreme Court or this Court and which interprets N.C. Gen. Stat. § 7B-1103(a)(6) to mean that the only member of the guardian *ad litem* team authorized to file and verify a termination petition is the volunteer guardian *ad litem*, is directly contrary to the interpretive approach adopted in *J.H.K.* As a result, given that the General Assembly intended for Sam and Opal to be represented by the guardian *ad litem* program and for the participants in that program to function as a team, we conclude that the termination petition at issue in this case was properly filed and verified and that Respondent-Father's argument to the contrary lacks merit.

B. Grounds for Termination

[2] Secondly, Respondent-Father argues that the trial court erred by concluding that his parental rights in Sam and Opal were subject to termination on the grounds that he failed to pay a reasonable portion of the cost of the care that Sam and Opal received while in foster care as authorized by N.C. Gen. Stat. § 7B-1111(a)(3). More specifically, Respondent-Father argues that the trial court erred by determining that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) on the grounds that the trial court did not find, and the record evidence did not show, that he had willfully

failed to pay a reasonable portion of the cost of the care that Sam and Opal received during the six month period immediately preceding the filing of the termination petition despite having the ability to do so. Respondent-Father's argument lacks merit.

A parent's parental rights in a child are subject to termination in the event that

> [t]he juvenile has been placed in the custody of a county department of social services, . . . or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). "The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*. Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so." *In re Adoption of Maynor*, 38 N.C. App. 724, 726, 248 S.E.2d 875, 877 (1978) (emphasis in original) (citations omitted). "A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster care for the child which the parent must pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *Id.* "[N]onpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982). In evaluating the validity of Respondent-Father's contention that the trial court erred by determining that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), we must examine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

In its termination order, the trial court determined that Respondent-Father, "for a continuous period of six months next preceding the filing of the TPR petition, ha[d] willfully failed for such period to pay a reasonable portion of the cost of care for the juveniles, although physically and financially able to do so[.]" In support of this conclusion, the trial court found as fact that:

> 53. Since the juveniles have been in the custody of the Department, the Respondent Father has never brought any gifts for the juveniles, has never paid any child support for the benefit of the juveniles, and has not sent any cards or letters to the juveniles.
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> . . . .
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> 55. The Respondent Mother is under a child support order which orders her to pay $50 per month for the benefit of each of the juveniles. The Respondent Father is also under a child support order which orders him to pay $50 per month for the benefit of each of the juveniles. Neither parent has paid any amount towards their respective child support obligations, and the Court is unaware of any disability which would prevent the parents from paying some amount toward these obligations.

As a result of the fact that Respondent-Father has refrained from challenging either of these findings as lacking in sufficient evidentiary support, they are deemed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

Although Respondent-Father contends in his brief that the evidence contained in the record developed at the termination hearing and the trial court's findings of fact did not suffice to adequately establish that he had the ability to pay any portion of the cost of Sam's and Opal's care during the relevant six month period and points to findings in prior orders concerning his continued unemployment and his failure to make certain payments required under a probationary judgment, this argument overlooks the fact that the issue of his ability to pay is addressed and resolved by the fact that he was subject to a child support order that required him to pay $50 per month for the benefit of his children. As this Court has previously stated, given that "a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990) (citations omitted). In addition to finding that Respondent-Father was subject to a child support order that required him to pay $50 per month for the benefit of the children, the trial court also found that it was not aware

that Respondent-Father was subject to any disability that would prevent him from paying some amount of support. As a result, given that record evidence and the trial court's findings establish that Respondent-Father had the ability to pay some amount greater than zero for the support of the children, the trial court did not err by determining that Respondent-Father's parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).[3]

III. Conclusion

Thus, none of Respondent-Father's arguments adequately support his request that the trial court's termination order be overturned. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

3. Although Respondent-Father also argues that the trial court erred by concluding that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), we need not address this aspect of his challenge to the trial court's termination order given our decision to uphold the trial court's decision that Respondent-Father's parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (holding that a finding that one ground for the termination of a parent's parental rights exists is sufficient to support a termination order).

IN THE MATTER OF THE PURPORTED WILL OF RUBY SHAW SHEPHERD, DECEASED

No. COA 13-1149

Filed 5 August 2014

1. Wills—election of remedies—pursuit of elective share of a testate estate and will caveat not inconsistent

The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder on the basis of the doctrine of election of remedies. A petition for payment of a spousal elective share was not inconsistent with the institution of a caveat action to contest a will.

2. Estoppel—judicial estoppel—caveat action—petition for elective share

The trial court abused its discretion by applying judicial estoppel as a bar to a caveat action after the trial court ordered payment of an elective share. Caveator's statement in his petition for an elective share was consistent with the determination made by the clerk and the legal presumption that the purported will was the valid will of decedent until set aside by a caveat action.

3. Estoppel—quasi-estoppel—receipt of elective share

The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder based on caveator's receipt of an elective share. Caveator cannot be estopped from pursuing the caveat action based on his receipt of the elective share because he would be entitled to that amount of cash in any event. Further, he has not exercised a right under the will to any specific property he would not otherwise be entitled to receive.

Appeal by Caveator from Order entered 12 April 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 19 February 2014.

Wall Esleeck Babcock LLP, by Andrew L. Fitzgerald, and Hickmon & Perrin, PC, by James E. Hickmon, for Caveator.

Helms, Robison & Lee P.A., by R. Kenneth Helms, Jr., and Aimee E. Brockington, for Propounder.

STEPHENS, Judge.

Factual Background and Procedural History

This appeal arises from a caveat proceeding challenging the will of Ruby Shaw Shepherd ("Decedent"). Decedent died on 21 February 2010 in Fort Myers, Florida. At the time of her death, Decedent was a resident of Union County, North Carolina. Decedent is survived by her husband of nearly thirty years, Caveator James A. Shepherd, and four children from a previous marriage, including Propounder Angela Caroline Jeffers Bullock.

On 7 April 2010, Propounder filed in the Union County Superior Court clerk's office an application for probate and letters testamentary and a document entitled "Last Will and Testament of Ruby Shaw Shepherd," which purported to be the will of Decedent. The purported will made no mention of Caveator and named Propounder as the executrix of Decedent's estate. With the exception of several specific devises of tangible personal property, the purported will provided that Decedent's estate was to be divided equally among her four children. The clerk of superior court admitted the purported will to probate in the common form in the Estates Division of the Superior Court of Union County.[1]

Caveator filed a verified petition for an elective share on 18 June 2010, seeking a statutory spousal elective share from the estate of Decedent. In Caveator's petition for elective share, he stated that Decedent "died testate . . . and [that] her Last Will and Testament was probated on April 7, 2010."

Propounder filed the inventory for Decedent's estate and an addendum thereto on 14 September 2010. The inventory indicated that Decedent's estate contained total assets in the amount of $1,894,928.97.

Caveator filed a caveat to the purported will of Decedent on 29 October 2010. In his petition, Caveator alleged that, "[u]pon information and belief, [Decedent's purported will] . . . is not the Last Will and Testament of Ruby Shaw Shepherd" because Decedent either did not sign the purported will, or, if she did, she did so under "undue and improper influence and duress." Propounder filed an answer to the caveat on 19 November 2010. Subsequently, an order was entered *sua sponte* by the clerk of superior court on 3 December 2010 staying the

1. Although the application for probate and letters testamentary are included in the record, the certificate of probate and the letters testamentary are not. Thus, this Court has no information in the record to verify the date that the purported will was admitted to probate. We must assume from the progression of the probate of the purported will that a certificate of probate was issued.

hearing on Caveator's petition for an elective share until the resolution of the caveat action.[2] Propounder appealed from this order to the trial court.[3] The trial court entered an order on 21 January 2011 reversing the clerk's stay order and remanding the administration of the estate and the petition for elective share to the clerk for further proceedings consistent with the trial court's reversal order. Following the trial court's reversal of the stay order, Caveator filed a motion to compel partial payment of the spousal elective share, to compel payment of expert fees, for issuance of an order to show cause, for revocation of Propounder's letters testamentary, and for attorneys' fees. In this motion, Caveator referred to the paper writing offered for probate as the "Decedent's purported will." Caveator also referred to the paper writing as the purported will in his memorandum in support of the motion for partial payment of the spousal elective share; however, Caveator calculated the spousal elective share based on the value of property passing according to the probate of Decedent's purported will.[4] Caveator's motion for partial payment of the spousal elective share was continued by the clerk of court until the parties engaged in mediation. Caveator's motion for attorneys' fees was granted, and his remaining motions were denied.

On 19 December 2012, the clerk of court entered an "Order Determining Elective Share" whereby the spousal elective share was calculated to be $36,028.93 and Propounder, as Executrix of the Estate of Decedent, was ordered to pay the whole amount to Caveator. The clerk's order did not mention the caveat proceeding, and the clerk calculated the elective share based on the values of the probate estate, wherein no property passed to Caveator under the purported will.

Following the order for payment of the spousal elective share, Propounder filed a motion for summary judgment as to the caveat on 8 March 2013. In her summary judgment motion, Propounder argued

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2. The clerk's 3 December 2010 order also stayed hearing on a petition for recovery of estate assets filed by Propounder. No copy of this petition is included in the record.

3. Although both briefs indicate Propounder appealed the 3 December 2010 order, no copy of the notice of appeal is included in the record to indicate the date or grounds for said appeal.

4. Calculation of the elective share is defined in Article 1A of Chapter 30 of the North Carolina General Statutes. The share to which a surviving spouse is entitled is diminished by the property he or she is already receiving, either under the probate estate, by intestate succession, or by other means. Here, Caveator received nothing under the purported will. However, his share received by intestate succession would be approximately one-third of the estate. *See* N.C. Gen. Stat. § 29-14 (2013). Therefore, the calculation of the elective share would differ depending on which way Caveator was to receive property.

that Caveator was estopped from pursuing the caveat because his position that the purported will was not valid was inconsistent with the position he maintained in the elective share action. Caveator filed a memorandum opposing Propounder's motion for summary judgment on 21 March 2013. The trial court entered an order on 12 April 2013 granting Propounder's motion. Caveator appeals.

Discussion

On appeal, Caveator argues that the trial court (1) erred in granting summary judgment in favor of Propounder on grounds that the doctrine of election of remedies bars Caveator from sustaining the caveat action, and (2) abused its discretion by holding that the doctrine of judicial estoppel also barred Caveator from sustaining the caveat action.[5] Caveator contends that the doctrine of election of remedies is not applicable in the case *sub judice* because payment of a spousal elective share and caveat of a will are not inconsistent remedies. Further, Caveator contends that the doctrine of judicial estoppel is not applicable in this case because Caveator did not make clearly inconsistent factual assertions. We agree and reverse the order of the trial court.

I. Election of Remedies

[1] Caveator argues that the trial court erred in granting summary judgment on the basis of the doctrine of election of remedies because a petition for payment of a spousal elective share is not inconsistent with the institution of a caveat action to contest a will. In contrast, Propounder argues that Caveator is estopped from pursuing the caveat action because it is predicated on an "opposite and irreconcilable" position from Caveator's position in the elective share proceeding. We conclude that the two remedies are not inconsistent and, therefore, that the doctrine of election of remedies is not applicable.

"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) (citation and internal quotation marks omitted; italics added).

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5. In support of her motion for summary judgment, Propounder argued that Caveator was estopped from pursuing the caveat according to the equitable doctrines of election of remedies and judicial estoppel. The trial court did not identify the grounds on which summary judgment was granted in favor of Propounder.

"The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (citation omitted), *disc. review denied*, 352 N.C. 683, 545 S.E.2d 728 (2000). "The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies." *Pritchard v. Williams*, 175 N.C. 319, 323, 95 S.E. 570, 571 (1918) (internal quotation marks omitted). "One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights." *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). "[A]n election of remedies presupposes a right to elect." *Competitor Liaison Bureau of NASCAR, Inc. v. Midkiff*, 246 N.C. 409, 414, 98 S.E.2d 468, 472 (1957) (citation and internal quotation marks omitted). "A party cannot . . . occupy inconsistent positions. . . . But the doctrine of election applies only where two or more existing *remedies* are alternative and inconsistent. If the remedies are not inconsistent, there is no ground for election." *Douglas v. Parks*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 85 (citation omitted; emphasis added), *disc. review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984). "It is the inconsistency of the demands which makes the election of one remedial right an estoppel against the assertion of the other . . . ." *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964) (citation omitted).

> A plaintiff is deemed to have made an election of remedies, and therefore estopped from suing a second defendant, only if he has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant [to] or inconsistent with the remedy sought in the second action.

Triangle Park Chiropractic, 139 N.C. App. at 203–04, 532 S.E.2d at 835.

Here, the issue is whether the pursuit of an elective share based on the administration of a testate estate and a will caveat are alternative and inconsistent remedies. "In general, the purpose of a caveat is to determine whether the paper[ ]writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded." *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002). The right to claim an elective share is a statutory right created by section 30-3.1 which is given to "[t]he surviving spouse of a decedent who dies domiciled in

[North Carolina]." N.C. Gen. Stat. § 30-3.1 (2013).[6] The elective share is calculated as a share of the decedent's "Total Net Assets" subtracted by the "Net Property Passing to Surviving Spouse," as both terms are defined by section 30-3.2. *See* N.C. Gen. Stat. § 30-3.1. Thus, the surviving spouse's elective share is reduced by the amount of property he or she is already going to receive. The "Net Property Passing to Surviving Spouse" includes property "(i) devised, outright or in trust, by the decedent to the surviving spouse or (ii) that passes, outright or in trust, to the surviving spouse by intestacy." N.C. Gen. Stat. § 30-3.2(3c) (2013). By including both property devised to the surviving spouse and property passing by intestate succession in the calculation of the elective share, it is clear from the plain language of the statute that an elective share may be claimed by a surviving spouse whether the decedent dies testate or intestate. *See*, *e.g.*, *Bland v. Harold L. & Audree S. Mills Charitable Remainder Unitrust*, __ N.C. App. __, 754 S.E.2d 259 (2014) (unpublished opinion), *available at* 2014 WL 220557 (holding that quasi-estoppel was inapplicable to bar a challenge to the validity of a trust where distributions received by the wife were less than the elective share of her husband's intestate estate to which she would be entitled absent the trust); *In re Estate of Hendrick*, __ N.C. App. __, 753 S.E.2d 740 (2013) (unpublished opinion), available at 2013 WL 6237353 (holding that the wife was entitled to an elective share of the husband's testate estate where other beneficiaries failed to establish grounds barring her entitlement).[7] Section 30-3.4(b) also makes clear that a claim for an elective share is not dependent on whether the decedent dies testate because it requires that the claim be made within "six months after the issuance of letters . . . in connection with the will or intestate proceeding." N.C. Gen. Stat. § 30-3.4(b) (2013). Indeed, Propounder concedes in her brief that Caveator was entitled to pursue an elective share whether Decedent died testate or intestate. Because the caveat action is meant to determine whether a purported will is in fact the will of a decedent and the statutory right to claim an elective share does not depend on whether a decedent dies with a will, we conclude that the two remedies are not inconsistent.

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6. Section 30-3.1 was modified by 2013 N.C. Sess. Laws 91, § 1.(d), effective 1 October 2013. The modification is not applicable to the issues on appeal in this case.

7. These opinions are unpublished and, thus, have no precedential value. N.C.R. App. P. 30(e). Nonetheless, they provide helpful examples of recent cases in which this Court has acknowledged the entitlement of a surviving spouse to an elective share in both testate and intestate estate administrations.

In this case, however, Caveator made a specific assertion in his petition for elective share that Decedent "died testate" even though he was entitled to pursue an elective share whether Decedent died testate or not. On its face, this statement is inconsistent with Caveator's challenge to the will. Propounder argues that such inconsistency estops him from pursuing the caveat action as an impermissible election of remedies. We disagree.

Propounder's argument is misplaced as applied to the doctrine of election of remedies. As discussed above, the elective share proceeding is not an inconsistent and alternative remedy to the caveat action. Even if the elective share proceeding were inconsistent with the caveat action, however, Caveator's assertion that Decedent died testate is irrelevant to the clerk's calculation of the elective share.

"[P]robate is conclusive evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal."[8] N.C. Gen. Stat. § 28A-2A-12 (2013). When the clerk of superior court takes proof of a script and admits it to probate in common form, it is an *ex parte* proceeding, and the script "stands as the testator's will, and his only will, until challenged and reversed" by caveat. *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965); *see also Walters v. Baptist Children's Home of N.C., Inc.*, 251 N.C. 369, 377, 111 S.E.2d 707, 714 (1959) ("[T]he probate of a will by the [c]lerk of [s]uperior [c]ourt is . . . conclusive evidence of the validity of the will[] until vacated on appeal[] or declared void by a competent tribunal in a proceeding instituted for that purpose.").

Consistent with our statutes and established case law, the trial court's 21 January 2011 order, which reversed the stay of the elective share proceeding until the resolution of the caveat action, concluded that probate "of the [w]ill is conclusive unless and until it is vacated on appeal or declared void by a competent tribunal in a caveat proceeding." In addition, the trial court concluded, *inter alia*, that (1) the will had not been set aside by the caveat because no determination had been reached in that proceeding, (2) the filing of the caveat did not stay the administration of the estate or the elective share proceeding, and (3) the elective share proceeding should be remanded to the clerk to proceed accordingly. As a result, the clerk was obligated on remand to calculate the elective share in accordance with the probate

8. This statute was codified as N.C. Gen. Stat. § 31-19 in 2010, when Decedent died. It was re-codified as N.C. Gen. Stat. § 28A-2A-12, effective 1 January 2012, by 2011 N.C. Sess. Laws 344.

of Decedent's purported will, regardless of Caveator's assertion in his petition. Consequently, Caveator had no "right to elect" between calculation of the elective share on the basis of a testate or intestate estate administration. *See, e.g.*, *Competitor Liaison Bureau of NASCAR, Inc.*, 246 N.C. at 414, 98 S.E.2d at 472. Though Caveator chose to pursue an elective share, that remedy, alone, is not inconsistent with a caveat. Moreover, the doctrine of election of remedies cannot be applied to bar the award of the elective share to Caveator based solely on the clerk's administration of Decedent's estate as a testate estate. Indeed, to the extent Caveator could have alleged an inconsistent remedy in his petition for an elective share, that element of his petition cannot work to bar his caveat proceeding when the clerk had no choice but to calculate the elective share based on a testate estate administration. Accordingly, we hold that the doctrine of election of remedies does not work to bar Caveator's challenge to the will.

II. Judicial Estoppel

[2] Caveator also argues that the trial court abused its discretion by applying judicial estoppel as a bar to the caveat action after the trial court ordered payment of the elective share. In opposition, Propounder contends that judicial estoppel was properly applied because Caveator asserted inconsistent factual positions by alleging both the validity and the invalidity of Decedent's will. We disagree.

"[J]udicial estoppel is to be applied in the sound discretion of our trial courts." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 33, 591 S.E.2d 870, 891 (2004). "[A] trial court's application of judicial estoppel is reviewed for abuse of discretion." *Id.* at 38, 591 S.E.2d at 894 (citations omitted). "[W]hen a trial court has acted within its discretion in applying judicial estoppel, leaving no triable issues of material fact, summary judgment is appropriate." *Id.* at 39, 591 S.E.2d at 895 (citations omitted). "If the trial court did not abuse its discretion in determining that [judicial estoppel is applicable], there are no triable issues of fact . . . as a matter of law, rendering summary judgment appropriate." *Bioletti v. Bioletti*, 204 N.C. App. 270, 274, 693 S.E.2d 691, 694-95 (2010). "Where the essential element of inconsistent positions is not present, it is an abuse of discretion to bar [the] plaintiff's claim on the basis of judicial estoppel." *Estate of Means v. Scott Elec. Co.*, 207 N.C. App. 713, 719, 701 S.E.2d 294, 299 (2010) (citation omitted).

"[T]he purpose of the [judicial estoppel] doctrine [i]s to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."

Whitacre P'ship, 358 N.C. at 28, 591 S.E.2d at 888 (citations and internal quotation marks omitted). "[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *T-Wol Acquisition Co. v. ECDG South, LLC*, N.C. App. , , 725 S.E.2d 605, 612 (2012) (citation and internal quotation marks omitted). Nevertheless,

> our Supreme Court [has] set forth three factors which may be considered in determining whether the doctrine is applicable: First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at __, 725 S.E.2d at 612-13 (citation omitted). "[T]hese three factors do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel and . . . additional considerations may inform the doctrine's application in specific factual contexts." *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 889 (citation and internal quotation marks omitted). "The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply[,] is that a party's subsequent position must be clearly inconsistent with its earlier position." *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (citation and internal quotation marks omitted). "[J]udicial estoppel is limited to the context of inconsistent factual assertions and . . . the doctrine should not be applied to prevent the assertion of inconsistent legal theories." *Whitacre P'ship*, 358 N.C. at 32, 591 S.E.2d at 890. When the record and pleadings are examined as a whole, minor discrepancies in a position consistently maintained do not amount to "clearly inconsistent" positions. *Harvey v. McLaughlin*, 172 N.C. App. 582, 585, 616 S.E.2d 660, 663 (2005) (holding that discrepancies in allegations in the plaintiff's complaint regarding the date of the onset of injury were not clearly inconsistent positions where the plaintiff maintained one position as a whole), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 250 (2006); *see also Estate of Means*,

207 N.C. App. at 720, 701 S.E.2d at 299 (holding that differences in allegations of knowledge of the two defendants in a negligence action which were "in general . . . not inconsistent," and meant to show separate duties owed by each defendant, were not factually inconsistent positions).

Here, Caveator stated in his petition for an elective share that Decedent "died testate" and that "her Last Will and Testament was probated on April 7, 2010." Four months later, however, Caveator stated in his caveat that Decedent "did not . . . sign and execute said paper writing as her Last Will and Testament" and that, if she did, it was due to "undue and improper influence and duress." Propounder argues that these statements represent clearly inconsistent factual assertions. We disagree.

No will is valid unless it complies with the relevant statutory requirements. N.C. Gen. Stat. § 31-3.1. "[T]he [c]lerk of the [s]uperior [c]ourt has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will." *Walters*, 251 N.C. at 376, 111 S.E.2d at 713 (citation and internal quotation marks omitted). "[T]he probate of a will by the [c]lerk of [s]uperior [c]ourt is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose." *Id.* at 377, 111 S.E.2d at 714; *see also* N.C. Gen. Stat. § 28A-2A-12; *In re Will of Spinks*, 7 N.C. App. 417, 173 S.E.2d 1 (1970) (upholding the clerk's denial of a motion by a group of surviving family members to set aside probate of a holographic will because there was no inherent or fatal defect appearing on the face of the will and no caveat action was filed). "And until so set aside it is presumed to be the will of the testator." *Walters*, 251 N.C. at 377, 111 S.E.2d at 714. In addition, "the proper execution of [a] will [is] a mixed question of law and fact." *Burney v. Allen*, 127 N.C. 476, 478, 37 S.E. 501, 502 (1900); *see also In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975) (holding that directed verdict as to whether a will may be probated is the best procedure when no evidence of testamentary intent is presented); *In re Will of Deyton*, 177 N.C. 494, 507, 99 S.E. 424, 430 (1919) ("But the facts must be found by the jury, in order that we may pass upon the validity of the paper[ ] writings as the will of the deceased."); *In re Will of Mason*, 168 N.C. App. 160, 606 S.E.2d 921 (holding that directed verdict is appropriate as to the validity of a will when there are no evidentiary issues to be resolved), *disc. review denied*, 359 N.C. 411, 613 S.E.2d 26 (2005).

Here, Decedent's purported will was admitted to probate by the clerk of superior court before Caveator filed the petition for an elective

share.[9] By admitting the purported will to probate, the clerk made the determination that Decedent died testate and that the purported will was the last will and testament of Decedent. *See, e.g.*, *Walters*, 251 N.C. at 377, 111 S.E.2d at 714. Caveator's statement in his petition for an elective share is consistent with the determination made by the clerk and the legal presumption that the purported will is the valid will of Decedent until set aside by a caveat action. *See id.* Further, as the validity of a will is a mixed issue of law and fact, Caveator's statements that Decedent "died testate" and that "her Last Will" was probated are not factual assertions as to the will's validity, and, therefore, judicial estoppel is not applicable in this case.

III. Receipt of a Benefit

[3] Caveator also argues that estoppel does not otherwise apply to bar him from pursuing the caveat when he accepted property to which he was already entitled. Propounder responds that estoppel does, in fact, apply because Caveator actually received a "benefit under the will," which bars him from thereafter seeking to invalidate it. This response is incorrect.

Although Propounder and Caveator make these arguments in the context of the doctrine of election of remedies, the cases cited are more representative of the principle of quasi-estoppel. In defining quasi-estoppel, or "estoppel by benefit," the North Carolina Supreme Court has stated that, "[u]nder a quasi estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 881-82 (citations and internal quotation marks omitted). "[T]he essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation, internal quotation marks, and ellipsis omitted). In the context of a will, a party that has "judicially asserted rights consistent with the validity of the will . . . is estopped, in a subsequent proceeding, from asserting the inconsistent position of disputing the will's validity." *In re Will of Lamanski*, 149 N.C. App. 647, 650, 561 S.E.2d 537, 540 (2002) (citation omitted) [hereinafter *Will of Lamanski*]. The cases cited by Caveator further address the doctrine of quasi-estoppel in the specific context of a will caveat and its exceptions.

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9. According to the petition for an elective share, the purported will was admitted to probate on 7 April 2010.

In *In re the Will of Peacock*, a decedent's son instituted a caveat proceeding after receiving a check under the decedent's will. 18 N.C. App. 554, 555, 197 S.E.2d 254, 255 (1973) [hereinafter *Will of Peacock*]. In analyzing whether the decedent's son could be estopped from pursuing the caveat on grounds that he had already taken under the will, this Court observed that the share of the estate to which the decedent's son would be entitled would be greater than the amount of the check he had already received if his caveat proceeding were successful. *Id.* at 556, 197 S.E.2d at 255. Specifically, the Court held that

> [the son's] acceptance of a check for less than [the amount of his share of the intestate estate] could in no way prejudice his sisters in [the] event [the] probate of the will is subsequently set aside. Nothing in the circumstances indicates any reason why it would be inequitable for [the son] to proceed with his caveat.

Id.

Similarly, in *In re Will of Smith*, this Court held that the decedent's daughter was not estopped from pursuing a caveat even though she received a car under the will. 158 N.C. App. 722, 724-25, 582 S.E.2d 356, 358 (2003) [hereinafter *Will of Smith*]. The Court observed that the daughter was entitled to the car under the will admitted to probate, a prior will, or via intestate succession. *Id.* Quoting *Will of Peacock*, the Court further reasoned that, because the daughter's caveat would not change the disposition of the car, it was not inequitable for her to receive the car and pursue the caveat. *Id.*

Will of Lamanski arose in a slightly different factual situation from *Will of Smith* and *Will of Peacock*. In *Will of Lamanski*, the decedent's will gave her sister the choice of certain items of tangible personal property in the decedent's home. 149 N.C. App. at 647, 561 S.E.2d at 538. Under that provision, the decedent's sister chose specific pieces of property, some of which were delivered to her pursuant to the bequest. *Id.* at 648, 561 S.E.2d at 539. When the executrix of the decedent's will failed to deliver the other items, however, the decedent's sister filed a caveat despite retaining the items of tangible personal property that had been delivered to her under the will. *Id.* The sister argued that retention of the tangible personal property should not work to estop her from pursuing the caveat because, if the will were set aside, she would be entitled to one-third of the estate, which was more than the value of the property she retained. *Id.* at 651, 561 S.E.2d at 540. Acknowledging the rule set forth in *Will of Peacock* and applied in *Will of Smith*, *i.e.*, that "one

cannot be estopped by accepting that which he would be legally entitled to receive in any event," we distinguished the facts in *Will of Lamanski*. *Id.* at 651, 561 S.E.2d at 540-41. Specifically, we pointed out that the beneficiary in *Will of Peacock* received cash in an amount less than he would have received if the will were set aside. *Id.* In *Will of Lamanski*, however, the decedent's sister had been given a right to choose from among items of tangible personal property in the decedent's home. *Id.* Otherwise, the sister "would have had no legal right, outside the will, to the specific personal property which she received and retained pursuant to the specific bequest." *Id.* Thus, the distinguishing factor in *Will of Lamanski* was the sister's choice of specific property which she would not necessarily receive if the will were set aside. *Id.*

In this case, unlike *Will of Lamanski*, Caveator did not receive a specific bequest. Rather, he asserted his right to an elective share, consistent with the validity of the will. The amount of the elective share awarded to Caveator was a cash amount that was a direct result of the probate of Decedent's will. Modeling our analysis after *Will of Peacock*, *Will of Smith*, and *Will of Lamanski*, we conclude that, if the will were set aside, Caveator would be entitled to receive a cash amount greater than he has already received. He has not exercised a right under the will to any specific property he would not otherwise be entitled to receive. Thus, Caveator cannot be estopped from pursuing the caveat action based on his receipt of the elective share because he would be entitled to that amount of cash in any event. Propounder's argument is overruled.

Conclusion

Propounder argues that the trial court's order, granting summary judgment, was appropriate pursuant to the equitable doctrines of election of remedies and judicial estoppel. We conclude, as discussed above, that neither doctrine is applicable here. Therefore, we hold that the trial court erred in granting summary judgment in favor of Propounder. We thus reverse that decision.

REVERSED.

Judges BRYANT and DILLON concur.

IRIS ENTERPRISES, INC., PLAINTIFF
v.
FIVE WINS, LLC, DEFENDANT

No. COA14-192

Filed 5 August 2014

Mortgages and Deeds of Trust—foreclosure—declaratory judgment action—pay-off and attorney fees—law of the case

The trial court did not invade the sole province of a foreclosure trustee when it determined that the trustee had misapplied the funds from a foreclosure sale where the pay-off amount and attorney fees had been set by the court in a prior declaratory judgment. If one superior court judge cannot overrule another, the trustee of a property in foreclosure lacks authority to overrule a superior court judge. Defendant lost the opportunity to challenge the trial court's decision when it failed to appeal the declaratory judgment.

Appeal by defendant from Order entered 18 September 2013 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 4 June 2014.

Hatch, Little & Bunn, LLP, by John N. McClain, Jr., A. Bartlett White, and Justin R. Apple, for plaintiff-appellee.

Morris, Russell, Eagle & Worley, PLLC, by Benjamin L. Worley, for defendant-appellant.

STROUD, Judge.

Five Wins, LLC ("defendant"), appeals from an order entered 18 September 2013, requiring the trustee of property encumbered by a deed of trust to pay Iris Enterprises ("plaintiff") $24,291.24 as surplus from the foreclosure sale of that property. We affirm.

I. Background

On 8 March 2007, Greenfield Durham, LLC executed a promissory note for $3,959,000.00 in favor of Capital Bank. As collateral for that loan, plaintiff executed a deed of trust in favor of Capital on three pieces of real property. Iris is owned by Massoumeh Valanejad, who is one of two owners of Greenfield. Greenfield defaulted on the note in 2010. On 31 March 2010, Capital sent Greenfield a letter declaring a default and

accelerating the terms of the loan. Greenfield did not pay the balance of $870,902.84. As a result, Capital initiated foreclosure proceedings against the encumbered properties. Before the foreclosure sale could proceed, Iris filed for Chapter 11 bankruptcy, which stayed the foreclosure proceedings. The United States Bankruptcy Court for the Eastern District of North Carolina entered a Chapter 11 Plan that required Iris to make full payment on or before 5 January 2013. Iris failed to do so.

On 8 March 2013, Capital sold Greenfield's debt to defendant. Defendant re-opened foreclosure proceedings and demanded payment of $971,670.03 in order for Iris to redeem the property and cancel the deed of trust. On 26 March 2013, plaintiff filed a complaint in Wake County Superior Court seeking an injunction to prohibit the foreclosure sale and a declaratory judgment on the "payoff on the Note secured by the Deed of Trust." The trial court issued a temporary restraining order halting foreclosure proceedings until it could hold a hearing.

On 28 June 2013, the trial court entered its declaratory judgment. It made a number of findings of fact and concluded that the "pay-off amount that Iris must pay to Five Wins to redeem the Property and cancel the Deed of Trust is $894,711.25 as of 6 May 2013 . . . ." It further concluded that interest would accrue at $314.08 per day while Iris would "receive credit for payments in the amount of $356.45 every day until pay-off by Iris, or Foreclosure by Five Wins." It therefore decreed:

> The pay-off amount that Iris must pay to Five Wins to redeem the Property and cancel the Deed of Trust is $894,711.25 as of 6 May 2013, which includes, in the discretion of the Court, "attorneys' fees" of $43,640.92, with that amount decreasing by $42.37 each day until pay-off by Iris, or foreclosure by Five Wins[.]

The trial court also permitted Five Wins to move forward with its foreclosure sale, which it did. At the foreclosure sale, Five Wins bid $875,000.00, but WA Venture, LLC made an upset bid of $918,750.00. WA Venture then assigned its upset bid to Five Wins. On 27 August 2013, the trustee of the encumbered property filed a "Final Report and Account of Foreclosure Sale" (original in all caps), which reported various disbursements, including $856,286.33 as the "Right of Redemption pursuant to Declaratory Judgment" and $24,105.61 as going toward the "Secured Obligation(s) (partial)". Under the disbursement made by the trustee, the entire $917,750.00 was used, leaving no surplus.

Plaintiff believed that these disbursements contravened the declaratory judgment. So, it noticed a hearing, without filing an accompanying

motion, and requested that the trial court "clarify" its previous declaratory judgment. The trial court rejected defendant's argument that the prior judgment did not control because "there is a distinction between 'the payoff on the Promissory Note' and the 'amount to redeem real property[.]' " It entered an order on 18 September 2013, wherein it concluded that its prior judgment determined the

> amount of the payoff on the Promissory Note applicable to Plaintiff, and after payment by the Substitute Trustee of the amounts set out therein, along with the three (3) expenses set out in paragraph 16 above [relating to expenses incurred after the judgment was entered], there should have been surplus funds totaling $24,291.24 to be paid to Plaintiff as owner of the Collateral.

The trial court therefore ordered the trustee to pay $24,291.24 to plaintiff as surplus from the foreclosure sale. Defendant filed written notice of appeal on 25 September 2013.

II. Distribution of Foreclosure Sale Assets

Defendant argues that the trial court invaded the sole province of the trustee by determining that the trustee had misapplied the funds from the foreclosure sale. We conclude that defendant lost the opportunity to challenge the trial court's decision when it failed to appeal the \declaratory judgment, which determined the "pay-off" amount and the amount of attorney's fees.

Any error in the trial court's 18 September 2013 order necessarily follows from the declaratory judgment. In that order, the trial court determined the attorney's fees and "pay-off amount" necessary to exercise the equitable remedy of redemption. Contrary to defendant's argument, the law of this state has long been that the right of redemption allows a mortgagor "to regain complete title by paying the mortgage debt, plus any interests and any costs accrued." James A. Webster, Jr., *Webster's North Carolina Real Estate Law*, § 13.05[1] (6th ed. 2013). The redemption amount thus *is* the amount of indebtedness. So, when the trial court concluded that the "pay-off" amount was $894,711.25, it was ruling on the amount of the indebtedness, including accrued interest and fees. Indeed, in the September order, the trial court specifically concluded that the June judgment "was intended to set out the amount of the payoff on the Promissory Note applicable to Plaintiff . . ." Further, in the prior judgment, the trial court calculated the amount of interest that would accrue each day and the credit for payments that Iris would receive until "pay-off by Iris, or foreclosure by Five Wins."

Once these amounts were set, any sale price in excess of that amount, deducting other reasonable expenses incurred after entry of the order and contemplated by that order, must be considered surplus. *See* N.C. Gen. Stat. § 45-21.31(b) (2013) ("Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) *shall* be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto." (emphasis added)). Once the trial court determined the amount of the payoff and the per diem sums of interest which would accrue until paid in full, and that determination was not appealed, it was the law of the case and the trustee was required to follow the court's order.

Although we have said that disbursements of proceeds from a foreclosure sale "are within the sole province of the trustee[,]" in none of the cases cited by defendant has there been a prior order from a declaratory judgment action determining the relevant amounts. *In re Foreclosure of Deed of Trust Executed by Ferrell Bros. Farm, Inc.*, 118 N.C. App. 458, 461, 455 S.E.2d 676, 678 (1995). "When an order is not appealed, it becomes[] the law of the case, and other . . . judges [are] without authority to enter orders to the contrary." *Kelly v. Kelly*, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004). Certainly if one superior court judge cannot overrule another, the trustee of a property in foreclosure lacks authority to overrule a superior court judge. *See Cato v. Crown Financial, Ltd.*, 131 N.C. App. 683, 686, 508 S.E.2d 822, 824 (1998) (holding that a prior final judgment was the law of the case, which the debtor corporation's receiver could not reduce or modify), *disc. rev. denied*, 350 N.C. 593, 536 S.E.2d 836 (1999). Even assuming that the declaratory judgment exceeded the trial court's authority, defendant cannot now challenge it.[1] Defendant does not argue that the trial court was without jurisdiction to enter the declaratory judgment, so any argument to that effect has been abandoned. N.C.R. App. P. 28(a). Therefore, we affirm the trial court's 18 September 2013 order enforcing its unappealed declaratory judgment.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

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1. Plaintiff also argues that the trial court erred in concluding that defendant was entitled to any attorney's fees, but plaintiff similarly failed to appeal the declaratory judgment, so we have no jurisdiction to address that issue.

KEESEE v. HAMILTON

[235 N.C. App. 315 (2014)]

BRIAN KEESEE, PLAINTIFF
v.
JOHN HAMILTON, DEFENDANT

No. COA13-1039

Filed 5 August 2014

1. Appeal and Error—interlocutory orders and appeals—discovery sanctions—dismissal

A sanctions order that dismissed plaintiff's complaint for not complying with discovery was interlocutory because it left unresolved the question of defendant's entitlement to monetary damages on his counterclaims. However, it was immediately appealable because it affected a substantial right.

2. Jurisdiction—continuing—contempt order—compliance

The trial court had subject matter jurisdiction to preside over telephonic hearings concerning sanctions that took place after a contempt order was issued. The judge's commission was for one day or until business was completed and he had continuing jurisdiction to ensure compliance with the contempt order.

3. Contempt—continuing—discovery sanctions

The trial court did not abuse its discretion by finding that plaintiff was in continuing civil contempt at the time of a show cause hearing concerning discovery violations where plaintiff claimed he could not have been in continuing civil contempt because the contempt order had not yet been issued. Even assuming an inaccurate use of the phrase, plaintiff did not offer a persuasive argument for vacating the sanctions order, given the abundant evidence supporting the court's decision to impose sanctions on plaintiff.

Appeal by plaintiff from order entered 18 March 2013 by Judge W. Russell Duke, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 6 February 2014.

The Lea Schultz Law Firm, P.C., by James W. Lea, III, for plaintiff-appellant.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Jennifer J. Bennett, for defendant-appellee.

DAVIS, Judge.

Brian Keesee ("Plaintiff") appeals from the trial court's order sanctioning him for his failure to respond to discovery requests and to comply with prior court orders. After careful review, we affirm.

Factual Background

Plaintiff and Kimberly Marie Keesee ("Mrs. Keesee") were married on 3 February 2003 and separated on 17 October 2009.[1] At some point while Plaintiff and Mrs. Keesee were still married, John Hamilton ("Defendant") allegedly initiated an affair with Mrs. Keesee that ultimately resulted in the Keesees' separation.

On 24 November 2009, Plaintiff filed an action against Defendant in Brunswick County Superior Court stating claims for alienation of affection, criminal conversation, and intentional infliction of emotional distress. On 24 February 2010, Defendant filed an answer denying the material allegations of the complaint and asserting counterclaims against Plaintiff for electronic eavesdropping, invasion of privacy, defamation, and defamation *per se*.

Defendant served his first set of interrogatories and request for documents on Plaintiff on 1 March 2010. Plaintiff submitted his responses and objections on 11 May 2010. Defendant filed a motion to compel on 4 June 2010 and an amended motion to compel on 14 September 2010.

Defendant's motion to compel was heard on 14 February 2011. On 16 March 2011, the Honorable James F. Ammons, Jr. entered an order ("the Discovery Order") providing, in pertinent part, as follows:

> 2. Within ten (10) days, Plaintiff is to provide to counsel for the Defendant full and complete responses to the following discovery requests:
>
> a. Plaintiff shall produce or tender for inspection a complete response to Defendant's requests for production #4 and 5, which shall comprise copies of any and all audio, video, digital or other form of recording containing the communications or activities, or featuring in any way, the Defendant . . . and/or [Mrs. Keesee], as well as any and all transcripts, photographs, or other

1. This is the date of separation alleged by Plaintiff in his complaint. Defendant's counterclaim lists the date of separation as 10 October 2010.

> documents referencing or recounting the content of the above-described audio, video, or other recordings;
>
> c. [sic] Plaintiff shall produce or tender for inspection a complete response to Defendant's request for production number 11, which shall comprise copies of any and all documents, including but not limited to statements, invoices, quotes, written or electronic correspondence, brochures, photographs, reports or other information from a private investigator or any individual with whom Plaintiff consulted regarding the monitoring and recording of the activities of [Defendant] and/or [Mrs. Keesee.]

Plaintiff filed a notice of appeal as to the Discovery Order and a motion for a stay on 15 April 2011. On 20 December 2012, Defendant filed a motion to dismiss Plaintiff's appeal of the Discovery Order based on his failure to timely prosecute the appeal. Plaintiff's appeal was dismissed by the Honorable Reuben F. Young by order entered 11 January 2013.

Defendant also filed a motion to show cause, asking the trial court to hold Plaintiff in contempt for his failure to comply with the Discovery Order. On 4 March 2013, Defendant's show cause motion came on for hearing before the Honorable W. Russell Duke, Jr. During Plaintiff's testimony at the show cause hearing, he admitted that he was in possession of audio recordings, videotapes, and written reports from a private investigator — all of which were encompassed within the Discovery Order but had not been provided by him. He testified that he did not know where these materials were specifically located but conceded that he had failed to make any efforts to comply with the Discovery Order — which had been in effect for almost two years at the time of Plaintiff's testimony — by attempting to locate them.

On 8 March 2013, the trial court entered an order ("the Contempt Order") finding Plaintiff in willful civil contempt and remanded him to the custody of the Brunswick County Sheriff's Office. In the Contempt Order, the trial court made the following relevant findings of fact:

> 4. The Plaintiff has failed to abide by and to obey the Discovery Order issued by this Superior Court.
>
> 5. The Plaintiff appeared before this Court and failed to show cause as to why he should not be held in civil contempt of the Discovery Order.

> 6. The Plaintiff has the materials ordered to be produced in his possession, custody or control.
>
> 7. The Plaintiff has made no demonstrable efforts to gather and produce the recordings and other documents, materials and information subject to the Discovery Order and has not sought to obtain any help to download electronically stored information or recordings.
>
> 8. The Plaintiff has failed and refused to produce the materials subject to the Discovery Order.

Based on these findings of fact, the trial court ordered, in pertinent part, as follows:

> 4. Prior to his release from custody, and as a condition of purging his contempt, the Plaintiff is ordered to fully and completely produce the following:
>
> a. Plaintiff shall produce or tender for inspection a complete response to Defendant's requests for production #4 and 5, which shall comprise copies of any and all audio, video, digital or other form of recording containing the communications or activities, or featuring in any way, the Defendant . . . and/or [Mrs. Keesee], as well as any and all transcripts, photographs, or other documents referencing or recounting the content of the above-described audio, video, digital or other recordings;
>
> b. Plaintiff shall produce or tender for inspection a complete response to Defendant's request for production number 11, which shall comprise copies of any and all documents, including but not limited to statements, invoices, quotes, written or electronic correspondence, brochures, photographs, reports of other information from a private investigator or any individual with whom Plaintiff consulted regarding the monitoring and recording of the activities and communications of [Defendant] and/or [Mrs. Keesee.]
>
> 5. The Plaintiff is ordered to pay to the Defendant the additional sum of $1,928.50, for the reasonable attorney's fees incurred by the Defendant in prosecuting the Defendant's Motion to show cause . . . prior to the Plaintiff's release from custody as an additional condition of purging his contempt; and

> 6. The Court retains jurisdiction over the parties and the subject matter of this action to enforce compliance with this order.

After the entry of the Contempt Order, counsel for Plaintiff began tendering certain documents to Defendant's counsel in an effort to purge Plaintiff of civil contempt. Defendant's counsel prepared a detailed list of the deficiencies in Plaintiff's responses and provided a copy to both Plaintiff's counsel and the trial court. Around this same time, it became apparent that a number of assertions previously made by Plaintiff in his testimony at the show cause hearing had been false. Records tendered from the private investigative firm hired by Plaintiff and affidavits from eyewitnesses were noted to directly conflict with Plaintiff's prior testimony in several respects.

First, Plaintiff, while admitting to having purchased surveillance equipment via the Internet, had denied placing a GPS tracking device on Defendant's vehicle. However, records from Plaintiff's private investigator showed that such a device had, in fact, been placed on Defendant's vehicle.

Second, Plaintiff had denied that he ever made written transcripts of audio recordings of Defendant and Mrs. Keesee. However, counsel for Plaintiff began producing such transcripts within 48 hours of the show cause hearing at which Plaintiff testified that they did not exist.

Third, when asked if he had ever brought any recordings or transcripts from his surveillance of Defendant and Mrs. Keesee with him to prior court proceedings, Plaintiff had denied ever doing so. However, several witnesses submitted affidavits stating that they had witnessed Plaintiff with such materials while in court.

On 8 March 2013 and again on 12 March 2013, Judge Duke presided over telephonic hearings arranged by Plaintiff's counsel in connection with Plaintiff's request that the trial court release him from jail so that he could assist in the efforts to bring himself into compliance with the Contempt Order. During these hearings, counsel for Defendant requested that the trial court sanction Plaintiff pursuant to Rule 37 of the North Carolina Rules of Civil Procedure for his continuing failure to provide adequate discovery responses and his failure to comply with prior court orders requiring him to produce responsive documents as a condition of purging his contempt.

The trial court denied Plaintiff's request for relief and entered an order ("the Sanctions Order") on 18 March 2013 sanctioning Plaintiff by

dismissing his complaint with prejudice and entering a default judgment in favor of Defendant on his counterclaims. Plaintiff gave timely notice of appeal to this Court.

Analysis

I. Interlocutory Appeal

[1] We first note that the Sanctions Order left unresolved the question of Defendant's entitlement to monetary damages on his counterclaims. Therefore, the order is interlocutory. *See Duncan v. Duncan*, 102 N.C. App. 107, 111, 401 S.E.2d 398, 400 (1991) (holding that appeal of default judgment ordering subsequent hearing on damages was interlocutory).

An interlocutory order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment. *Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996). This Court has previously held that "where a party is found in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under [N.C. Gen. Stat. §] 1-277 . . . ." *Cochran v. Cochran*, 93 N.C. App. 574, 576, 378 S.E.2d 580, 581 (1989). As such, we have jurisdiction over Plaintiff's appeal.

II. Subject Matter Jurisdiction of Trial Court Over Telephonic Hearings

[2] Plaintiff's first argument on appeal is that the trial court lacked subject matter jurisdiction to preside over the telephonic hearings that took place on 8 March and 12 March 2013 and to enter the subsequent Sanctions Order. We disagree.

We review questions of subject matter jurisdiction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citation, quotation marks, and brackets omitted), *aff'd in part, rev'd in part on other grounds, and remanded*, 366 N.C. 303, 735 S.E.2d 306 (2012).

Judge Duke was commissioned to preside over a special session of Brunswick County Superior Court at the time Defendant's motion to show cause was heard on 4 March 2013. The parties do not dispute that, by its terms, his commission was to last for one day or "until the business is completed." Four days after the 4 March 2013 hearing, Judge

Duke entered the Contempt Order, concluding as a matter of law that "[t]he Court has jurisdiction of the subject matter of this action and over the person of the Plaintiff" and that "[t]he Court retains jurisdiction over the parties and the subject matter of this action to enforce compliance with this order."

Plaintiff argues that although Judge Duke possessed jurisdiction to enter the Contempt Order, he lacked jurisdiction to take any action thereafter. Plaintiff contends that once Judge Duke entered the Contempt Order, there was no further "business" left for him to conduct, and that, as such, the limited jurisdiction conferred upon him by his commission had ended.

In rejecting Plaintiff's argument, we find instructive our decision in *Hockaday v. Lee*, 124 N.C. App. 425, 477 S.E.2d 82 (1996). In *Hockaday*, this Court held that a superior court judge commissioned to preside over a special session of superior court set to last for two weeks or "until the business of the court was completed" possessed jurisdiction to enter an order taxing costs and fees outside of the two-week period because the business of the court was not completed until the execution of the judgment and the settling of the costs. *Id.* at 428, 477 S.E.2d at 84 (quotation marks and brackets omitted).

Similarly, in the present case, Judge Duke's commission granted him authority to preside over a special session of Brunswick County Superior Court for one day "or until the business [was] completed." Judge Duke's jurisdiction did not expire simply by virtue of him entering the Contempt Order because enforcement issues related to that order could — and, in fact, did — arise, leaving the business of that session of court unfinished.

The present case is distinguishable from *In re Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991), which Plaintiff cites in support of his jurisdictional argument. In *Delk*, we held that an out-of-district judge assigned to preside over a special session of superior court did not have jurisdiction to enter a show cause order. *Id.* at 661, 406 S.E.2d at 602. However, the trial judge in *Delk* entered the show cause order *prior* to the commencement of the special session. *Id.* Here, conversely, the telephonic hearings and Sanctions Order took place *after* the special session had begun and while the business of the court was not yet finished.

Thus, Judge Duke had jurisdiction to preside over the telephonic hearings and to subsequently enter the Sanctions Order based upon his continuing jurisdiction to ensure compliance with the Contempt Order. Accordingly, Plaintiff's argument on this issue is overruled.

III. Sanctions Order

[3] Plaintiff's final argument is that the Sanctions Order contains erroneous findings and must therefore be vacated. We disagree.

Rule 37 authorizes a trial court to impose sanctions, including the entry of a default judgment, against a party who fails to comply with a discovery order. N.C.R. Civ. P. 37(b)(2),(d). "Sanctions [imposed] under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*; *see In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246, 618 S.E.2d 819, 826 (2005) (holding that trial court's decision to impose sanctions may only be overturned "if there is no record which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred"), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006).

Although a trial court must consider lesser sanctions prior to dismissing an action with prejudice for failure to comply with discovery, it is not required to expressly list and reject each lesser sanction that it considered in its order. *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911, *aff'd per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006). Here, in Finding of Fact 12 of the Sanctions Order, Judge Duke stated that he had considered lesser sanctions before deciding to impose the sanctions contained therein.

Plaintiff argues that the trial court abused its discretion by finding in the Sanctions Order that Plaintiff was in *continuing* civil contempt at the time of the show cause hearing. Specifically, he points to a provision in the Sanctions Order stating that the trial court made its findings of facts after

> having reviewed the file in this matter, having presided over the hearing on Defendant's Motion to Show Cause in which the Plaintiff was found to be in *continuing civil contempt* for failure to make discovery, having presided over a telephonic hearing on March 8, 2013, having presided over a telephonic hearing on March 12, 2013, and having otherwise heard arguments of counsel for both parties and being fully advised in this matter[.]

(Emphasis added.) Plaintiff claims he could not have been in continuing civil contempt at the time of the show cause hearing because the

Contempt Order had not yet been issued. Plaintiff argues that this mischaracterization may have influenced the trial court's decision to impose more stringent sanctions against him.

Pursuant to N.C. Gen. Stat. § 5A-21, failure to comply with a court order constitutes continuing civil contempt as long as

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2013).

At the hearing on Defendant's motion to show cause and as memorialized in the ensuing Contempt Order, the trial court made the requisite findings necessary to hold Plaintiff in continuing civil contempt. Specifically, the trial court found, in pertinent part, as follows:

> 4. The Plaintiff has failed to abide by and to obey the Discovery Order issued by this Superior Court.
>
> 5. The Plaintiff appeared before this Court and failed to show cause as to why he should not be held in civil contempt of the Discovery Order.
>
> 6. The Plaintiff has the materials ordered to be produced in his possession, custody or control.
>
> 7. The Plaintiff has made no demonstrable efforts to gather and produce the recordings and other documents, materials and information subject to the Discovery Order and has not sought to obtain any help to download electronically stored information or recordings.
>
> 8. The Plaintiff has failed and refused to produce the materials subject to the Discovery Order.
>
> 9. The Discovery Order remains in force.
>
> 10. The purpose of the Discovery Order may still be served by compliance with the same.

> 11. The Plaintiff's noncompliance with the performance obligations of the Discovery Order is willful.
>
> 12. The Plaintiff is able to comply with the performance obligations of the Discovery Order or is able to take reasonable measures that would enable him to comply with the performance obligations of the Discovery Order.

Thus, the trial court did not err by using the phrase "continuing civil contempt" when it entered the Sanctions Order. However, even assuming *arguendo* that the trial court's use of the phrase was inaccurate, Plaintiff has failed to offer any persuasive argument as to why any such error would require that the Sanctions Order be vacated as an abuse of the trial court's discretion — given the abundant evidence supporting the court's decision to impose sanctions on Plaintiff.

Finally, Plaintiff alleges that Finding of Fact 6 of the Sanctions Order constitutes an erroneous finding upon which the trial court relied in determining the sanctions to be imposed. Specifically, Plaintiff refers to the fact that Finding of Fact 6 mistakenly states that Plaintiff testified at a hearing on 6 March 2013 that he had not made written transcripts of the audio recordings of Defendant and Mrs. Keesee when, in actuality, this testimony took place at a hearing held on 4 March 2013. Plaintiff argues that the trial court's use of the incorrect hearing date in the Sanctions Order rose to the level of prejudicial error because it "contributed to Judge Duke's ultimate decision to impose the harshest sanctions possible."

Nothing in the Sanctions Order, however, supports a conclusion that Judge Duke considered the precise date on which Plaintiff gave this testimony to be relevant in his decision-making process regarding the imposition of sanctions. Rather, as the Sanctions Order makes clear, the imposition of the sanctions at issue was based on the fact that Plaintiff engaged in conduct such as producing transcripts that he had previously testified did not exist. Given the wealth of evidence to support the entry of the Sanctions Order, we conclude that any clerical error as to the date of the hearing was not material to the trial court's decision to impose sanctions and, therefore, any such error was harmless.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges CALABRIA and STROUD concur.

MAZZEO v. CITY OF CHARLOTTE

[235 N.C. App. 325 (2014)]

DOMINICK MAZZEO, PLAINTIFF
v.
CITY OF CHARLOTTE, DEFENDANT

No. COA13-1388

Filed 5 August 2014

1. Police Officers—employment termination—civil service hearing—oath retaken after consolidation

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, competent evidence existed to support a finding of fact that plaintiff was "re-sworn" as an officer with the Charlotte-Mecklenburg Police Department Airport Division, so that he was entitled to a civil service hearing. Both oaths were identical and both oaths were administered by the Deputy City Clerk of the City of Charlotte.

2. Police Officers—employment termination—civil service hearing—not a probationary officer after consolidation—finding supported by evidence

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department (CMPD), the trial court's finding that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal) was supported by evidence that plaintiff had been to some degree under the supervision of the CMPD since shortly after his initial hire.

3. Police Officers—employment termination civil service hearing—not a probationary officer after consolidation—conclusion—supported by finding

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, the evidence supported the trial court's findings of fact which supported its conclusion that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal).

Appeal by defendant from order entered 29 August 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2014.

Office of the City Attorney, by Catherine L. Cooper and Mark H. Newbold, for defendant-appellant.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by Miles S. Levine, for plaintiff-appellee.

DAVIS, Judge.

Defendant City of Charlotte ("the City") appeals from the trial court's 29 August 2013 order finding that Dominick Mazzeo ("Plaintiff") is entitled to a Civil Service Board hearing in connection with the termination of his employment with the City. After careful review, we affirm.

Factual Background

Plaintiff was hired by the City on 30 May 2007 and assigned to the Charlotte Douglas International Airport ("CDIA") as an Airport Safety Officer ("ASO"). On 19 June 2007, after receiving his general certification in law enforcement, he was administered the oath of office and sworn in as a law enforcement officer. Throughout his employment, Plaintiff received annual Performance Reviews and Development assessments ("PRDs"). These PRDs were reviewed and signed by officers of the Charlotte-Mecklenburg Police Department ("CMPD").

Effective on 15 December 2012, the City Manager ordered the consolidation of all airport safety officers into the CMPD. As a result, Plaintiff was transferred to the CMPD, retaining his "rank, salary, longevity, and relevant benefits." Because of the consolidation, the City required Plaintiff to take a new oath of office as an officer with the CMPD, which he did on 4 January 2013.

On 14 June 2013, Plaintiff received a letter from the CMPD terminating his employment for a "work rule violation." He was then given a packet of information describing his appeal rights to the Charlotte-Mecklenburg Civil Service Board ("the Board"). Section 4.61 of the Charlotte City Charter provides members of the City's police and fire departments who have been employed for longer than 12 months with the right to have the Board review various types of personnel actions, including termination.

On 18 June 2013, Plaintiff appealed his termination to Rodney Monroe, the CMPD's Chief of Police. His appeal was denied by letter dated 25 June 2013. Plaintiff then attempted to file an appeal to the Board asking the Board to review his termination. However, he was told that he did not, in fact, qualify for civil service protection because he was a probationary CMPD employee on the date of his termination due to the fact that he did not become a sworn officer of the CMPD until the December 2012 consolidation.

Plaintiff's attorney subsequently filed a written request on 26 June 2013 asking the Board to review his termination. In an undated letter, an attorney for the City explained its rationale for classifying Plaintiff as a probationary employee:

> It is true that Mr. Mazzeo became an employee of the City of Charlotte in 2007. As a City employee who worked at the airport as an airport safety officer, he was not entitled to Civil Service protection under the City's Charter provisions. Rather, like all other non-sworn City employees whose employment is terminated, he was entitled to a pre-termination hearing and also to file a grievance through the City's grievance process.
>
> In December of 2012, through a functional consolidation, all airport safety officer positions were moved from the City's aviation department to the police department. Following that consolidation, [Plaintiff] became a "sworn officer" . . . entitled to the protection of the Civil Service Board in December, 2012, when his application for hire to the police department was approved by the Board. Accordingly, on the date of his termination, June 14, 2013, he was still subject to the police department's 12-month probationary period and considered an "exception" . . . to Civil Service provisions requiring terminated officers be given a hearing before the Board.

Plaintiff filed a complaint in Mecklenburg County Superior Court seeking a declaration that he was entitled to a hearing before the Board regarding his termination. The case was heard by the trial court without a jury on 26 August 2013. On 29 August 2013, the trial court issued an order determining that Plaintiff was entitled to a hearing before the Board. The City filed a timely notice of appeal.

Analysis

Section 4.61 of the Charlotte City Charter provides, in pertinent part, as follows:

> (f) Definitions. The terms "officer or employee" or "officer," as used in this Article, shall mean sworn officers with regard to the police department and shall mean uniformed personnel with regard to the fire department.
>
> . . . .
>
> (j) Appeal hearings. Upon receipt of a citation for termination from either chief or upon receipt of notice of appeal for a suspension from any civil service covered police officer or firefighter, the Board shall hold a hearing not less than 15 days nor more than 30 days from the date the notice of appeal, or the citation, is received by the Board. . . .
>
> . . . .
>
> (t) Exceptions. The provisions of this Article pertaining to civil service coverage of officers and employees of the fire and police departments . . . shall not apply to an officer of the police or fire department until he or she has been an officer of the respective department for at least 12 months. During such 12-months' probationary period, he or she shall be subject to discharge by the chief of such department under rules promulgated with respect thereto, such rules to be approved by the [City] Council.

2000 N.C. Sess. Laws ch. 4, § 4.61.

"[W]here a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed." *First Union Nat'l Bank v. Ingold*, 136 N.C. App. 262, 264, 523 S.E.2d 725, 727 (1999). The trial court's conclusions of law are reviewable *de novo* on appeal. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

In its 29 August 2013 order, the trial court made the following findings of fact:

1. That the Plaintiff, Dominick Mazzeo, is a citizen and resident of Mecklenburg County and was hired as a Charlotte Douglas International Airport (CDIA) Officer on May 30, 2007.

2. That the Plaintiff's badge number at the time of his hire was 3636.

3. That on December 15, 2012, the Charlotte Mecklenburg Police Department acquired, merged and consolidated all Charlotte Douglas International Airport (CDIA) Safety Officers into one organization to be controlled by the Charlotte Mecklenburg Police Department, part of the City of Charlotte[.]

4. That at the time of the consolidation and thereafter, the Plaintiff retained his same rank, badge number, employee identification number and salary.

5. That the City of Charlotte required all CDIA Officers to be "re-sworn."

6. That the Plaintiff was re-sworn as an officer with the Charlotte Mecklenburg Police Department-Airport Division on January 4, 2013.

7. That a review of the oath of office by the undersigned finds the oaths are identical pre-take over and post-take over by the City of Charlotte.

8. That at the time of his employment with the CDIA Police, the Plaintiff had his Performance Review and Development (PRD) signed off by supervisors of the Charlotte Mecklenburg Police Department, even though at the time he was under the ultimate authority of the Aviation Department with respect to hiring, discipline and firing.

9. From and after the time of the merger, when the Plaintiff became an employee of the Charlotte Mecklenburg Police Department, he was under the authority of the Charlotte Mecklenburg Police Department Chain of Command for all purposes and required to follow Charlotte Mecklenburg Police Department policies and procedures.

> 10. That the Plaintiff received a letter on June 13 [sic], 2013 from the Charlotte Mecklenburg Police Department terminating his employment from the Charlotte Mecklenburg Police Department-Airport Division.
>
> 11. That the Plaintiff appealed his termination to Charlotte Mecklenburg Police Department Chief Rodney Monroe requesting a Civil Service Hearing by the Charlotte-Mecklenburg Civil Service Board.
>
> 12. That the Plaintiff was informed that he was not entitled to an appeal to the Civil Service Board as he was a "probationary employee."
>
> 13. That under the City Charter, to be considered for a Civil Service Board hearing, an officer must be "non probationary."
>
> 14. That the merger by the City of Charlotte-Charlotte Mecklenburg Police Department and the Charlotte Douglas International Airport Police Division did not substantially change the nature and character of the Plaintiff's employment with the City of Charlotte.

The trial court then made the following conclusion of law:

> . . . [T]hat, notwithstanding the provisions of the Charlotte City Charter Section 4.61 (t), any changes in the nature and character of the Plaintiff's employment with the City of Charlotte after the departmental consolidation on December 15, 2012, were not substantive enough to have resulted in his being classified as a probationary employee with the Charlotte Mecklenburg Police Department, and he therefore should be and is entitled to a hearing before the City of Charlotte Civil Service Board regarding his termination from the Charlotte Mecklenburg Police Department-Airport Division.

Defendant challenges only findings of fact 6 and 14. Thus, findings of fact 1-5 and 7-13 are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

[1] Specifically, Defendant challenges the portion of finding of fact 6 stating that Plaintiff was "re-sworn as an officer with the

Charlotte-Mecklenburg Police Department Airport Division on January 4, 2013," claiming that this finding is unsupported by the evidence. The City argues that there was "no evidence before the Court indicating that the second oath somehow 'endowed' [an] Airport Safety Officer with civil service protection in 2007." The City further argues the record lacks "credible evidence that Plaintiff was ever sworn in as an Airport Safety Officer with the Charlotte-Mecklenburg Police Department until January, 2013."

We are satisfied that competent evidence existed to support finding of fact 6. Plaintiff presented as exhibits during the hearing both the oath of office he was administered on 19 June 2007 and the oath administered on 4 January 2013. The content of both oaths is identical:

> I, Dominick Mazzeo, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States and the Constitution and laws of North Carolina not inconsistent therewith; that I will be alert and vigilant to enforce the criminal laws of this State; that I will not be influenced in any matter on account of personal bias or prejudice; that I will faithfully and impartially execute the duties of my office as a law enforcement officer according to the best of my skill, abilities, and judgment; so help me, God.

Moreover, on both occasions the oath was administered by the Deputy City Clerk of the City of Charlotte. Thus, competent evidence exists to support the trial court's finding of fact 6.

[2] Defendant next challenges finding of fact 14 which states that "the merger by the City of Charlotte-Charlotte Mecklenburg Police Department and the Charlotte Douglas International Airport Police Division did not substantially change the nature and character of the Plaintiff's employment with the City of Charlotte." While the City argues that "[o]nly after December 15, 2012 did all Airport Safety Officers, including Plaintiff, come under the chain of command of the CMPD," the trial court's finding is supported by evidence of record that Plaintiff had been — at least to some degree — under the supervision of the CMPD since shortly after his initial hire date in 2007. During the hearing, Plaintiff introduced into evidence his PRDs, dating back to June 2008, which were signed by ranking officers of the CMPD, including a captain with the CMPD.

Finding of fact 14 is further supported by evidence of a five percent (5%) contribution made by the City to Plaintiff's "Police ER 401k" that

is reflected on both (1) Plaintiff's *pre*-consolidation pay stub for the pay period beginning on 17 November 2012 and ending on 23 November 2012; and (2) Plaintiff's *post*-consolidation pay stub for the pay period beginning on 15 December 2012 and ending on 21 December 2012. Pursuant to N.C. Gen. Stat. § 143-166.50(e)[1], the City contributes five percent (5%) of sworn officers' bi-weekly earnings to the "Police ER 401k." The fact that the City's five percent (5%) contribution was made to Plaintiff both prior to and after the consolidation supports the trial court's finding that the merger did not materially alter Plaintiff's employment status with the City. Similarly, evidence was presented that Plaintiff was enrolled in the "Police Retirement Plan" both before and after the consolidation.

Furthermore, as noted by the trial court in finding of fact 4 (which the City does not challenge on appeal), after the consolidation, Plaintiff retained his same rank, badge number, employee identification number, and salary. Thus, finding of fact 14 is supported by competent evidence.

[3] Finally, Defendant challenges the trial court's conclusion of law "that . . . any changes in the nature and character of the Plaintiff's employment with the City of Charlotte after the departmental consolidation on December 15, 2012, were not substantive enough to have resulted in his being classified as a probationary employee with the Charlotte Mecklenburg Police Department . . . ." The City argues that "[o]nly after December 15, 2012 did all Airport Safety Officers, including Plaintiff, come under the chain of command of the CMPD . . . [such that] their one year probationary period set out in the Charter started on December 15, 2012."

We hold that the trial court's conclusion of law is supported by its findings of fact. The trial court's findings established that: (1) Plaintiff retained his same rank, badge number, employee identification number, and salary after the consolidation; (2) Plaintiff took identical oaths of office both upon his initial hiring in 2007 and after the consolidation in 2012; (3) from the time he was originally assigned to the CDIA until the date of his dismissal, Plaintiff had his PRDs reviewed and signed by supervising officers of the CMPD; and (4) the City contributed to his law enforcement 401k account in the same amount both before and after the consolidation.

---

1. N.C. Gen. Stat. § 143-166.50(e) states, in pertinent part, that "on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers."

Therefore, we conclude that the trial court's findings of fact support its legal conclusion that any changes in Plaintiff's employment as a result of the departmental consolidation were insufficient to classify Plaintiff as a "probationary" employee for purposes of §4.61(t) of the Charlotte City Charter. As such, the trial court did not err in determining that Plaintiff is entitled to a hearing before the Civil Service Board with regard to his termination.

Conclusion

For the reasons stated above, the trial court's 29 August 2013 order is affirmed.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

KAREN B. NEVITT IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF DAVID R. ROBOTHAM AND AS BENEFICIARY OF THE ROBOTHAM REAL PROPERTY TRUST AS SET FORTH UNDER ARTICLE VI OF THE ROBOTHAM REVOCABLE TRUST AGREEMENT DATED AUGUST 2, 2011, PLAINTIFF-APPELLEE

v.

RICHARD GORDON ROBOTHAM; WADE A. NEVITT; RICHARD H. JAGER; STEPHEN P. SHEFFIELD, JR.; STEPHEN L. KELTNER; SARA SHEFFIELD; GRIFFIN E. NEVITT; JACK K. HUMPHREY, JR.; ROBERT E. NEVITT; WILMINGTON CHAPTER OF THE COLONIAL DAMES HISTORICAL SOCIETY; SABRINA BURNETT; JACK K. HUMPHREY, JR., AS TRUSTEE OF THE ROBOTHAM REAL PROPERTY TRUST, DEFENDANTS

No. COA13-1232

Filed 5 August 2014

Trusts—by declaration—real property—declaratory judgment—no requirement to execute deed transferring title to self

The trial court erred in a declaratory judgment action by concluding that a trust was never funded with the pertinent real property. When considered together, the trust agreement and the deed created a valid trust by declaration, which included the real property. There was no requirement that decedent execute a deed transferring title from himself to himself as trustee. The documents satisfied N.C.G.S. § 36C-4-401(2) and served as a declaration by the owner of property that the owner held identifiable property as trustee.

Appeal by Defendant Sabrina Burnett from judgment and order entered 3 June 2013 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Court of Appeals 4 March 2014.

Lawrence S. Boehling for Plaintiff-Appellee Karen Nevitt.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III and Paige E. Inman, for Defendant-Appellant Sabrina Burnett.

McGEE, Judge.

Karen B. Nevitt ("Plaintiff"), in her capacity as Executrix of the Estate of David R. Robotham and as Beneficiary of the David R. Robotham Revocable Trust, filed a complaint on 11 July 2012 against Richard Gordon Robotham, Wade A. Nevitt, Richard H. Jager, Stephen P. Sheffield, Jr., Stephen L. Keltner, Sara Sheffield, Griffin E. Nevitt, Jack K. Humphrey, Jr., Robert E. Nevitt, the Wilmington Chapter of the Colonial Dames Historical Society, Sabrina Burnett ("Ms. Burnett"), and Jack K. Humphrey, Jr., as Trustee of the Robotham Revocable Trust (together, "Defendants"). In her complaint, Plaintiff requested declaratory judgment concerning whether a certain deed was valid.

Plaintiff attached as Exhibit A to her complaint, an agreement titled "David R. Robotham Revocable Trust Agreement" (hereinafter "trust agreement"). The trust agreement, dated 2 August 2011, was "by and between" David R. Robotham as Grantor and David R. Robotham as Trustee. The trust agreement provided that, upon the "incapacity or death" of David R. Robotham ("Mr. Robotham"), "[his] friend, Jack K. Humphrey, Jr., shall serve as sole Trustee hereunder[.]" The trust agreement was immediately funded with ten dollars by the express terms of the trust agreement. In the trust agreement, Mr. Robotham clearly stated that the purpose of the trust was to hold his "personal residence located at 225 Seacrest Drive, Wrightsville Beach, North Carolina for [Ms. Burnett's] remaining lifetime should she survive me. It is my intent and desire that [Ms. Burnett] be provided with uninterrupted and exclusive use and enjoyment of the residence for as long as she shall live."

Plaintiff also attached as Exhibit B to her complaint, a document titled "North Carolina General Warranty Deed" ("the deed"). The deed, also dated 2 August 2011, identified "David R. Robotham" as Grantor and purported to convey the real property at 225 Seacrest Drive in fee simple to Grantee "David R. Robotham, Trustee [for the] David R. Robotham Revocable Trust."

Ms. Burnett filed an answer to Plaintiff's complaint in which she denied certain allegations, and asserted various counterclaims against Jack K. Humphrey, Jr. Jack K. Humphrey, Jr. filed an answer to Plaintiff's complaint in which he stated: "I [] Accept the Request of the Declaratory Judgment by Karen Nevitt," and he answered "Accept" to all allegations in Plaintiff's complaint.

The trial court held a hearing on 1 May 2013 and heard testimony from Richard Inlow ("Mr. Inlow"), Jack K. Humphrey, Jr., Ms. Burnett, Stephen Sheffield, Karen Nevitt, and Mark Sheffield. Mr. Inlow testified that he was the attorney who, at Mr. Robotham's request, had prepared the trust agreement and the deed. Mr. Inlow agreed that, at the same time Mr. Robotham executed the trust agreement, Mr. Robotham "signed a deed to transfer in the [real] property from himself to the trust[.]" Mr. Inlow testified that he had told Mr. Robotham that "we were not done until we funded the trust and we had to do that with a bank account. We'll record a deed at the register of deed's office."

The trial court entered judgment and order on 3 June 2013 and made the following finding of fact number 18: "At the time of the death of David R. Robotham, the David R. Robotham Revocable Trust Agreement dated August 2, 2011 and the Robotham Real Property Trust were funded with a bank account only." The trial court concluded that: "The deed from grantor David R. Robotham remained within the control of the grantor David R. Robotham until his death, *was never delivered so was not a legally valid deed.*" (Emphasis added). Ms. Burnett appeals.

I. Standard of Review

" 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (citations omitted). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Id.* (citation omitted).

II. Analysis

First, "[t]he exchanges between the parties covering the subject in controversy are in writing, and manifest no ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact. Their construction is, therefore, for the [C]ourt." *Atkinson v. Atkinson*, 225 N.C. 120, 124-25, 33 S.E.2d 666, 670 (1945). It " 'is a fundamental rule

that, when interpreting . . . trust instruments, courts must give effect to the intent of the . . . settlor, so long as such intent does not conflict with the demands of law and public policy.' " *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 586, 692 S.E.2d 457, 466 (2010) (citations omitted).

Ms. Burnett correctly observes that the present case "does not fit the fact pattern" of previous cases regarding "delivery of a deed from a grantor to a third-party grantee[.]" The rule that " 'the creation of a trust must involve a conveyance of property,' " *Bissette v. Harrod*, ___ N.C. App. ___, ___, 738 S.E.2d 792, 799 (2013) (quoting *In re Estate of Washburn*, 158 N.C. App. 457, 461, 581 S.E.2d 148, 151 (2003)), does not contemplate the situation in the present case, in which the settlor and the trustee are the same individual. In *Washburn*, this Court has acknowledged that a conveyance is not required where settlor and trustee are the same individual. *Id.* " 'Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.' " *Id.* (citation and footnotes omitted).

It is well-established that, "[i]n creating an *inter vivos* trust, the creator [settlor] and the trustee may be one and the same person." *Ridge v. Bright*, 244 N.C. 345, 348, 93 S.E.2d 607, 610 (1956). Given that the settlor of a trust and the trustee are the same person in the present case, the trial court's reliance on delivery of the document labeled "North Carolina General Warranty Deed" is misplaced. There are multiple ways in which a valid trust may be created, for example:

> (1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death[; or]
>
> (2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law.

N.C. Gen. Stat. § 36C-4-401 (2013), *see also* Restatement (Second) of Trusts § 17 (1959), Restatement (Third) of Trusts § 10(c) (2003) (a trust may be created by "a declaration by an owner of property that he or she holds that property as trustee for one or more persons"). In order to create a valid trust by *transfer*, under section (1) above, title to the trust property has to be transferred by settlor to the designated trustee(s) to hold for the benefit of the intended beneficiary. *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 287, 547 S.E.2d 62, 66 (2001).

However, transfer of the trust property is not a requirement for creating a valid *inter vivos* trust by *declaration* – under section (2) above. Because the settlor of a trust and the trustee may be the same person, it follows that "where the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title." 76 Am. Jur. 2d Trusts § 46. The Restatement Second provides illustrations of ways a valid *inter vivos* trust may be created by declaration:

> a. Declaration of trust. If the owner of property declares himself trustee of the property, a trust may be created without a transfer of title to the property.
>
> Illustration:
>
> 1. A, the owner of a bond, declares himself trustee of the bond for designated beneficiaries. A is trustee of the bond for the beneficiaries.
>
> So also, the owner of property can create a trust by executing an instrument conveying the property to himself as trustee. In such a case there is not in fact a transfer of legal title to the property, since he already has legal title to it, but the instrument is as effective as if he had simply declared himself trustee.
>
> 2. A, the owner of Blackacre, executes, acknowledges and records a deed conveying Blackacre to A as trustee for a designated beneficiary. A is trustee of Blackacre for the beneficiary.

Restatement (Second) of Trusts § 17, Comments (1959). This method of creating a valid trust — declaration of trust — is recognized in *Ridge*, 244 N.C. at 349, 93 S.E.2d at 611 ("when the owner of personal property, in creating a trust therein, constitutes himself as trustee, it is not necessary as between himself and the beneficiary that he should part with the possession of the property"); *see also* N.C. Gen. Stat. § 36C-4-401(2) (2013) (a trust may be created by "[d]eclaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law"); Wiggins Wills & Administration of Estates in N.C. § 23:3 (4th ed.) ("Where the property owner declares himself trustee, delivery is not required.").

"The principle that a trust may be created by a declaration contained in a separate instrument, or in several instruments, other than the deed conveying the legal title, provided they have sufficient relation

to each other and construed together evidence such trust, is generally recognized." *Peele v. LeRoy*, 222 N.C. 123, 125, 22 S.E.2d 244, 246 (1942). " 'Express' . . . trusts are those trusts intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or an oral declaration[.]" *Williams v. Mullen*, 31 N.C. App. 41, 45, 228 S.E.2d 512, 514 (1976) (quoting 76 Am. Jur. 2d, Trusts § 15, p. 263).

In the present case, the record on appeal presents two documents relating to the Robotham Real Property Trust, both duly executed in front of a notary: (1) the trust agreement and (2) the deed. "Where there are two or more instruments relating to a trust, the instruments should be construed together to effectuate the settlor's intent." *Davenport v. Central Carolina Bank & Tr. Co.*, 161 N.C. App. 666, 672, 589 S.E.2d 367, 370 (2003) (citations omitted); *see also Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 534 (1959) ("All instruments executed at the same time and relating to the same subject may be construed together in order to effectuate the intention.").

A "Statement of Grantor's Intent" appeared in Section 6.3 of the trust agreement, and set out Mr. Robotham's purpose for creating the trust:

> I am creating and funding this trust in an effort to grant **Sabrina Burnett** exclusive use and enjoyment of my personal residence located at 225 Seacrest Drive, Wrightsville Beach, North Carolina for her remaining lifetime should she survive me. It is my intent and desire that **Sabrina Burnett** be provided with uninterrupted and exclusive use and enjoyment of the residence for as long as she shall live. Furthermore, it is my desire that the trust bear the costs associated with maintaining the home, including but not limited to, the costs associated with taxes, insurance, association fees (if any), pest control, assessments and necessary repairs. I have attempted to fund the trust with sufficient working capital to cover the expenses associated with the residence for a reasonable period of time. (Emphasis in original).

The deed contained the following declaration that Mr. Robotham held the real property at 225 Seacrest Drive as trustee:

> WITNESSETH, that the Grantor, David R. Robotham, also known as David Ray Robotham (the "Settlor"), for a valuable consideration (non-taxable consideration) paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey

> onto the Grantee [David R. Robotham, Trustee, David R. Robotham Revocable Trust] in fee simple, all that certain lot or parcel of land situated in the Town of Wrightsville Beach, County of New Hanover, State of North Carolina, and being more particularly described as follows:[.]

When the trust agreement and the deed quoted above are considered in conjunction with each other, Mr. Robotham's intent concerning the real property at issue in this case is clear. Mr. Robotham desired that Ms. Burnett have exclusive use and enjoyment of Mr. Robotham's residence for Ms. Burnett's remaining lifetime, and intended to hold the property as trustee for the use and enjoyment of Ms. Burnett, as beneficiary. Because we have two contemporaneously executed documents relating to the trust, we do not decide whether either document, when considered alone, would have been sufficient to create a valid *inter vivos* trust by declaration.

We must consider the conditional language in N.C. Gen. Stat. § 36C-4-401(2) (emphasis added):

> A trust may be created by . . .:
>
> . . . .
>
> Declaration by the owner of property that the owner holds identifiable property as trustee *unless the transfer of title of that property is otherwise required by law.*

We must determine whether our law required additional action, such as recordation, to effectuate Mr. Robotham's intent to include the real property in the trust. The North Carolina Comment to N.C. Gen. Stat. § 36C-4-401 states:

> Paragraph (2) [of N.C.G.S. § 36C-4-401] differs from the Uniform Trust Code by adding the phrase "unless the transfer of title of such property is otherwise required by law." The Uniform Trust Code adopts the common law rule that a declaration of trust can be funded by declaring assets to be held in trust without executing separate documents of transfer. See the Official Comment to this section and authorities cited. *North Carolina courts have not addressed this issue.* The drafters concluded that the *best practice* is to require compliance with state law provisions governing the transfer of title in order to eliminate questions regarding ownership of property and

> provide better protection of the rights of third parties and trust beneficiaries.

N.C. Gen. Stat. § 36C-4-401, Comments (emphasis added).

In the present case, Mr. Robotham made no promise to convey legal title to Ms. Burnett. Rather, the record plainly shows that Mr. Robotham retained legal title to the real property at issue. It is well-established that the trustee holds legal title to trust property. *In re Estate of Pope*, 192 N.C. App. 321, 335, 666 S.E.2d 140, 150 (2008) ("There is no dispute that legal title to the trust assets was lodged in the trustees."); *see also* Strong's N.C. Index 4th, Trusts and Trustees, § 236 (2008). The documents at issue in the present case did not convey, as in transfer or deliver, legal title, because Mr. Robotham already held legal title to the real property. Legal title remained vested in Mr. Robotham. We can locate no North Carolina law requiring the transfer of property when creating an *inter vivos* revocable trust by declaration. Other jurisdictions clearly do not require any transfer of title when creating a trust by declaration. *See Taliaferro v. Taliaferro*, 260 Kan. 573, 580, 921 P.2d 803, 809 (1996) ("Where, as here, the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title."); *Estate of Heggstad*, 16 Cal. App. 4th 943, 950, 20 Cal. Rptr. 2d 433, 436 (1993) ("authorities provide abundant support for our conclusion that a written declaration of trust by the owner of real property, in which he names himself trustee, is sufficient to create a trust in that property, and that the law does not require a separate deed transferring the property to the trust"). Transfer is, of course, required when the settlor and trustee are not the same person. N.C.G.S. § 36C-4-401(1).

We hold that the trial court erred in concluding: "The trust was never funded with the real property[.]" When considered together, the trust agreement and the deed created a valid trust by declaration, which included the real property. There was not a requirement that Mr. Robotham execute a deed transferring title from himself to himself as trustee. We reverse and remand to the trial court for further action in accordance with this opinion.

In addition, assuming *arguendo* transfer of the real property was required, that transfer would still have to have been from Mr. Robotham to Mr. Robotham, as trustee. The deed was executed by Mr. Robotham, as grantor, to himself, as "Trustee, David R. Robotham Revocable Trust." This deed was executed by Mr. Robotham simultaneously with the trust agreement. Once these documents were executed by Mr. Robotham, the David R. Robotham Revocable Trust was created, and the real property

became part of the corpus of that trust. There is nothing in these two documents evincing any intent on the part of Mr. Robotham to prevent the trust from taking immediate effect, or prevent title to the real property from being immediately delivered to himself, as trustee. Mr. Robotham's intent is clear from the documents, and manifests "no ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact." *Atkinson*, 225 N.C. at 124-25, 33 S.E.2d at 670.

Because there exists no ambiguity in the documents, it is irrelevant that Mr. Inlow informed Mr. Robotham after the fact that the transaction would not be "done" until the deed was recorded. At that point, the revocable trust had already been created, the real property was already part of the corpus, and Mr. Robotham was already trustee. Had Mr. Robotham wanted to revoke the trust, he could have done so, but any misunderstanding about the nature of the trust, its corpus, or Mr. Robotham's authority under the trust, could not alter the nature of the trust itself.

"A conveyance of land can only be by deed." *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 683, 131 S.E.2d 425, 427 (1969) (citation omitted). "The word 'deed' ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee." *Gifford v. Linnell*, 157 N.C. App. 530, 532, 579 S.E.2d 440, 442 (2008) (citation omitted). Recordation of the deed was not required to effect transfer of title in this instance, even assuming transfer of title between Mr. Robotham and Mr. Robotham as trustee was required, or possible, in the creation of a trust by declaration. *Washburn*, 158 N.C. App. at 461, 581 S.E.2d at 151 (" 'Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.' ") (citation and footnotes omitted); *see also Ridge*, 244 N.C. at 349, 93 S.E.2d at 611 ("when the owner of personal property, in creating a trust therein, constitutes himself as trustee, it is not necessary as between himself and the beneficiary that he should part with the possession of the property").

Therefore, we hold that the trial court erred in concluding: "The deed from David R. Robotham to David R. Robotham, Trustee, David R. Robotham Revocable Trust . . . was not delivered and is not a valid deed." Though we do not believe a properly executed deed was required to create the trust, we hold the deed was properly executed and delivered, and is therefore valid. Though the deed has not been recorded, that

does not impact its validity in this instance. Lack of recordation only denies the deed the protections that recordation affords.

We hold that, in the present case, the documents satisfied N.C.G.S. § 36C-4-401(2) and served as a declaration "by the owner of property that the owner h[eld] identifiable property as trustee[.]" N.C.G.S. § 36C-4-401(2). Accordingly, the trial court's order is reversed.

Reversed.

Judges STEELMAN and ERVIN concur.

KIMBERLY PURCELL, EMPLOYEE, PLAINTIFF
v.
FRIDAY STAFFING, EMPLOYER, ZURICH NORTH AMERICAN, CARRIER (GALLAGHER BASSETT SERVICES, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-1252

Filed 5 August 2014

1. Workers' Compensation—denial of benefits—prior undisclosed work-related injury increased risk

The Industrial Commission did not err by denying plaintiff's claim for workers' compensation benefits. There was sufficient evidence that plaintiff's prior undisclosed work-related injury increased the risk of sustaining her present injury.

2. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although plaintiff alternatively argued that N.C.G.S. § 97-12.1, as applied in this case, was an unconstitutional ex post facto law, defendant failed to raise this argument at trial. Even if this issue were preserved, it would be without merit since N.C.G.S. § 97-12.1 does not involve a criminal offense.

Appeal by plaintiff from opinion and award entered 21 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 2014.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Sally B. Moran and Colin E. Cronin, for defendants-appellees.

GEER, Judge.

Plaintiff Kimberly Purcell appeals an opinion and award of the Industrial Commission denying her claim for workers' compensation benefits. Plaintiff contends on appeal that the Commission improperly applied N.C. Gen. Stat. § 97-12.1 (2013) when it concluded that the injury she suffered while working for defendant Friday Staffing was causally connected to a previous work-related injury that plaintiff concealed when she applied for employment with Friday Staffing. However, we agree with the Commission's interpretation of N.C. Gen. Stat. § 97-12.1 that a causal connection exists between a willfully misrepresented prior condition and a present injury if the former increases the risk of the latter. Because there was sufficient evidence in this case that plaintiff's prior undisclosed work-related injury increased the risk of sustaining her present injury, we affirm.

Facts

On 6 August 1999, plaintiff suffered an injury to her back while working for Quality Assured Enterprises. A lumbar MRI revealed a disc protrusion in her lower back at the L5-S1 vertebrae and disc degeneration at the L4-5 vertebrae. Dr. Stewart J. Harley treated plaintiff for those injuries, in part with a surgical procedure called a microdiscectomy, and he initially restricted plaintiff from doing any work that involved bending, stooping, lifting, or twisting. Following a functional capacity evaluation ("FCE") and after reaching maximum medical improvement, plaintiff was given a seven percent partial disability rating to her back. Dr. Harley prescribed physical therapy and eventually relaxed plaintiff's lifting restrictions to permit lifting of no more than 20 pounds, although he encouraged her to find sedentary-level work.

As a result of this injury, plaintiff filed a workers' compensation claim against Quality Assured. Plaintiff and Quality Assured signed a Compromise Settlement Agreement on 24 January 2002 for an amount of $50,000.00 to be paid to plaintiff. Part of the Settlement Agreement stated, "IT IS UNDERSTOOD by and between the respective parties hereto that party of the second part's condition as the result of her accident may be permanent and may be progressive, that recovery therefrom is uncertain and indefinite . . . ." The Settlement Agreement also

noted that plaintiff did not dispute that she had a seven percent permanent partial impairment to her back.

Subsequently, plaintiff worked in different jobs for various companies. She continued to receive treatment for back pain through her primary care providers. In 2007, plaintiff complained of low back pain radiating down her left leg and weakness in her left leg. After her primary care provider recommended a lumbar MRI and physical therapy, plaintiff told her, on 20 July 2007, that she had a disc bulge at L4-5. Her doctor diagnosed degenerative disc disease, wrote a prescription for a TENS unit, and recommended physical therapy. On 23 January 2008, plaintiff again complained of back pain, told her primary care provider that she was seeing a neurosurgeon, and said she might need back surgery.

On 28 May 2010, plaintiff applied for employment with defendant Friday Staffing, a company that fills the labor needs of a clientele of employers with potential employees it hires. The employment application included two pertinent questionnaires: a "Friday Essential Functions Questionnaire" and a "Medical History Questionnaire." On the Essential Functions questionnaire, plaintiff indicated that she could engage in the following activities: lifting more than 50 pounds; carrying more than 50 pounds; frequent bending, pulling, pushing, kneeling, squatting, and twisting; standing for long periods; and sitting for long periods. In the Medical History portion of the application, plaintiff indicated that she had never filed a workers' compensation insurance claim, suffered any injury or undergone surgery, or received treatment or consultation about back pain or possible back injuries.

To complete her application, plaintiff signed the following verification: "I hereby state all information on this Work History Record is true and factual. . . . I understand that any false statement may result in my immediate dismissal. . . . I understand that Friday Services is an Employer-At-Will, and that my employment can be terminated at any time, with or without reason and with or without cause."

Friday Staffing matched plaintiff with Continental Teves, a company that manufactures automotive parts. Friday Staffing then conducted an in-person interview in which plaintiff verified her ability to lift and carry up to and over 50 pounds and that she had not filed any workers' compensation claims previously, did not have any condition that might limit her ability to perform any work assignment, had not had any prior injury or surgery, and had not ever received treatment or consultation for back pain or a back injury.

Plaintiff initially began working for Continental Teves on 2 June 2010 as an assembly line worker. The job profile for the position included occasional walking and stooping; frequent overhead reaching; pushing 40- to 45-pound baskets of automotive parts; lifting automotive parts from baskets to the assembly line; and carrying boxes of automotive parts from a staging area to a table.

At Continental, plaintiff worked a CO2 line and a drum line. With regard to the CO2 line, the Commission found that plaintiff was required to constantly lift trailer arms weighing between 20 and 25 pounds. In April 2011, plaintiff was working 80 percent of her time on the CO2 line, "which involved the more strenuous work of the lines Plaintiff worked." At approximately 1:00 a.m. on 18 July 2011, while at work, plaintiff re-injured her back. A subsequent MRI revealed a "new large focal disk [sic] extrusion at L5-S1 compressing the descending right S1 nerve root." Since the 18 July 2011 injury, plaintiff has been out of work.

Plaintiff completed an undated Form 18, "Notice of Accident to Employer and Claim of Employee," and on 17 November 2011, defendant Friday Staffing filed a Form 61 denying liability for plaintiff's claim. The deputy commissioner denied her claim in an opinion and award filed 9 November 2012. Plaintiff appealed to the Full Commission.

The Full Commission filed an opinion and award on 21 June 2013, affirming the opinion and award of the deputy commissioner with minor modifications. The Commission concluded that plaintiff's claim should be denied pursuant to N.C. Gen. Stat. § 97-12.1 on the grounds that at the time plaintiff was hired: "(1) Plaintiff knowingly and willfully made a false representation as to her physical condition; (2) Defendant-Employer relied upon said false representation by Plaintiff, and the reliance was a substantial factor in Defendant-Employer's decision to hire her; and (3) there was a causal connection between the false representation by Plaintiff and her claimed injury." Plaintiff timely appealed the Full Commission's opinion and award to this Court.

Discussion

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists[.]" *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). As the

fact-finding body, " '[t]he 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) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). "[T]he Industrial Commission's conclusions of law are reviewable *de novo*." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003).

[1] Plaintiff challenges the Full Commission's interpretation and application of N.C. Gen. Stat. § 97-12.1, which provides:

> No compensation shall be allowed under this Article for injury by accident or occupational disease if the employer proves that (i) at the time of hire or in the course of entering into employment, (ii) at the time of receiving notice of the removal of conditions from a conditional offer of employment, or (iii) during the course of a post-offer medical examination:
>
> (1) The employee knowingly and willfully made a false representation as to the employee's physical condition;
>
> (2) The employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; and
>
> (3) There was a causal connection between false representation by the employee and the injury or occupational disease.

Plaintiff does not dispute the Commission's determination that the first two elements were met, but contends on appeal that that the Commission erred in finding a causal connection, the third element. In making this argument, plaintiff appears to contend that defendants must show through expert testimony "that the herniated disc was caused or contributed [to] by the alleged fraud." Defendants, however, contend that plaintiff has applied the wrong causation standard.

Our appellate courts have not interpreted and applied N.C. Gen. Stat. § 97-12.1 since its enactment in 2011. "Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent."

First Bank v. S & R Grandview, L.L.C., ___ N.C. App. ___, ___, 755 S.E.2d 393, 394 (2014) (internal citations omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (internal citation and quotation marks omitted).

Statutory language is ambiguous if it is " 'fairly susceptible of two or more meanings.' " *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (quoting *Abernethy v. Bd. of Comm'rs of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577 580 (1915)). Because our courts have defined the phrase "causal connection" differently depending on the issues involved, that phrase is ambiguous when included in a statute, at least in the workers' compensation context. *Compare Chambers v. Transit Mgmt.*, 360 N.C. 609, 618, 619, 636 S.E.2d 553, 559 (2006) (explaining that in order to prove "causal connection" between specific traumatic event and injury, plaintiff must show that injury was " 'the direct result of a specific traumatic incident' " (quoting N.C. Gen. Stat. § 97-2(6) (2005)) *with Morrison v. Burlington Indus.*, 304 N.C. 1, 39, 43, 282 S.E.2d 458, 481, 484 (1981) (requiring for "causal connection" a showing that "occupational conditions . . . significantly contributed to the [occupational] disease's development"), *and Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (holding decedent's death did not arise out of her employment due to lack of "causal connection" between work and death since nature of work did not increase risk she would be slain by criminal act).

When confronted with ambiguous statutory language, we may determine the intent of the legislature by " 'considering [the statute's] legislative history and the circumstances of its enactment.' " *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (quoting *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008)). Also, when construing an amendment, "[i]n determining legislative intent, we may 'assume that the legislature is aware of any judicial construction of a statute.' " *Blackmon v. N.C. Dep't of Corr.*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)).

Prior to the enactment of N.C. Gen. Stat. § 97-12.1, a majority opinion in *Freeman v. J.L. Rothrock*, 189 N.C. App. 31, 36, 657 S.E.2d 389, 392-93 (2008), *rev'd per curiam sub nom. Estate of Freeman v. J.L. Rothrock, Inc.*, 363 N.C. 249, 676 S.E.2d 46 (2009), attempted to adopt the "*Larson* test":

> Pursuant to the Larson test, an employee may be barred from recovering workers' compensation benefits as a result of a false statement at the time of hiring when the employer proves:
>
> > (1) The employee must have knowingly and wilfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.
>
> 3 *Larson's Workers' Compensation Law* § 66.04 (2006) (footnotes omitted).

Although the *Freeman* majority opinion found "no specific statutory basis for the Larson test," it nonetheless reasoned that common law doctrines provided implicit authority because " 'in construing the provisions of this State's Workers' Compensation Act, common law rules . . . remain in full force . . . .' " *Id.* at 37, 38, 657 S.E.2d at 393, 394 (quoting *Tise v. Yates Constr. Co.*, 122 N.C. App. 582, 587, 471 S.E.2d 102, 106 (1996)). This Court, after applying the *Larson* test, reversed the Industrial Commission's award of compensation to Mr. Freeman on the grounds that he had made misrepresentations to his employer regarding a prior back injury and workers' compensation claim. *Id.* at 48, 657 S.E.2d at 399.

Judge Wynn, however, dissented, noting: "Not only have we previously rejected the *Larson* test, there is no legislative authority for this Court to adopt such a test." 189 N.C. App. at 49, 657 S.E.2d at 400 (Wynn, J., dissenting). The Supreme Court reversed "for the reasons stated in the dissenting opinion[.]" *Estate of Freeman*, 363 N.C. at 250, 676 S.E.2d at 46.

In short, just two years preceding the enactment of N.C. Gen. Stat. § 97-12.1, the Supreme Court reversed *Freeman* because this Court had "no legislative authority" to read the *Larson* test into the Workers' Compensation Act. 189 N.C. App. at 49, 657 S.E.2d at 400 (Wynn, J., dissenting). Then, when the legislature enacted N.C. Gen. Stat. § 97-12.1, it used language identical to the *Larson* test as set out and applied in this Court's opinion in *Freeman*. We presume that the legislature was aware of this Court's decision in *Freeman* applying the *Larson* test and, under these circumstances, we conclude that the legislature intended to adopt the *Larson* test as *Freeman* initially expressed and applied it.

In *Freeman*, this Court determined that the requirement of "a causal connection" between the plaintiff's misrepresentations and his earlier back injury presented "the issue . . . whether his undisclosed medical condition increased his risk of injury." 189 N.C. App. at 45, 46, 657 S.E.2d at 398, 399. We, therefore, hold that when requiring a "causal connection" to satisfy the third element of N.C. Gen. Stat. § 97-12.1, the legislature intended that a defendant show that a plaintiff's undisclosed or misrepresented injury, condition, or occupational disease increased the risk of the subsequent injury or disease.

Here plaintiff concedes, and Dr. Harley's unchallenged expert medical testimony indicates, that plaintiff's prior back problems, which she concealed from defendant employer, increased the potential for her 2011 back injury if she violated her lifting restrictions. Nonetheless, plaintiff argues that because there was "no evidence as to the exact parts being lifted" while plaintiff worked with Continental, the Commission could not have concluded that plaintiff violated her lifting restrictions, and thus there could be no causal connection between her prior and recent back injuries. We disagree.

The Commission found that plaintiff developed severe right-sided pain and numbness on 18 July 2011 "as she was having to constantly twist and bend over to pick up trailer arms from the pallet." In addition, the Commission found that the trailer arms weighed between 20 and 25 pounds, a weight in excess of her work restrictions. Although plaintiff argues that there was no evidence that she violated her work restrictions of lifting no more than 20 pounds, the Commission's finding regarding the weight of the trailer arms was supported by plaintiff's own testimony that the trailer arms weighed "about twenty -- maybe twenty-five pounds."

The Commission was entitled to find based on plaintiff's testimony that she was exceeding her work restrictions when she injured her back. That finding, in conjunction with Dr. Harley's unchallenged expert testimony that plaintiff was at an increased risk of injury if she exceeded her work restrictions, supported the Commission's conclusion that a causal connection existed between plaintiff's false representation and her 18 July 2011 back injury. We, therefore, hold that the Commission did not err in denying plaintiff's claim for worker's compensation based on N.C. Gen. Stat. § 97-12.1. *See Freeman*, 189 N.C. App. at 47-48, 657 S.E.2d at 399 (holding that causal connection was established by expert testimony that plaintiff's undisclosed medical condition increased his risk of back injury at issue).

[2] Plaintiff alternatively argues that N.C. Gen. Stat. § 97-12.1, as applied in this case, is an unconstitutional ex post facto law. However, " '[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal.' " *In re Cline*, ___ N.C. App. ___, ___, 749 S.E.2d 91, 102 (2013) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)), *disc. review denied*, ___ N.C. ___, 753 S.E.2d 781 (2014). "Since this argument was not raised [below], it is not properly before us on appeal." *Id.* at ___, 749 S.E.2d at 102.

However, even if this issue were before us, it would be without merit since N.C. Gen. Stat. § 97-12.1 does not involve a criminal offense. *See State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (explaining that ex post facto implicates four types of laws: " '1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*[]' " (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39, 110 S. Ct. 2715, 2719 (1990)). Accordingly, we affirm the Commission's opinion and award.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

STATE v. CLAPP

[235 N.C. App. 351 (2014)]

STATE OF NORTH CAROLINA
v.
ROBERT ALFONZO CLAPP

No. COA13-785

Filed 5 August 2014

1. Sexual Offenses—sexual offense against 13, 14, or 15 year old child—taking indecent liberties with student while acting as first responder—requested jury instruction—law of accident

The trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by failing to give defendant's requested jury instruction concerning the law of accident. There was a complete absence of any evidence tending to show that defendant digitally penetrated the victim's vagina with his fingers in an accidental manner. Further, any error was rendered harmless by the trial court's subsequent decision to instruct the jury with respect to the issue of accident.

2. Evidence—character—working well with children—no unnatural lust or desire to have sexual relations with children

A de novo review revealed that the trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to allow a former member of the coaching staff to testify that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The excluded testimony did not tend to show the existence or non-existence of a pertinent character trait.

3. Evidence—character—honesty—trustworthiness—substantive evidence

A de novo review revealed that the trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to instruct the jury that it could consider evidence concerning defendant's character for honesty and trustworthiness as substantive evidence of his guilt or innocence. A person exhibiting those character traits was not necessarily less likely than others to commit these crimes.

Appeal by defendant from judgments entered 5 February 2013 by Judge Shannon Joseph in Alamance County Superior Court. Heard in the Court of Appeals 6 January 2014.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant.

ERVIN, Judge.

Defendant Robert Alfonzo Clapp appeals from judgments entered based upon his convictions for committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder. On appeal, Defendant argues that the trial court erred by refusing to instruct the jury concerning the law of accident, precluding Defendant from eliciting evidence tending to show that Defendant did not have an unnatural lust or sexual interest in children, and refusing to instruct the jury concerning the use of evidence tending to show Defendant's character for honesty and trustworthiness for substantive purposes. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 23 March 2011, H.D.[1] was a fifteen-year-old freshman at Walter Williams High School. At that time, Defendant served as a first responder at Walter Williams. Individuals acting as first responders, who had previously been known as athletic trainers, were supposed to be present at practices in order to assess injuries, determine if additional medical services were needed, and assist student athletes in addressing problems associated with actual and potential injuries by performing such functions as taping ankles, stretching sore muscles, and providing ice. The compensation that Defendant received was provided by funds supplied to the Alamance County schools and the Walter Williams booster club.

1. H.D. will be referred to throughout the remainder of this opinion as Hailey, a pseudonym used for ease of reading and to protect H.D.'s privacy.

Hailey ran cross country during her freshman year and participated in outdoor track during her freshman and sophomore years. As a result of the fact that she had sustained injuries during both the cross country and track seasons, Hailey sought assistance from Defendant after her cross country and track coach, Brian Smith, told her to be stretched by Defendant. In accordance with that instruction, Defendant periodically stretched Hailey in the field house.

On 23 March 2011, Defendant approached Hailey and inquired about the status of her ankle injury. After Defendant asked Hailey if she wanted to be stretched, Hailey agreed to allow Defendant to stretch her ankle and followed Defendant to the stretching room in the field house. At that time, Hailey was wearing loose running shorts that included built-in underwear and an additional pair of underwear.

After the two of them arrived in the field house, Defendant asked Hailey to remove her socks and shoes and began bending Hailey's foot back and forth. During that process, Defendant asked Hailey if she was still experiencing pain as the result of an earlier hip injury. After Hailey stated that her hip occasionally hurt when she ran, Defendant told Hailey that he would stretch her hip in addition to her ankle.

As Hailey laid on her back, Defendant stretched Hailey's leg in two different ways. In one instance, Defendant lifted Hailey's leg up and pushed it towards her chest using her foot. In the other instance, Defendant had Hailey curve her leg and then pushed the leg to the side. While Defendant performed these stretches, he massaged the inner portion of Hailey's leg at the point where her thigh met her torso using two or three fingers while instructing Hailey to let him know if she experienced pain. As he massaged Hailey's leg, Defendant mentioned that he had to leave shortly in order to sell tickets to the baseball game.

At some point during the leg stretching process, Defendant began massaging an area near her vagina underneath both of the pairs of underwear that Hailey was wearing. As he did so, Defendant inserted his finger or thumb into the area in or around Hailey's vagina on two different occasions. On the first of these occasions, one of Defendant's fingers went to the side of the lips of Hailey's vaginal opening. On the second of these two occasions, Defendant's finger penetrated Hailey's vagina. Defendant made no response after Hailey mumbled, "Watch your fingers." In light of Defendant's silence, Hailey reiterated, "Watch your fingers." Although Defendant removed his fingers from the area around Hailey's vagina after the making of the second statement, he continued to make massaging motions beneath Hailey's underwear.

The stretching and massaging process involving Defendant and Hailey lasted for approximately thirty to forty-five minutes. During that time, a number of other people entered the field house in order to ask Defendant to provide them with tape or ice. At such times, Defendant would hold brief conversations with the new arrivals while moving his hand from beneath Hailey's underwear to a location on Hailey's thigh or knee. The stretching and massaging process ended when Defendant was summoned to help sell tickets to the baseball game.

After she left the field house, Hailey told her friend, T.H.,[2] that Defendant had touched her "in places" and moved his fingers beneath her underwear. Although Teresa insisted that the incident be reported to Mr. Smith, Hailey was too embarrassed to tell Mr. Smith what had happened. As a result of the fact that Mr. Smith was involved in a romantic relationship with the mother of another student named R.B.,[3] Teresa and Hailey decided to ask Rachel to speak with Mr. Smith instead. After Rachel spoke with Mr. Smith, Hailey told him that Defendant had touched her vagina.

After returning home, Hailey met with investigating officers, told them what had happened, and stated that another girl on the track team, whom she identified as A.B.,[4] had had a similar experience with Defendant. On the same evening, Detective Steven Reed of the Alamance County Sheriff's Department interviewed Defendant, who denied having engaged in the conduct that Hailey had described and asserted that any contact that he might have had with Hailey's vagina would have been the result of an accident.

In the fall of 2010, Amy was a sixteen-year-old junior at Walter Williams who was experiencing pain as the result of an earlier groin injury. For that reason, Amy asked Defendant to stretch her. At the time that Defendant and Amy went to the field house in order to complete the stretching process, Amy was wearing yoga shorts and underwear. After the two of them reached the field house, Defendant stretched Amy's leg in three different ways. First, Defendant lifted Amy's leg. Secondly, Defendant had Amy push back with her lifted leg while the other leg

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2. T.H. will be referred to throughout the remainder of this opinion as Teresa, a pseudonym used for ease of reading and to protect T.H.'s privacy.

3. R.B. will be referred to throughout the remainder of this opinion as Rachel, a pseudonym used for ease of reading and to protect R.B.'s privacy.

4. A.B. will be referred to throughout the remainder of this opinion as Amy, a pseudonym used for ease of reading and to protect A.B.'s privacy.

remained on the table. Finally, as Amy remained seated, Defendant pushed her knee towards her chest.

While Defendant stretched Amy's leg, he used his hand to massage the muscles in that appendage. As he did so, Defendant's fingers went beneath Amy's underwear. Although Defendant's fingers touched the interior of the lips of Amy's vaginal opening, he did not touch the vicinity of Amy's vagina in any other way. As she left the training room, Amy told a member of the coaching staff that Defendant was a "creep" without describing what he had just done to her. Amy did not report the details of Defendant's conduct to anyone because she was embarrassed about what had happened.

In addition, M.A.[5] testified that she had participated in soccer and volleyball during her years as a Walter Williams student. After sustaining a groin injury during her senior year, Mandy asked Defendant for advice about stretches and other exercises that she could perform. In response to this request, Defendant told Mandy to meet him in the gym on the following day. At the appointed time, Defendant took Mandy to the athletic training room instead of the gym at a time when no one else was there.

After asking Mandy to lie down on a table, Defendant stretched Mandy's groin by lifting her leg, which was in a bent position, and pushing it to the side. Subsequently, Defendant massaged Mandy's groin area while using some sort of oil. As he did so, Defendant's hands were near Mandy's "bikini line," which she described as the area in which her thigh met her torso. After massaging Mandy's groin for five or ten minutes, Defendant asked Mandy to flip over and lie on her stomach. Once she had done as he requested, Defendant massaged Mandy's lower back and upper buttocks area. As he did this, Defendant's hands went beneath Mandy's underwear.

At approximately the same time that Mandy flipped over in order to lie on her back a second time, a loud bang was heard in the locker room immediately adjacent to the athletic training room. After telling Mandy to stay in the training room, Defendant went outside to check on the origin of the noise. Although Mandy remained in the athletic training room after Defendant's departure, she got dressed. When Defendant returned, Mandy told Defendant that she needed to go to practice and left. Mandy never told anyone about Defendant's conduct due to embarrassment.

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5. M.A. will be referred to throughout the remainder of this opinion as Mandy, a pseudonym used for ease of reading and to protect M.A.'s privacy.

2. Defendant's Evidence

At the time of trial, Defendant was forty-seven years old. Defendant had become involved with the sports program at Walter Williams because his two sons wanted to play football at that institution. For that reason, Defendant began helping the football team in the summer of 2007 by filling the water cooler. After his volunteer efforts were noticed, Defendant was asked to join the staff and help the football team. Subsequently, Defendant worked with the basketball, wrestling, track, lacrosse, and cross country teams as well as the football team.

During the first year in which Defendant was compensated for his services, his title was assistant trainer. However, Defendant's job title was changed to first responder, rather than a trainer, because he did not have a four-year college degree and because the Alamance County school system did not want people who lacked four-year degrees to be referred to as assistant trainers. As a part of the process by which he served as a member of the Walter Williams athletic staff, Defendant attended injury management classes for three consecutive years, which is the maximum amount of training available to individuals in his position. Defendant served as a member of the Walter Williams athletic staff for four consecutive years.

In the autumn, Defendant's primary responsibility was to assist the football team. However, volleyball and cross country students would ask for Defendant's assistance during that time of year as well. Although Defendant assisted student athletes both outdoors and in the field house, he generally elected to take student athletes to the field house if he needed to plug in a massaging instrument or use equipment located in that building. The door to the field house was always propped open with a steel pole in order to prevent the door from slamming on windy days. People freely entered and exited the field house during times when Defendant was assisting student athletes.

On 23 March 2011, Defendant approached a group of students to ask about their injuries. As part of that process, Defendant asked Hailey, who was standing nearby, about her ankle, which had been swollen the previous week. After Hailey indicated that she had hurt her other ankle, Defendant asked Hailey if she wanted him to stretch her ankle. After Hailey agreed, the two of them went to the field house.

Initially, Defendant checked both of Hailey's ankles and twisted and flexed the recently injured ankle for the purpose of determining the extent to which it was tight or loose. Next, Defendant spent five or ten

minutes stretching Hailey's ankles. As Defendant worked, various individuals entered and exited the field house for the purpose of obtaining ice, wraps, or assistance with various injuries.

After he finished stretching Hailey's ankles, Defendant asked Hailey if she had any other injuries. In response, Hailey stated that an old right hip flexor injury had begun hurting her again. Upon receiving this information, Defendant stretched Hailey's hip by taking her right leg and pushing it towards her chest and across her left leg and body. Although Defendant placed two fingers on Hailey's right hip, Defendant kept those two fingers at the spot at which Hailey said that she was experiencing pain and never moved them from that spot.

In view of the fact that he had been trained to treat both sides of an injured student athlete's body, Defendant stretched Hailey on the left as well as on the right. After stretching the left side of her body, Defendant returned to the right side to eliminate any remaining soreness before stretching Hailey's ankles further. Defendant spent about ten to fifteen minutes stretching each of Hailey's legs. Defendant denied having ever put his fingers or thumbs into Hailey's vagina.

At the time that he received a phone call asking for help in selling baseball tickets, Defendant ended his treatment session with Hailey. As Defendant was exiting the field house, two other female student athletes asked Defendant for assistance. After assisting the two female student athletes, Defendant left to help with the baseball ticket sales.

According to Defendant, Amy was a dedicated runner who would not stop to rest even when advised to do so. Defendant acknowledged that he had assisted Amy on a couple of occasions during her freshman year. During her sophomore year, Amy suffered numerous injuries, including shin splints, a sore knee, and a recurring hip injury. As a result of the fact that Amy had sustained a hip injury, Defendant stretched her leg on occasion and saw her more than once a week. On those occasions, Defendant iced and stretched Amy and used a massaging instrument in order to relieve the effects of muscle strains and pulls. Defendant denied having ever touched Amy's genital area.

According to Defendant, Mandy approached him in order to obtain treatment for a groin injury. Prior to the date upon which this request was made, Defendant had treated Mandy for wrist, shoulder, and groin injuries. As a result of the fact that Mandy was not available for treatment at the time that she made this request, Defendant suggested that the two of them get together on the following day.

Although Mandy met with Defendant according to the agreed-upon schedule, she was in a hurry to go to practice. Even so, Defendant and Mandy went to the training room beneath the gym, where Defendant treated Mandy using a massage instrument, putting pressure where Mandy's upper thigh met her torso, and applying ice. Mandy did not say anything to him or appear to be upset during the treatment process.

After hearing a heavy weight dropping in another room, Defendant left Mandy alone while he investigated what he had heard. Upon Defendant's return, Mandy stated she needed to get to practice and departed. When Defendant saw Mandy, Mandy thanked Defendant for his assistance. Defendant denied having ever touched Mandy's vagina.

A number of individuals associated with the athletic program at Walter Williams testified that Defendant was trustworthy and had a good reputation for honesty and truthfulness. Similarly, four female students who participated in the Walter Williams athletic program testified that Defendant was honest and truthful, with several of them also asserting that he was trustworthy.

B. Procedural History

On 24 March 2011, a warrant for arrest charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child and committing a sexual offense against Hailey while acting as a coach was issued. On 31 March 2011, a warrant for arrest charging Defendant with taking indecent liberties with Amy while acting as a coach was issued. On 8 August 2011, the Alamance County grand jury returned bills of indictment charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a coach, and taking indecent liberties with Amy while acting as a coach.

Although the case was called for trial before Judge G. Wayne Abernathy and a jury at the 29 May 2012 criminal session of the Alamance County Superior Court, the jury was unable to reach a unanimous verdict, resulting in the declaration of a mistrial on 5 June 2012. On 11 June 2012, the Alamance County grand jury returned superseding bills of indictment charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a coach, and committing a sexual offense against Hailey while acting as a first responder, taking indecent liberties with Amy while acting as a coach, and taking indecent liberties with Amy while acting as a first responder.

The charges against Defendant came on for trial before the trial court and a jury at the 28 January 2013 criminal session of the Alamance County Superior Court. At the beginning of Defendant's second trial, the State announced that it had elected not to proceed against Defendant on the charges alleging that he had committed a sexual offense against Hailey and had taken indecent liberties with Amy while acting as a coach. On 5 February 2013, the jury returned a verdict convicting Defendant of committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a first responder, and taking indecent liberties with Amy while acting as a first responder. At the conclusion of the ensuing sentencing hearing, the trial court arrested judgment in the case in which Defendant was convicted of committing a sexual offense against Hailey while acting as a first responder and entered judgments sentencing Defendant to a term of 192 to 240 months imprisonment based upon his conviction for committing a sexual offense against a child of 13, 14, or 15 years of age and to a consecutive term of 6 to 8 months imprisonment based upon his conviction for taking indecent liberties with Amy while acting as a first responder, with this sentence being suspended and with Defendant being placed on supervised probation for 24 months on the condition that he pay attorney's fees and costs, obtain a mental health assessment, have no contact with Amy, and comply with the usual terms and conditions of probation. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Accident Instruction

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by failing to instruct the jury concerning the law of accident in accordance with Defendant's request. More specifically, Defendant contends that the trial court was required to submit the accident instruction that he requested given that the record contained evidence that would have supported a jury determination that Defendant had not penetrated Hailey's vagina intentionally. Defendant's contention lacks merit.

1. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own

judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

2. Appropriateness of Accident Instruction

" '[W]hen a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance.' " *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E. 2d 271, 273 (quoting *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993)), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). "If a requested instruction is refused, defendant on appeal must show the proposed instruction was not given in substance, and that substantial evidence supported the omitted instruction," with " '[s]ubstantial evidence' [being] that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted) (quoting *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985), and *State v. Gray*, 337 N.C. 772, 777-78, 448 S.E.2d 794, 798 (1994)).

At the jury instruction conference, Defendant requested that the trial court instruct the jury concerning the law of accident in accordance with N.C.P.J.I. 307.11, which begins by stating that "the defendant asserts the victim's injury was the result of an accident" and indicates that, if the State failed to satisfy the members of the jury that "the injury was in fact accidental, the defendant would not be guilty of any crime even though his acts were responsible for the victim's injury." After the trial court refused to deliver the requested instruction, Defendant made no further request for the delivery of an accident instruction. During its deliberations, the jury inquired about what it should do "if there is proof beyond a reasonable doubt that penetration however slight by an object into the genital opening of a person's body occurred but the State has not proven beyond a reasonable doubt that the penetration was 'willful' and of a sexual nature." In response, the trial court instructed the jury that "[t]he words [']of a sexual nature['] have not appeared in your instruction and you are to apply the instruction that the Court has given you"; that, "[w]ith respect to the willful[ness] question, that word doesn't appear in

the instructions"; and that "the defendant's conduct must be intentional and not accidental."

Although the trial court did refuse to deliver the requested accident instruction based on the inclusion of language in N.C.P.J.I. 307.11 to the effect that "the defendant asserts" that the victim's injury was accidental in nature, Defendant's contention that the trial court's action was not motivated by the absence of sufficient record support for the proposed accident instruction is not consistent with our reading of the record. Instead, we read the record to reflect that the trial court refused to deliver the requested accident instruction given the complete absence of any evidence tending to show that he digitally penetrated Hailey's vagina with his fingers in an accidental manner, a determination that we believe to have been correct.

At trial, Defendant explicitly denied having inserted his finger into Hailey's vagina or touching Amy's genital area in any way. Even so, Defendant asserts that he was entitled to the delivery of an accident instruction given the presence of other evidence contained in the record, including Detective Reed's statement that Defendant, at one point, said, "I f I did touch her in any way it was innocent and I didn't mean to do it," and Hailey's statement that "I didn't say anything though because I thought that he wasn't thinking about it like that or he didn't realize it and was only doing his job." In spite of Defendant's assertions to the contrary, neither of these statements provide any basis for a jury determination that Defendant accidentally penetrated Hailey's vagina with his finger. On the contrary, Defendant's statement to Detective Reed was hypothetical in nature and immediately preceded a renewed denial that Hailey's allegations were true. Similarly, Hailey's assertion that Defendant might not have known what he was doing amounted to mere speculation about Defendant's mental state and provides no basis for a determination that Defendant accidentally penetrated Hailey's vagina with his finger. As a result, we have no hesitancy in concluding that the record simply did not support the delivery of the requested accident instruction.

Moreover, even if the trial court's decision to refrain from instructing the jury in accordance with N.C.P.J.I. 307.11 was erroneous, any such error was rendered harmless by the trial court's subsequent decision to instruct the jury with respect to the issue of accident. During its deliberations, the jury asked the trial court, among other things, what it should do if "the State has not proven beyond a reasonable doubt that the penetration was 'willful' and of a sexual nature must we still rule guilty in Count One?" Upon reviewing this inquiry, the trial court proposed that the jury be instructed that, in order to support of a finding of guilt, "the

conduct -- defendant's conduct at issue must be intentional, not accidental." After Defendant indicated that he did not object to the trial court's proposal, the trial court instructed the jury that a finding that the defendant acted intentionally, rather than accidentally, was necessary in order for the jury to return a guilty verdict. In view of the fact that the trial court explicitly told the jury during the course of its deliberations that Defendant could not be convicted if his conduct was accidental, we are unable to see how the trial court's initial refusal to instruct the jury in accordance with N.C.P.J.I. in any way prejudiced Defendant. *State v. Rogers*, 299 N.C. 597, 603-05, 264 S.E.2d 89, 93-94 (1980) (holding that any error in the trial court's initial jury instructions was cured by a correct instruction given in response to a jury inquiry). As a result, for both of these reasons, Defendant is not entitled to relief from the trial court's judgments based upon the trial court's refusal to instruct the jury with respect to the law of accident.

B. Excluded Witness Testimony

[2] Secondly, Defendant contends that the trial court erred by refusing to allow Scott Frazier, a former member of the Walter Williams coaching staff, to testify that he possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. More specifically, Defendant contends that the excluded evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the crimes with which he had been charged. We do not find Defendant's argument persuasive.

1. Standard of Review

The essential issue raised by Defendant's second challenge to the trial court's judgments is whether the testimony in question tended to show that Defendant possessed a character trait that is relevant to the matters at issue in this case. In other words, the inquiry that we are required to conduct in this instance is relevance-based in nature. Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228, *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398 (1991), *cert. denied*, 506 U.S. 915, 121 S.E.2d 321, 121 L. Ed. 2d 241 (1992). As a result, we will review Defendant's challenge to the exclusion

of Mr. Frazier's testimony using the loose *de novo* standard of review utilized in addressing relevance-related issues.

2. Admissibility of Proposed Character Evidence

According to N.C. Gen. Stat. § 8C-1, Rule 404(a)(1), "[e]vidence of a pertinent trait of [the accused's] character offered by an accused" is admissible. "The exception allowing evidence of a 'pertinent' trait should be 'restrictively construed,' [however,] since such evidence is excluded as a general rule." *State v. Wagoner*, 131 N.C. App. 285, 293, 506 S.E.2d 738, 743 (1998) (quoting *State v. Sexton*, 336 N.C. 321, 359-60, 444 S.E.2d 879, 901, *cert. denied*, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994)), *disc. review denied*, 350 N.C. 105, 533 S.E.2d 476 (1999). As a result, "an accused may only introduce character evidence of 'pertinent' traits of his character and not evidence of overall 'good character.' " *Id.* (quoting *State v. Mustafa*, 113 N.C. App. 240, 245-46, 437 S.E.2d 906, 909, *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994)).

This Court addressed the admissibility of similar evidence in *Wagoner*, in which we held that the trial court properly excluded evidence tending to show the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait. *Id.* at 292-93, 506 S.E.2d at 743. Similarly, the evidence at issue in this case, which consisted of testimony from Mr. Frazier to the effect that he saw no indication that Defendant had an unnatural lust for or sexual interest in young girls, constituted nothing more than an attestation to Defendant's normalcy. As a result, given that the excluded testimony did not tend to show the existence or non-existence of a pertinent trait of character, the trial court did not err by excluding Mr. Frazier's testimony concerning Defendant's lack of unnatural lust for or sexual interest in young girls.

C. Instruction Concerning Defendant's Character or Honesty and Trustworthiness

[3] Finally, Defendant contends that the trial court erred by refusing to instruct the jury that it could consider evidence concerning his character for honesty and trustworthiness as substantive evidence of his guilt or innocence. According to Defendant, the trial court was required to deliver the requested instruction given that it constituted an accurate statement of the law arising from the evidence. We do not find Defendant's argument persuasive.

1. Standard of Review

As we have previously noted, arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149. Thus, we will review Defendant's challenge to the trial court's refusal to instruct the jury that it was entitled to consider the evidence tending to show that Defendant was honest and trustworthy as substantive evidence of his guilt or innocence using a *de novo* standard of review.

2. Appropriateness of Honesty and Trustworthiness Instruction

At trial, five witnesses testified, in essence, that Defendant was honest and trustworthy. During the jury instruction conference, Defendant requested that the trial court instruct the jury in accordance with N.C.P.J.I. 105.60, which informs the jury that a person having a particular character trait "may be less likely to commit the alleged crime(s) than one who lacks the character trait" and tells the jury that, if it "believe[d] from the evidence [that the defendant] possessed the character trait" in question, it "may consider this in [its] determination of [Defendant's} guilt or innocence[.]" The trial court rejected Defendant's request.

As we have already noted, "when a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith." *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992). For that reason, the trial court would have been required to deliver the requested instruction in the event that the jury could reasonably find that an honest and trustworthy person was less likely to commit the crimes at issue in this case than a person who lacked those character traits. As the Supreme Court noted in *State v. Bogle*, "a person is 'truthful' if she *speaks* the truth" and "is 'honest' if his *conduct*, including his speech, is free from fraud or deception." 324 N.C. 190, 202, 376 S.E.2d 745, 752 (1989). Similarly, a person is "trustworthy" if he or she is "worthy of trust; dependable, reliable." *Webster's New World College Dictionary* 1537 (4th ed. 2006). Although an individual's honesty and trustworthiness are certainly relevant to an individual's credibility, we are unable to say that a person exhibiting those character traits is less likely than others to commit a sexual offense against a child of 13, 14, or 15 years of age or to take indecent liberties with a student while acting as a first responder. *Bogle*, 324 N.C. at 202, 376 S.E.2d at 752 (stating that, since "[n]either trafficking by possession nor by transporting marijuana necessarily involves being untruthful or engaging in fraud or deception,"

"we hold that the traits of truthfulness and honesty are not 'pertinent' character traits to the crime of trafficking in marijuana by possession or transportation"). As a result, the trial court did not err by refusing to instruct the jury that it could consider the evidence tending to show that Defendant was an honest and trustworthy individual as substantive evidence of his guilt or innocence.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Chief Judge MARTIN concurred in this opinion prior to 1 August 2014.

STATE OF NORTH CAROLINA
v.
BRANDON MIKAL FOSTER, DEFENDANT

No. COA13-1084

Filed 5 August 2014

1. Drugs—delivery of cocaine—jury instruction—entrapment

The trial court erred in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment. Defendant presented sufficient evidence that an undercover officer tricked him into believing that the officer was romantically interested in defendant in order to persuade defendant to obtain cocaine for him, that defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer.

2. Discovery—sanction—failure to instruct jury—defense of entrapment—lack of notice of defense

The trial court abused its discretion in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment as

a discovery sanction under N.C.G.S. § 15A-910(a) for failure to provide specific information as to the nature and extent of the defense. The trial court made no findings of fact to justify imposition of such a harsh sanction, and the State had not shown that it suffered any prejudice from the lack of detail in the notice filed eight months prior to trial.

Appeal by defendant from judgment entered 11 October 2012 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Alesia M. Balshakova, for the State.

Gilda C. Rodriguez for defendant-appellant.

GEER, Judge.

Defendant Brandon Mikal Foster appeals his conviction of delivery of cocaine. Defendant argues on appeal that the trial court erred in refusing to instruct the jury on the defense of entrapment. Based on defendant's evidence that an undercover officer tricked defendant into believing that the officer was romantically interested in defendant in order to persuade defendant to obtain cocaine for him, that defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer, we hold that the trial court erred in failing to instruct the jury on the defense of entrapment.

The trial court, however, indicated that it was also denying the request for an instruction as a sanction under N.C. Gen. Stat. § 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by N.C. Gen. Stat. § 15A-905(c)(1)(b) (2013). Because the trial court made no findings of fact to justify imposition of such a harsh sanction, and the State has not shown that it suffered any prejudice from the lack of detail in the notice filed eight months prior to trial, we hold that the trial court abused its discretion in precluding the use of the entrapment defense as a sanction. Consequently, defendant is entitled to a new trial.

Facts

The State's evidence tended to show the following facts. On 22 June 2011, Officer Thomas Wishon, Officer Daniel Bignall, and Detective Hefner

of the Charlotte-Mecklenburg Police Department ("CMPD") were working undercover at Chasers, a male strip club in Charlotte, North Carolina, investigating a complaint of sexually-oriented business and narcotics violations. Defendant was working as a dancer at the club that night, and there were only a few patrons at the club. Defendant, whose stage name was Thunder, and another dancer with the stage name Mercury approached the officers after they finished dancing. Mercury and defendant gave lap dances to Officer Bignall and Detective Hefner.

Officer Wishon engaged in small talk with defendant throughout the evening. Officer Wishon admitted that he tipped defendant and flirted, maintained eye contact, and joked with defendant. Towards the end of the night, Officer Wishon asked defendant if he had a "hookup" and indicated that he would like to buy some cocaine. Defendant stated that he had a "connect." Officer Wishon asked defendant for his phone number and told defendant that he was going to a friend's party but would be back after the party. Before leaving, Officer Wishon gave defendant a goodbye hug.

Later that night, Officer Wishon received three text messages from defendant. The first stated, " 'You have to come back. You never got a lap dance. LOL.:)' " The second text stated, " 'I can get what you wanted if you need it. Let me know quick.' " The third text stated, " 'My friend needs to know what to get if your [sic] still wanting that.' " Officer Wishon did not respond to these text messages or return to the nightclub that night.

Officer Wishon did not text defendant until 29 June 2011, when he asked defendant if he was able to "hook him up." Officer Wishon and defendant exchanged several text messages discussing the details of the deal. They arranged for Officer Wishon to go to Chasers the following day to make the purchase.

The next day, 30 June 2011, Officer Wishon went to Chasers where he and other undercover officers played pool with defendant until defendant's "source" arrived. When defendant's source, later identified as Paul Peterson, walked in, defendant said to Officer Wishon: "Oh. He's here. Let me get your money." Officer Wishon handed defendant $185.00 and watched defendant follow Mr. Peterson into the bathroom. When defendant returned, he had a plastic baggy of cocaine tucked into his underwear on his hip. He asked Officer Wishon to be "frisky" with him. Officer Wishon told defendant that he was making him uncomfortable, but he, nevertheless, retrieved the plastic baggy of cocaine from defendant's hip. Shortly thereafter, defendant was arrested.

After defendant was read his rights, he agreed to talk with Officer Stephanie White of the CMPD. Defendant told Officer White that he met Mr. Peterson in the bathroom, took the $185.00 given to him by Officer Wishon and exchanged it for the cocaine, put the cocaine in his underwear and Officer Wishon retrieved it. Defendant also told Officer White that Officer Wishon had offered him $100.00 to broker the drug deal. Officer White testified that, generally, undercover officers will only offer someone a cigarette or up to $5.00 at most to broker a drug deal and that defendant's claim that he was offered $100.00 was a lie.

On 11 July 2011, defendant was indicted for sale of a controlled substance, possession with intent to sell or deliver a controlled substance, and delivery of a controlled substance. On 2 February 2012, defendant filed a notice of an intent to assert the defense of entrapment. The notice stated that "undercover CMPD Officer Wishon, acting on behalf of Charlotte Mecklenburg Police Department induced Brandon M. Foster to obtain cocaine, a crime not contemplated by Brandon M. Foster."

At a pretrial hearing on 8 October 2012, the State made a motion in limine to bar defendant from asserting the defense of entrapment on the grounds that the notice did not "contain specific information as to the nature and the extent of this defense" as required by N.C. Gen. Stat. § 15A-905(c). The trial court initially denied the State's motion and then asked defendant to describe more specifically what constituted entrapment in this case. After defendant gave a proffer of the evidence he intended to present to support the defense, the trial court again denied the State's motion. The trial began the following day.

Defendant testified in his own defense on the second day of trial. He testified that on the night of 22 June 2011, he believed that Officer Wishon was interested in him. Officer Wishon initiated a conversation with defendant by asking him if he was single and asking other personal information such as what he liked to do besides dancing. Defendant told Officer Wishon that he was in school and that he danced to pay the bills. He was intrigued by Officer Wishon, noting that Officer Wishon "never mentioned the fact that I was sitting there in boy shorts or that I am half naked" and instead kept the conversation intellectual and sincere.

By the end of the night, defendant had given Officer Wishon his real name and telephone number, information that he normally did not give guests at the club. At one point, defendant commented that he thought Officer Wishon liked Mercury. Officer Wishon responded that he was into defendant and that is why he wanted defendant's number and not Mercury's. When Officer Wishon left, he gave defendant a goodbye hug.

At one point in the night, after having a one-on-one conversation with defendant, Officer Wishon asked both defendant and Mercury about getting "straight," which is street language for cocaine. Defendant asked "[w]hat are you talking about?" Officer Wishon clarified that he was referring to cocaine. Defendant stated that he did not do drugs. However, both defendant and Mercury told Officer Wishon that they would ask around for him.

Defendant testified that he did ask around, but did not find anything that night. He did not speak to Officer Wishon about drugs again before the officers left. Although defendant texted Officer Wishon later about the lap dances, he denied sending the second and third text messages. The last communication between the two of them that night was Officer Wishon's response stating that he was not coming back to the club that night.

Defendant did not hear from Officer Wishon again until one week later when he texted defendant, "Are you working tonight?" By that time, defendant had deleted Officer Wishon's number from his phone, thinking that Officer Wishon had lost interest in him. Defendant's first response, therefore, was to ask who was texting him. When defendant found out it was Officer Wishon, he became excited and giddy. They texted back and forth a few times, but when Officer Wishon turned the conversation back to narcotics, defendant slowed down his responses. Referring to cocaine, Officer Wishon asked defendant if he had ever found what Officer Wishon had asked for the night of 22 June 2011. Defendant told him he had not. Officer Wishon asked defendant if he could find him drugs, and defendant told him the same thing he had told him the first night -- that he could ask around.

Defendant told Officer Wishon to contact Eric, a customer of defendant's. Defendant began texting between both Officer Wishon and Eric, relaying the questions of Officer Wishon to Eric, and forwarding Eric's responses to Officer Wishon. Officer Wishon told defendant he was planning on going to Chasers the following night. Defendant forwarded Officer Wishon a text from Eric stating that the drug dealer was supposed to be at Chasers that night as well.

On the night of 30 June 2011, defendant was excited to see Officer Wishon at Chasers and went over to talk to him after he had finished a set. It was a busy Friday night, so defendant was unable to talk as much as he had been able to talk on the first night. Instead, the conversations were centered on Officer Wishon's questions about the dealer and whether he was there or not -- Officer Wishon would go to the bar

and tip defendant and ask defendant when the drug dealer would arrive. He tipped defendant $10.00.

Eric was at the bar and signaled to defendant when the drug dealer, Paul Peterson, had arrived. Defendant recognized the drug dealer as "Uncle Paul," a man who frequented the bar, but he did not know him personally. Defendant told Officer Wishon that the drug dealer was at the club, and Officer Wishon asked defendant to get the cocaine for him. Defendant took the money from Officer Wishon, followed Mr. Peterson to the bathroom, and returned with the cocaine. He put the drugs in his underwear and asked Officer Wishon to retrieve the drugs because he did not want to touch the drugs himself.

When asked why he got the drugs for Officer Wishon, defendant replied: "I was doing what I could to impress him. He seemed to like me. I liked him, so I tried to do that for him." He also explained, "I had a crush. Having someone continuously ask you for the same thing makes you feel persuaded to do it."

Defendant testified that in one of the texts from Officer Wishon, he was told he would be given $100.00 for setting everything up. However, defendant did not state that money was what motivated him to help Officer Wishon. Instead, defendant explained:

> I mean, I just I liked him. In my life and my organization at that profession I was doing, I didn't get a lot of chances to meet decent people to actually date or who could possibly be a possible date.
>
> When I found someone who I was really, really interested in and I felt like they were interested in me, I took a chance basically.
>
> I didn't per se want to do it with the narcotics or be involved in it. I felt like I was pushed more to get it or else the interest would have been lost on his part in me.

Defendant felt that Officer Wishon took advantage of both his emotions and his financial situation. He had told Officer Wishon that he lived with his mother and that he was working to support himself and his mother and pay for school. He had never gotten in trouble before and does not use or sell drugs.

At the close of all the evidence, the State again argued that it was not given notice of the nature and extent of defendant's defense of entrapment until trial and asked that it be given until the following morning to

address the issue of entrapment. In response, defense counsel asserted that defendant filed his intent to use the entrapment defense on 2 February 2012, 240 days prior to trial.

The trial court then indicated that "[w]hat the Court is going to hear with regard to the entrapment defense is whether or not that defense should go to the jury." The court granted the State's request that it wait to hear the parties' arguments until the following morning. Specifically, the trial court stated, "In the morning at 9:30, [the court will hear the parties] about whether the issue of entrapment goes to the jury, based on the evidence before the Court." Defense counsel responded: "So I may be clear what the State is asking and what the Court is deciding -- we are not revisiting the issue of the motion in limine. We are objecting. There is sufficient evidence to present the testimony to submit to a jury or its consideration."

The following morning, after hearing the parties' arguments regarding the sufficiency of the evidence presented on entrapment, the trial court concluded that there was not sufficient evidence to instruct the jury on the entrapment defense. Although the parties had not addressed the adequacy of the notice, the trial court also added:

> In addition, the Court having given further thought to the motion of State raises the issue of notice to the state [sic] of the intent to use the defense of entrapment, the Court finds that the defendant failed to comply with the statute; that the defendant did not give them specifics as to the basis of the defense.
>
> So in addition to the Court's rul[ing] finding that the defendant failed to present sufficient or competent evidence of entrapment, the defendant further failed to notify the State in accordance with the statute of its intent to raise the defense of entrapment. The Court will not submit the issue of entrapment to the jury.

The jury found defendant guilty of delivery of cocaine and not guilty of the other two offenses. The trial court sentenced defendant to a presumptive-range term of five to six months imprisonment. The court suspended defendant's sentence and placed defendant on supervised probation for 12 months. Defendant timely appealed to this Court.

Discussion

[1] Defendant first argues that the trial court erred in concluding that the evidence was insufficient to warrant submission of the defense of entrapment to the jury.

> "Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him. To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials. The defendant has the burden of proving entrapment to the satisfaction of the jury."

State v. Thompson, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001) (quoting *State v. Davis*, 126 N.C. App. 415, 417-18, 485 S.E.2d 329, 331 (1997)).

"The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment." *State v. Hageman*, 307 N.C. 1, 30, 296 S.E.2d 433, 449 (1982). Instead, the defendant must present evidence that the law enforcement officers or their agents engaged in "acts of persuasion, trickery, or fraud[.]" *State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 462 (1985). "A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant." *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983).

In *State v. Stanley*, 288 N.C. 19, 32-33, 215 S.E.2d 589, 597-98 (1975), our Supreme Court held that the evidence presented at trial established that the defendant was entrapped as a matter of law. There, the undisputed evidence showed that an undercover officer, based on false representations, befriended the teenage defendant and became a "big brother" figure to him. *Id.* at 32, 215 S.E.2d at 597. The officer repeatedly asked the defendant where he could find and buy drugs, persuaded the defendant to make more than one drug buy for him, and supplied the money for the purchases. *Id.* at 21-22, 215 S.E.2d at 591. On two occasions prior to his arrest for possession of a controlled substance, the defendant purchased drugs that turned out to be counterfeit because the defendant did not know the difference. *Id.* at 22, 215 S.E.2d at 591. The Supreme Court held that this evidence demonstrated that the criminal design originated with the officer, and there was not any evidence

indicating that the defendant was predisposed to engage in possession or distribution of drugs. *Id.* at 32-33, 215 S.E.2d at 597-98.

Even where the evidence does not establish entrapment as a matter of law, "[i]f defendant's evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment." *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002). In *Branham*, the defendant testified that two days before he was arrested, an informant, who was the older brother of a girl defendant knew, asked defendant if he "'could get him a kilo of Cocaine,'" and the defendant responded that he had no idea where to get it. *Id.*, 569 S.E.2d at 30. The next day, the informant repeatedly asked the defendant for LSD, and persisted until the defendant agreed to locate the LSD requested. *Id.* Although the defendant offered to drive the informant to the seller so that the informant could make the purchase himself, the defendant ultimately agreed to make the purchase after the informant offered the defendant an additional $100.00. *Id.* at 100-01, 569 S.E.2d at 30.

This Court held that the trial court properly instructed the jury on the issue of entrapment since "there was evidence that [an informant] and the officers initiated the offense, but also evidence from which the jury could have inferred that defendant was predisposed to sell LSD." *Id.* at 100, 569 S.E.2d at 30. Specifically, "[d]efendant's testimony that [the informant] repeatedly pushed defendant to obtain drugs for him, that he attempted to get [the informant] to make the purchase himself, and that he had never before been involved in any drug sales of this quantity" was sufficient to raise an issue of fact as to inducement and lack of predisposition to commit the offenses, despite the State's evidence to the contrary. *Id.* at 101-02, 569 S.E.2d at 30.

In *Jamerson*, the defendant presented evidence that an undercover officer and an informant came to the defendant's apartment and asked the defendant to sell them some drugs, but the defendant said that he did not have any. 64 N.C. App. at 302, 307 S.E.2d at 436. When the officer and informant returned a few hours later and the defendant still did not have any drugs and had not made any attempt to locate any drugs, the officer repeatedly told the defendant that he desperately needed drugs because he was an addict. *Id.*, 307 S.E.2d at 437. After the informant located a person who would sell drugs and offered the defendant $15.00 to make the purchase, the informant drove the defendant to the location and the defendant made the purchase with money provided by the officer. *Id.* This Court held that this evidence was sufficient to require submission of a jury instruction on entrapment. *Id.* at 303, 307 S.E.2d at 437.

We believe that the facts of this case are analogous to *Stanley*, *Branham*, and *Jamerson*. Defendant's evidence and Officer Wishon's own testimony tended to show that Officer Wishon falsely led defendant to believe that he was romantically interested in defendant by asking him personal questions about defendant's life, maintaining eye contact, flirting, joking with him throughout the evening, asking for defendant's phone number, saying that he was "into" defendant rather than another dancer, and giving defendant a hug goodbye the first night they met.

The undisputed evidence shows that Officer Wishon, who was investigating narcotics violations, initiated the conversation regarding drugs by asking defendant where he could get "straight," a street term for cocaine that defendant did not understand. After Officer Wishon clarified that he was referring to cocaine, defendant told Officer Wishon that he did not do drugs but that he would ask around. Although the State presented evidence that defendant, later that evening, renewed the conversation about his obtaining cocaine for Officer Wishon in two text messages defendant sent, defendant admitted sending only a flirtatious text message that did not mention drugs and denied sending the other two text messages. For purposes of the entrapment issue, we must assume that defendant's testimony is true.

Consequently, viewing the evidence in the light most favorable to defendant, there was no further discussion of drugs after defendant said simply that he would ask around until, a week later, Officer Wishon texted defendant about whether he was working that night. In the meantime, defendant had deleted Officer Wishon's phone number from his phone, an act a jury could find was consistent with someone focused on a romantic interest rather than a potential drug client. The initial texts a week later were not about drugs, but Officer Wishon then again asked defendant about obtaining drugs for him. Defendant ultimately did not himself act as an intermediary with the drug dealer, but identified one of his clients who could assist Officer Wishon with connecting with the drug dealer -- evidence which suggests that defendant did not have a predisposition to engage in drug dealing.

In addition, defendant testified that he only agreed to help Officer Wishon obtain the drugs because he was romantically interested in Officer Wishon, and, after being continuously asked about the drugs, "felt like [he] was pushed more to get it or else the interest would have been lost on [Officer Wishon's] part in [defendant]." The record also contains no evidence that defendant had previously used drugs, engaged in drug dealing, or was aware of common street lingo for drugs -- indeed, the record

contains no evidence of any other behavior on defendant's part that was suggestive of a predisposition to help supply someone with drugs.

In sum, viewed in a light most favorable to defendant, Officer Wishon's flirtatious behavior towards defendant combined with his persistent requests for cocaine persuaded defendant to obtain the cocaine for Officer Wishon. Further, defendant's evidence would permit the jury to find that the idea for the crime (delivery of cocaine) originated with and was pursued solely by Officer Wishon, with no indication that defendant had any predisposition to participate in drug transactions.

Thus, as in *Stanley*, *Branham*, and *Jamerson*, the undercover officer initiated the conversation about drugs, persisted in seeking drugs, and provided defendant with the money for the exchange. Moreover, Officer Wishon's acts of inducement, like those of the undercover officer in *Stanley*, involved emotional manipulation including creating a false relationship and then taking advantage of the defendant's desire to maintain that relationship. Finally, as in *Stanley*, there was no evidence of predisposition.

The State, nevertheless, argues that Officer Wishon merely afforded defendant the opportunity to commit the offense, arguing that the facts of this case are analogous to *Thompson*, *Martin*, *State v. Rowe*, 33 N.C. App. 611, 235 S.E.2d 873 (1977), *State v. Booker*, 33 N.C. App. 223, 234 S.E.2d 417 (1977), and *State v. Stanback*, 19 N.C. App. 375, 198 S.E.2d 759 (1973), decisions holding that the evidence was insufficient to show that the defendant was entrapped. We disagree.

In each of the cases cited by the State, the evidence established that the undercover agent had reason to believe the defendant was a drug dealer, or the defendant was otherwise specifically targeted by the undercover agent because the agent had reason to believe the defendant could obtain drugs. *See Martin*, 77 N.C. App. at 63, 334 S.E.2d at 460 (evidence was presented that defendant told undercover agent that "he had been dealing drugs for sixteen years and had a reputation in the community as a 'fair dealer who gave a good product at a fair price' "); *Thompson*, 141 N.C. App. at 699-700, 543 S.E.2d at 162 (sheriff's office received information from informant that defendant was selling drugs from his apartment and defendant was a heroin addict with extensive criminal history); *Booker*, 33 N.C. App. at 223, 234 S.E.2d at 417 (undercover officer went to defendant's house and asked to buy drugs, and defendant stated that he knew where he could get some marijuana and was able to retrieve drugs in 20 minutes); *Rowe*, 33 N.C. App. at 614, 235 S.E.2d at 875 (evidence established that undercover agent "worked

herself into the drug traffic society and purchased drugs from the defendant"); *Stanback*, 19 N.C. App. at 376, 198 S.E.2d at 760 (undercover agent went to defendant's apartment to purchase drugs that defendant had promised to sell to agent previous day, and defendant told agent after transaction that " '[a]nytime you need anything, an ounce or a lid or a pound, I can get it for you' ").

While the State argues that this case is similar to the decisions upon which it relies because defendant did not hesitate before telling Officer Wishon that he would ask around about drugs and did so in a short period of time, in the cases the State cites, any evidence tending to show that the defendant needed little urging before agreeing to the undercover agent's request was consistent with the totality of the evidence suggesting that the defendant was, in fact, a drug dealer. When, in this case, the evidence is viewed in the light most favorable to defendant, there is no suggestion that defendant was a drug dealer, had any criminal history, or was in any way predisposed to commit the offense of delivery of cocaine independent of government influence.

Given the lack of evidence regarding defendant's criminal predisposition, any evidence that defendant required little urging before agreeing to ask around for drugs could be attributed by a jury to defendant's romantic interest in Officer Wishon and a desire to impress him. Thus, the evidence that the State points to as showing that defendant was predisposed to commit the crime is consistent with defendant's theory of the entrapment defense and merely creates an issue of fact for the jury to decide. We therefore hold that defendant presented sufficient evidence of the essential elements of entrapment, and the trial court erred in refusing to instruct the jury based on a lack of evidence.

[2] The question remains whether the trial court's denial of defendant's request for an entrapment instruction may be upheld as a sanction for defendant's failure to provide adequate notice of his defense. N.C. Gen. Stat. § 15A-905(c)(1)(b) specifies that a defendant must provide the State with notice of its intent to offer at trial the defense of entrapment and that the notice must "contain specific information as to the nature and extent of the defense." The trial court, in this case, found generally that defendant violated N.C. Gen. Stat. § 15A-905(c)(1)(b) because "defendant did not give [the State] specifics as to the basis of the defense." The trial court then used this violation as an additional basis for its refusal to submit the issue of entrapment to the jury.

If a trial court determines that a defendant has violated N.C. Gen. Stat. § 15A-905(c)(1)(b), it may impose any of the following sanctions on the defendant:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2013).

However, "[p]rior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article." N.C. Gen. Stat. § 15A-910(b). "If the court imposes any sanction, it must make specific findings justifying the imposed sanction." N.C. Gen. Stat. § 15A-910(d).

"Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 810 (1991). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

As explained by our Supreme Court, "the rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance." *State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977). Despite the General Assembly's emphasis on protecting defendants from the State's noncompliance, "[s]uch legislative intent . . . does not give defendants *carte blanche* to violate discovery orders, but rather, defendants and defense counsel both must act in good faith, just as is required of their counterparts representing the State." *State v. Gillespie*, 180 N.C. App. 514, 525, 638 S.E.2d 481, 489 (2006), *modified and affirmed*, 362 N.C. 150, 655 S.E.2d 355 (2008). Thus, the rules of discovery have been applied with equal force to both defendants and the State to ensure a fair trial and avoid unfair surprise for both parties.

See, e.g., *State v. McMahon*, 67 N.C. App. 181, 183, 312 S.E.2d 526, 527 (1984) (applying common law notions of fairness and holding that discovery rule applicable to State is equally applicable to defendant).

In *State v. Cooper*, ___ N.C. App. ___, ___, 747 S.E.2d 398, 414 (2013), *appeal dismissed and disc. review denied*, ___ N.C. ___, 753 S.E.2d 783 (2014), this Court reversed the trial court's imposition of sanctions against a defendant when the sanction imposed "was disproportionate to the purposes this state's discovery rules were intended to serve." In *Cooper*, the trial court had excluded the testimony of the defendant's second expert witness as a sanction for the defendant's failure to disclose the witness to the State as required by N.C. Gen. Stat. § 15A-905 (2011). ___ N.C. App. at ___, 747 S.E.2d at 403. The defendant had only proffered the second expert witness after the State successfully moved at trial to exclude the testimony of defendant's first expert witness on the basis that the witness was not qualified to testify as an expert. *Id.* at ___, 747 S.E.2d at 413. Because the State had not indicated any intention to challenge the defendant's first expert witness prior to trial, the defendant did not anticipate needing a second expert, and, as a result, did not have the second expert on its witness list. *Id.* at ___, 747 S.E.2d at 413.

In addressing whether the trial court abused its discretion in sanctioning the defendant by excluding the testimony of the expert witness, the *Cooper* Court first recognized that the imposition of sanctions on a criminal defendant has constitutional implications because of a defendant's constitutional right under the Sixth Amendment to present a defense. *Id.* at ___, 747 S.E.2d at 414. The Court then pointed to the factors set out by the United States Supreme Court in *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d. 798, 108 S. Ct. 646 (1988), to be considered in determining the appropriate sanction, consistent with that constitutional right, when a defendant has failed to disclose a witness:

> "Although the *Taylor* Court declined to cast a mechanical standard to govern all possible cases, it established that, as a general matter, the trial judge (in deciding which sanction to impose) must weigh the defendant's right to compulsory process against the countervailing public interests: (1) the integrity of the adversary process, (2) the interest in the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness *vel non* of the violation, the relative simplicity

> of compliance, and whether or not some unfair tactical advantage has been sought."

___ N.C. App. at ___, 747 S.E.2d at 415 (quoting *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988)).

Applying the *Taylor* factors to the facts in *Cooper*, the Court reasoned:

> Defendant, in failing to provide earlier notice to the State, was clearly not seeking any tactical advantage. The trial court made no finding of willful misconduct, and the record divulges none. Defendant only sought out another expert . . . after the State was successful in moving to limit [the first expert's] testimony in the middle of the trial. At that point, Defendant had no way to present vital expert testimony and comply with N.C.G.S. § 15A–905(c)(2).
>
> In light of the lack of willful misconduct on the part of Defendant, the rational reason presented for failing to inform the State before trial that Defendant would be calling [the second expert], the role of the State in having this situation arise after the trial had commenced, the fundamental nature of the rights involved, the importance to the defense of the testimony excluded, and the minimal prejudice to the State had the trial court imposed a lesser sanction -- such as continuance or recess, we hold that imposing the harsh sanction of excluding [the second expert] from testifying constituted an abuse of discretion.

Id. at ___, 747 S.E.2d at 415.

In *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, *appeal dismissed and disc. review denied*, 366 N.C. 594, 743 S.E.2d 205 (2013), this Court addressed, in similar fashion, the appropriateness of the extreme sanction of dismissal when the State has committed a discovery violation, even though sanctioning the State has no constitutional implications. The Court held that " '[g]iven that dismissal of charges is an "extreme sanction" which should not be routinely imposed,' " such dismissals " 'should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.' " *Id.* at ___, 737 S.E.2d at 470 (quoting *State v. Allen*, ___ N.C. App. ___, ___, 731 S.E.2d 510, 527-28, *disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, ___ U.S. ___, 185 L. Ed. 2d 876, 133 S. Ct. 2009 (2013)). After noting that the defendant had possession of the evidence

the State initially failed to disclose, the Court held that "[a]bsent a finding explaining the specific and continuing prejudice Defendant will suffer, the trial court's order dismissing the charge on this basis is in error." *Id.* at ___, 737 S.E.2d at 470.

We see no reason why the rules set out in *Cooper* and *Dorman* should not apply with equal force to a trial court's refusal to instruct the jury on an affirmative defense presented by the defendant. Such a sanction in this case has the same effect on the defendant as the "harsh sanction" in *Cooper* that interfered with the defendant's defense -- even though defendant was allowed to present entrapment evidence, the jury was not instructed in a way that permitted it to consider that evidence as a basis for acquitting defendant. Given such a harsh sanction, the trial court was required, under *Dorman*, to justify the sanction with findings regarding the prejudice to the State resulting from defendant's discovery violation.

Requiring the trial court to consider the prejudice to the State resulting from the defendant's discovery violation before imposing the extreme sanction of precluding an affirmative defense is also consistent with this court's holding in *State v. McDonald*, 191 N.C. App. 782, 786-87, 663 S.E.2d 462, 465 (2008). In *McDonald*, the defendant failed to provide the State with notice of the defenses it intended to assert at trial as required by N.C. Gen. Stat. § 15A-905, despite the State having made several motions requesting notice of defenses. *Id.* at 785, 663 S.E.2d at 464-65. The trial court ultimately allowed the defendant to assert the defenses of duress and accident but precluded the defendant from asserting the defenses of voluntary intoxication and diminished capacity. *Id.*, 663 S.E.2d at 465.

This Court noted that the State "had anticipated the accident defense" and that "unlike the diminished capacity and voluntary intoxication defenses, the defense of duress would not require substantial preparation on the part of the State, including the engagement of experts." *Id.* at 786, 663 S.E.2d at 465. Because the trial court "precluded only those defenses that would have prejudiced the State" and allowed defendant to proceed with other defenses -- either because the State could have anticipated the defense, or because the State could quickly and adequately prepare despite the late notice -- this Court held that the trial court's sanction was not an abuse of discretion. *Id.* at 787, 663 S.E.2d at 465.

In line with this Court's analysis in *Cooper*, *Dorman*, and *McDonald*, we hold that in considering the totality of the circumstances prior to

imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

In this case, the trial court found that defendant violated N.C. Gen. Stat. § 15A-905(c)(1)(b) because "defendant did not give [the State] specifics as to the basis of the defense." Assuming, without deciding, that defendant's notice constituted a discovery violation, we must determine, in light of the factors listed above, whether the trial court abused its discretion in refusing to instruct the jury on the defense of entrapment.

We note first that the procedure by which the trial court concluded that defendant failed to comply with the notice requirements suggests that it was not the result of a reasoned decision. The trial court originally denied the State's pretrial motion for sanctions. At the end of the trial, the trial court indicated that it would hear oral argument regarding the submission of the entrapment defense to the jury, but specifically limited the party's arguments to the sufficiency of the evidence -- the court confirmed that it would not be revisiting the court's decision to deny the State's pretrial motion for sanctions. Nevertheless, after ruling that the evidence presented by defendant was insufficient to support an instruction on the defense of entrapment, the trial court, *sua sponte*, without giving defendant any notice or an opportunity to be heard, decided to reverse its denial of the State's pretrial motion for sanctions and preclude the use of the entrapment defense as a sanction.

In doing so, the trial court made no findings "justifying the imposed sanction" as required by N.C. Gen. Stat. § 15A-910(d) and made no finding that the State had been prejudiced by the lack of specifics in defendant's notice. The court simply found that defendant had failed to fully comply with the notice statute. The procedure followed by the trial court, the failure to find prejudice, and the lack of findings are inconsistent with the court's ruling being a reasoned decision to further the purposes of the rules of discovery. Rather, the record suggests that the trial court imposed sanctions simply as an afterthought to bolster its decision not to instruct the jury on entrapment.

In addition, our review of the record reveals no basis for imposing the extreme sanction of precluding a defense. There is no indication that defendant, in failing to give more specifics in his notice, acted in bad faith or to gain an unfair advantage at trial. Rather, defendant filed a timely notice well in advance of trial, disclosing his intent to assert the defense of entrapment and including the identity of the specific officer whom defendant contended induced him to commit the crime. The State made no showing that the omission of further details was in bad faith or a tactical move.

Indeed, the record indicates that any lack of preparation to meet the defense was contributed to by the State's failing to take timely action. Defendant filed his notice on 2 February 2012 -- more than eight months prior to trial. During that time, the State had general notice of defendant's intent to use the defense and specific notice that Officer Wishon's actions resulted in the alleged entrapment. Officer Wishon, the State's lead witness, was readily accessible to the State for questioning regarding his conduct in interacting with defendant. In the event that the State desired additional specifics regarding defendant's entrapment defense, the State could have requested more information from defendant or moved for an order requiring defendant to provide adequate discovery. Given defense counsel's apparent belief that he had complied with N.C. Gen. Stat. § 15A-905(c)(1)(b), the State's failure to request more information or to alert defendant that its notice was inadequate during the eight months prior to trial, similar to the State's failure in *Cooper* to notify the defendant prior to trial of its intention to challenge the defendant's primary expert, deprived defendant of an opportunity to comply with the rules of discovery in a timely fashion and avoid being subject to sanctions.

Moreover, the refusal to instruct the jury concerning an affirmative defense is a harsh sanction that implicates defendant's fundamental right to present a defense at trial. In contrast, the prejudice to the State resulting from defendant's violation was minimal. During the pretrial motions hearing, defendant gave a detailed proffer of the evidence he intended to present to establish entrapment. The State did not call its first witness until the following day, and defendant did not testify until the second day of trial. Because the evidence on entrapment was testimonial in nature, was limited to the acts of Officer Wishon, and "would not require substantial preparation on the part of the State, including the engagement of experts[,]" *McDonald*, 191 at 786, 663 S.E.2d at 465, the additional days to prepare after receiving notice of the nature and extent of defendant's entrapment defense should have been sufficient

to remedy any prejudice to the State. In any event, the State would not have been prejudiced had the trial court imposed a less severe sanction such as a continuance or a recess.

After considering the totality of the circumstances, we hold that the trial court's refusal to instruct the jury on the entrapment defense was not a proper sanction for any failure by defendant to provide sufficiently specific notice of his intent to assert the defense of entrapment. The trial court's ruling, therefore, constituted an abuse of discretion. *See Dorman*, ___ N.C. App. at ___, 737 S.E.2d at 470 (holding trial court's pretrial order suppressing certain witnesses' testimony from use in future proceedings based on State's initial failure to disclose various documented conversations was in error when defendant was in possession of the relevant information well before trial, and trial court failed to detail specific and continuing prejudice defendant suffered as a result of initial nondisclosure and failed to explain how suppression of witnesses' testimony remedied non-disclosure).

Conclusion

We hold that defendant presented sufficient evidence to warrant submission of the entrapment defense to the jury. Further, the trial court abused its discretion when precluding the entrapment defense as a sanction for defendant's having served a notice of his intent to rely upon the entrapment defense that was not sufficiently specific. Defendant is, therefore, entitled to a new trial.

New trial.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA
v.
KEITH LAUCHON JACKSON, JR., DEFENDANT

No. COA14-140

Filed 5 August 2014

1. Criminal Law—defendant's escape attempt during trial—additional security—jury instructions

Given the facts of the case, the trial court did not abuse its discretion or violate defendant's constitutional rights by ordering physical restraints on defendant, additional security in the courtroom, and an escort for the jury at the end of the day after defendant attempted to escape during his trial for murder and armed robbery. The jury was sequestered in the jury room at the time and was told only that there had been a security incident. The trial court specifically instructed the jury not to consider the use of restraints and the jury had no way to know that the security issue of the previous day was related to defendant's trial until evidence of defendant's escape was introduced.

2. Criminal Law—defendant's escape attempt—increased security—individual inquiry not made

The trial court did not err or violate defendant's due process rights by failing to individually ask the jurors whether they had been affected by increased security after defendant attempted to escape during trial. Under these facts, a general inquiry of the jury regarding their exposure to media coverage of the trial was sufficient to ensure that they had not been exposed to improper, prejudicial material.

3. Evidence—flight—attempted escape during trial—admissible

The trial court did not abuse its discretion in a prosecution for murder and armed robbery by admitting evidence of defendant's attempted escape during his trial. Although defendant persuasively argued that evidence of his escape was highly prejudicial, the evidence was not unfairly prejudicial. The inference that defendant attempted to escape because he is guilty is precisely the inference that makes evidence of flight relevant.

4. Evidence—prison letter—written in Crip code—admissible

The trial court did not err in a prosecution for robbery and murder by admitting a letter defendant wrote while in jail that was in Crip code and by allowing the State to ask him on cross-examination

whether he was in a gang. The letter itself was relevant and not unfairly prejudicial because defendant solicited in the letter the murder of one of the State's primary witnesses against him. Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter.

Appeal by defendant from Judgment entered 17 June 2013 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Keith Jackson ("defendant") appeals from the judgment entered after a Guilford County jury found him guilty of first degree murder. We find no error.

I. Background

Defendant was indicted for murder and robbery with a dangerous weapon on 14 April 2008. The indictments alleged that defendant robbed a Lucky Mart store in High Point on 31 October 2007 and, in doing so, shot and killed Joshua Sweitzer. Defendant pled not guilty and proceeded to jury trial.

During the lunch break on the first day of testimony, defendant escaped from custody of the sheriffs. As he was being led out of the holding cell, defendant managed to slip out of his leg shackles. Once he was free from his leg shackles, he ran from the bailiffs, fled down a corridor, vaulted about 15 feet over the railing onto the third floor, ran down the stairwell, and exited the courthouse. He was apprehended in a nearby parking lot.

Once he was returned to custody, the trial court addressed counsel. The jury was in the jury room when defendant escaped and none of them could have seen the incident, nor would they have been aware that the courthouse was briefly on "lockdown" due to the incident. So, the trial court decided to tell the jury only that there had been a security incident that would prohibit them from continuing for the day. The judge also decided to give the jurors a security escort to their cars. When he

dismissed the jury for the day, he re-emphasized that they were not to read any media coverage of the trial. He further told them that the security escort was "nothing to be concerned about" and that it was just an effort "to exercise as much caution as need be."

When court reconvened the next morning, defendant moved for a mistrial. He was concerned that the jurors "may have been tainted by the deluge of press coverage and the fact that the facility itself was under lockdown." He further argued that having the jurors escorted to their cars could have been construed as an expression of judicial opinion. He asked the trial court to individually inquire of each juror.

The trial court explained that it had asked the bailiff to ask the jurors whether any of them had seen any reports about the events of the previous day. None of them indicated that they had. The trial court decided that it was unnecessary to individually inquire of the jurors. Instead, once the jury was back in the courtroom, the trial court asked them, as a whole, whether they had followed the court's instructions to avoid any coverage of the trial. None of them indicated that they had violated the court's instructions.

The trial court explained its decision to inquire of the jury as a whole:

> They were probably never fully aware that the courthouse was in lockdown mode because they were sequestered in the jury room, and no one told them anything about what was going on. But as I had said yesterday, I did it out of an overabundance of caution. And I think in matters such as this, safety concerns always outweigh and are paramount to anything else, and I do not believe that the jury would necessarily connect it to anything involving this defendant, and I do not believe it necessary to conduct individual questioning of the jurors about this.

Before the trial recommenced, the trial court decided to order physical restraints and additional security personnel, including one bailiff standing within arm's reach of defendant. Defendant objected to the added restraints. The trial court conducted the required hearing under N.C. Gen. Stat. § 15A-1031. The trial court found that

> in light of the seriousness of the charge, first-degree murder, with the penalty being life imprisonment without the possibility of parole; the fact that the defendant is of a temperament that he sometimes loses his temper, and I

> have personally seen this in previous hearings as well as his prior attorneys have noted this and reported it to the Court; the defendant's relatively young age and his obvious nimbleness in being able to escape yesterday; the fact that he has made threats to harm others or cause a disturbance in the past, both to his prior attorneys and making statements to others; as well as the nature and physical security of the courtroom; and again, the need to protect those immediately around the defendant from any potential harm, the Court will find that it is necessary to restrain the defendant during the trial.

It concluded that

> the restraint [was] reasonably necessary to maintain order, to prevent another escape attempt, and to provide for the safety of other persons in the defendant's immediate vicinity here in the courtroom. So I believe that in light of the events of yesterday, it is necessary for me to take this action.

After asking the jurors whether they had seen any coverage of the trial, the trial court instructed the jury on the additional restraints. It stated,

> I am instructing you that the defendant has been placed in some physical restraints, and I do not -- I am ordering you not to consider this in any fashion, whether in terms of weighing the evidence or in determining the defendant's guilt or innocence in this matter. You are to conduct yourselves just in a manner as if the defendant had not been placed in any restraints.

Defendant did not object to these instructions or request additional cautionary instructions. The remainder of the trial proceeded without incident.

At trial, the State's evidence showed the following:

On the evening of 31 October 2007, Josh Sweitzer was working the cash register in a Lucky Mart convenience store owned by his uncle, Travis Luck. Mr. Luck left the store to get Mr. Sweitzer some dinner. As he was leaving, he saw two men standing outside of the store. He asked them what they were doing. They claimed to be waiting for a ride. One of the men was defendant.

After Mr. Luck left, two men walked into the store wearing bandanas over their faces and hoods covering their heads. One of the men walked up to the cash register and demanded money from Mr. Sweitzer. Mr. Sweitzer did not respond, so the man shot him in the head. He then approached the only customer in the store and demanded money from his wallet. The customer opened his wallet to show the gunman that he only had $7. The two perpetrators then walked out of the store without taking any money. Mr. Sweitzer died of a single gunshot wound to the right side of his forehead. When Mr. Luck returned to his store, police had already responded to the scene and were in the process of putting up crime scene tape.

The next morning, Officer Kyle Shearer searched the area around the Lucky Mart. He found a blue baseball hat hidden in a bush, a camouflage bandana on the ground, and a .38 caliber silver revolver within approximately 200 yards of the store. The revolver still had five unspent rounds in it and one spent shell casing. No fingerprints were found on the revolver and no DNA was found on the bandana. Police were, however, able to recover DNA from the baseball hat. They later matched its predominate profile to defendant.

Ronnie Covington testified that on 31 October 2007, he and defendant were hanging out, discussing ways to get money, including robbery. Defendant had a .38 caliber revolver with him. Mr. Covington and defendant went to the Lucky Mart store. Mr. Covington went in first to buy a cigar and to see who was in the store and then stepped back out. They both then went into the store, where Mr. Convington confronted the only customer and defendant attempted to rob Mr. Sweitzer. While he was looking at the customer, Mr. Covington heard a single gunshot. He and defendant ran out of the store. Defendant hid his gun under an old car before leaving the area. Over the next several months, defendant, Mr. Covington, and other associates of theirs committed a string of armed robberies in the area.

Matthew Savoy, another one of the men involved in the string of armed robberies, also testified at trial. He testified that defendant said to him: "Man, you missed it. We hit this robbery and we murdered this dude. Man, we went into the store, pointed a gun at him and told him to give me the money. He wouldn't move. He ain't say nothing. So I like, man, give me the money. He was just looking at me, so I shot him in the face."

Mr. Savoy also testified that after he and defendant were arrested, they were placed in adjoining pods at the jail. They passed notes back

and forth. Defendant passed one note to Mr. Savoy written in "Crip code," a disguised method of writing used by members of the Crip gang and their associates. Mr. Savoy explained that defendant is a Crip, but denied being one himself. Nevertheless, he testified that he could read and understand "Crip code." He translated the note written by defendant as follows:

> Matt, what's cracking, Big Homey. I hope everything 360 with you. Man, look, I just got a visit from my people, and shit, and where it is, Ronnie talking and his cousin Neco snitching on his behalf. That's how Marcel got caught. We was at Neco's house counting loot when we had hit the lick in Lexington. My grandma said they came and searched my crib off a statement somebody wrote. So where do your loyalty lie, Big Homey? You really want a position of power? You want -- you want your mark of purity, Homey? Crip the fool a straight 187, and I'm thinking about admitting my part in all 12 licks so I can pull my 15 to 20 years and build our army, the East 99 Mafia Crips, and get the black book of knowledge. You dig, Big Homey? But shit, I got some canteen coming, so if you want -- if you need something, I'm in M-19. Be safe, Homey.

The note was signed, "Young Blue," which is defendant's nickname. Mr. Savoy explained that "Crip the fool a straight 187" means to kill someone and that, in context, he understood that defendant was asking him to kill Ronnie Covington.[1]

After defendant was arrested, he gave a number of statements to police. He admitting taking part in a string of armed robberies but denied involvement in the Lucky Mart murder. He named a couple people he thought might have been involved with the murder. Defendant later admitted that he made up the story implicating others in the Lucky Mart shooting, but continued to deny that he was involved.

After the State rested, defendant elected to present evidence and testify on his own behalf. Defendant denied participating in the Lucky Mart robbery and denied that he had ever been to the Lucky Mart. He admitted that the blue baseball hat was his, though he acknowledged

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1. Colloquial use of the term "187" to refer to murder seems to be based upon § 187 of the California Penal Code, which defines the crime of murder. *See People v. Jones*, 70 P.3d 359, 376-77 (Cal. 2003) (discussing a Crips affiliate called "the 211 187 Hard Way Gangster Crips"); Cal. Penal Code § 187 (2014) (defining the crime of murder).

that he had previously told the police otherwise. Defendant said that he "was lying like hell" when he denied that the hat was his. On cross-examination, the State asked him, over objection, about his escape in detail. The prosecutor also asked him, over objection, if he had been a Crip in 2008. Defendant admitted that he had been, though he denied being able to read or write "Crip code."

The jury found defendant guilty of both attempted armed robbery and first degree murder. The trial court arrested judgment on the robbery conviction. On 17 June 2013, the trial court entered judgment on the murder conviction and sentenced defendant to life imprisonment without parole. Defendant gave notice of appeal in open court.

II. Improper Judicial Comment

[1] Defendant first argues that the trial court made an improper judicial comment on his dangerousness in violation of his due process rights and the prohibition of such comment in N.C. Gen. Stat. §§ 15A-1222 and 15A-1232. Defendant reasons that the trial court's decision to order additional security, including physical restraints and an escort for the jury, was akin to a statement by the trial judge that defendant was "highly dangerous, and therefore probably guilty[.]" We conclude that the trial court did not abuse its discretion or violate defendant's constitutional rights by ordering additional security measures after he attempted to escape.

> While, as a general rule, a criminal defendant is entitled to be free from physical restraint at his trial, unless there are extraordinary circumstances which require otherwise, there is no per se prohibition against the use of restraint when it is necessary to maintain order or prevent escape. What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial. Such a decision must necessarily be vested in the sound discretion of the trial court.

State v. Simpson, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002) (citations and quotation marks omitted); *see Deck v. Missouri*, 544 U.S. 622, 632, 161 L.Ed. 2d 953, 964 (2005) (noting that "due process does not permit the use of visible restraints *if the trial court has not taken account of the circumstances of the particular case.*" (emphasis added)). Additionally, "it is within the judge's discretion, when

necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial." *State v. Tolley*, 290 N.C. 349, 363, 226 S.E.2d 353, 365 (1976).

"We review the trial court's decision of whether to place defendant in physical restraints [and to order additional security measures] for abuse of discretion." *State v. Posey*, ___ N.C. App. ___, ___, 757 S.E.2d 369, 372 (2014) (citations, quotation marks, and brackets omitted). Nevertheless, "[t]he trial court's discretion is not unbridled and must be exercised in a manner that is 'not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience of the judge to a just result.' " *State v. Atkins*, 349 N.C. 62, 92, 505 S.E.2d 97, 116 (1998) (quoting *Langnes v. Green*, 282 U.S. 531, 541, 75 L.Ed. 520, 526 (1931)), *cert. denied*, 526 U.S. 1147, 143 L.Ed. 2d 1036 (1999).

> In deciding whether restraints [and other security measures] are appropriate, a trial court may consider, among other things, the following circumstances:
>
> the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Posey, ___ N.C. App. at ___, 757 S.E.2d at 372 (citation and quotation marks omitted).

> [T]he question for decision boils down to this: On the basis of the record before us, can we say, as a matter of law and with definite and firm conviction, that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors?

Tolley, 290 N.C. at 369-70, 226 S.E.2d at 369 (citation and quotation marks omitted).

Here, defendant does not argue that the trial court failed to follow the procedure governing the use of restraints at trial under N.C. Gen.

Stat. § 15A-1031 (2011). *Cf. Simpson*, 153 N.C. App. at 808, 571 S.E.2d at 275 (considering whether failure to follow § 15A-1031 prejudiced defendant and violated his constitutional rights). Outside the presence of the jury, the trial court made the following findings of fact:

> [I]n light of the seriousness of the charge, first-degree murder, with the penalty being life imprisonment without the possibility of parole; the fact that the defendant is of a temperament that he sometimes loses his temper, and I have personally seen this in previous hearings as well as his prior attorneys have noted this and reported it to the Court; the defendant's relatively young age and his obvious nimbleness in being able to escape yesterday; the fact that he has made threats to harm others or cause a disturbance in the past, both to his prior attorneys and making statements to others; as well as the nature and physical security of the courtroom; and again, the need to protect those immediately around the defendant from any potential harm, the Court will find that it is necessary to restrain the defendant during the trial.[2]

After bringing the jury back into the courtroom, the trial court specifically instructed the jury not to consider the use of restraints "in any fashion, whether in terms of weighing the evidence or in determining the defendant's guilt or innocence in this matter."

Given the facts of this case, we cannot say that the trial court committed a "clear error of judgment" or arbitrarily decided to place defendant in restraints and order additional security personnel to stand by defendant. Defendant escaped in the midst of this trial. Defendant managed to slip out of his leg shackles while being removed from a holding cell, jump over a railing out to the third floor and then over an outdoor breezeway before being apprehended. Defendant had trouble managing his anger; he had previously threatened to harm others. He was facing the most serious charge possible in this state—first degree murder. His potential punishment upon conviction is the second most serious available in North Carolina—life in prison without the possibility of parole. We do not think the fact that defendant broke his ankle during his escape attempt and was in a wheelchair for the rest of the trial makes the court's decision to order additional security measures an abuse of discretion. The trial court must consider not only the potential danger

2. Defendant does not challenge any of these findings as unsupported by the evidence.

to others in the courtroom from the defendant personally, but also the potential threat that associates of the defendant could pose to the court proceedings and those involved in it.[3]

We have no difficulty concluding that use of restraints and additional security measures—even though visible to the jury—were fully justified by defendant's behavior at trial and before trial. *Cf. Tolley*, 290 N.C. at 370-71, 226 S.E.2d at 369 (holding that the trial court did not abuse its discretion in ordering restraints where the defendant had attempted escape during a preliminary hearing one month before trial); *Holbrook v. Flynn*, 475 U.S. 560, 571, 89 L.Ed. 2d 525, 536 (1986) (approving the use of four visible, uniformed troopers in the first row of the courtroom as security where a defendant "had been denied bail after an individualized determination that [his] presence at trial could not otherwise be ensured").[4]

At oral argument, defendant argued that the trial court's instruction was insufficient because it failed to inform the jury that they were not to consider the fact that they had been escorted to their cars or the additional security personnel in the courtroom. An instruction specifically addressing the use of escorts for the jury would probably just have led the jurors to believe that the need for use of an escort arose from defendant's trial and not from some unrelated incident that might have occurred elsewhere in the courthouse. Otherwise, they had no way to know that the security issue of the previous day was related to defendant's trial until evidence of defendant's escape was introduced. Indeed, defendant did not request a cautionary instruction specifically regarding the escort. Further, an instruction explicitly mentioning each of the additional security measures would likely just have drawn the jury's attention to those measures. "If defendant desired a different . . . instruction he should have requested it at that time." *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977); *see Tolley*, 290 N.C. at 371, 226 S.E.2d at 370 (holding that the trial court did not err in failing to instruct the jury to disregard the defendant's shackles where such an instruction was not requested). Therefore, we hold that the trial court's instruction not to consider the restraints was sufficient.

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3. Concern about threats by associates of the defendant was surely justified in this case, as defendant had, while in jail, attempted to solicit an associate to kill one of the witnesses against him, as discussed in more detail below.

4. Indeed, the United States Supreme Court has approved use of restraints far more prejudicial than those at issue here, in appropriate circumstances. *See Illinois v. Allen*, 397 U.S. 337, 343-44, 25 L.Ed. 2d 353, 359 (1970) (opining that one constitutionally permissible response to "an obstreperous defendant" would be to bind and gag him).

III. Failure to Individually Inquire

[2] Defendant next argues that the trial court erred and violated his due process rights by failing to individually inquire of the jurors regarding whether they had been affected by the increased security after defendant's escape. We conclude that the trial court's procedure was constitutionally sufficient.

"[W]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Campbell*, 340 N.C. 612, 634, 460 S.E.2d 144, 156 (1995), *cert. denied*, 516 U.S. 1128, 133 L.Ed. 2d 871 (1996). "It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992). The question for us to consider is whether the trial court abused its discretion in directing its inquiry to the jury as a whole rather than the individual jurors.

In *State v. Barts*, the defendant had moved for a mistrial because he feared that the jurors may have read a prejudicial article in the local newspaper. 316 N.C. 666, 681, 343 S.E.2d 828, 838 (1986). The trial court questioned the jury, as a whole, about whether any juror had violated his instructions. *Id.* at 681-82, 343 S.E.2d at 839. The defendant argued on appeal that this method of inquiry was insufficient because the judge did not specifically question each juror. *Id.* at 682, 343 S.E.2d at 839. The Supreme Court held that the chosen method of inquiry was sufficient because "[t]here has been no showing that this mode of questioning was ineffective in ascertaining whether exposure to the article had occurred." *Id.* at 683, 343 S.E.2d at 840.

Here, the only information potentially "conveyed" to the jury was that defendant had attempted to escape.[5] The jurors were in the jury room when defendant attempted to escape. When the trial court dismissed them for the day, the judge explained that there had been a security incident at the courthouse and that they would be provided an escort to their cars. The trial court specifically instructed the jury not to look at media coverage of what happened at the court. Without exposure to

5. Defendant also argues that the trial court should have inquired about the impact the additional security measures had on the jury. We have already determined that the additional, visible security measures were warranted by defendant's actions at trial and that the trial court's curative instruction was sufficient. "The law presumes that jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), *cert. denied*, 544 U.S. 909, 161 L.Ed. 2d 285 (2005).

such media or having witnessed the escape, which none of the jurors did, there is no reason to think that the jurors knew that defendant had escaped and that it was this escape which caused the trial court to order additional security measures.

The only possible exposure to improper, external information concerning defendant's escape attempt would have to come from media coverage. The trial judge had the bailiff question them about whether they had been exposed to any publicity concerning the trial. The judge then followed up with his own inquiry, asking whether they had been exposed to any publicity. None of the jurors indicated that they had.

Under these facts, general inquiry of the jury regarding their exposure to media coverage of the trial was sufficient to ensure that they had not been exposed to improper, prejudicial material. "Additionally, there is no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008), *cert. denied*, 558 U.S. 851, 175 L.Ed. 2d 84 (2009). Therefore, we hold that defendant is not entitled to a new trial on this basis.

IV. Evidence of Escape Attempt

[3] Defendant next argues that the trial court erred in not excluding evidence of his escape attempt under Rule 403 and in failing to explicitly apply the Rule 403 balancing test.

> [W]hether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. McDougald, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994) (citations, quotation marks, and brackets omitted).

"Evidence of a criminal defendant's flight following the commission of a crime is evidence of his guilt or consciousness of guilt." *State v. Jones*, 347 N.C. 193, 205, 491 S.E.2d 641, 648 (1997). "[A]n escape from custody constitutes evidence of flight." *McDougald*, 336 N.C. at 456, 444 S.E.2d at 214 (citation and quotation marks omitted).

Although defendant persuasively argues that evidence of his escape was highly prejudicial, we fail to see how this evidence was at all unfairly prejudicial. Evidence is generally considered *unfairly* prejudicial when it has "an undue tendency to suggest decision on an improper basis,

commonly, though not necessarily, as an emotional one." *Id.* at 457, 491 S.E.2d at 214 (quoting N.C. Gen. Stat. § 8C-1, Rule 403 official commentary). Here, the jury may have inferred from the fact that defendant attempted to escape that defendant was guilty of the charges against him. That inference is precisely the inference that makes evidence of flight relevant and it is not an unfair inference to draw. *See id.*

Defendant does not argue that there is some other unfair inference that the jury might have drawn from the flight evidence. Where there is no unfair prejudice, there is no balancing to be done. Therefore, even assuming *arguendo* that the trial court failed to apply the Rule 403 balancing test explicitly, we conclude that the "evidence of the defendant's escape . . . 'could only be viewed as having a *due* tendency to suggest a decision on a *proper basis*.'" *Id.* (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)). Therefore, we hold that the trial court did not abuse its discretion in admitting the evidence of defendant's escape.

V. Gang-Related Evidence

[4] Defendant finally argues that the trial court erred in admitting the jail letter he wrote to Matt Savoy and in allowing the State to ask him on cross-examination whether he was in a gang because that evidence should have been excluded under Rule 403. We disagree.

We review the trial court's decision to admit the evidence over defendant's Rule 403 objection for an abuse of discretion. *McDougald*, 336 N.C. at 457, 444 S.E.2d at 214. First, although there was some dispute about its authenticity, the State's evidence showed that defendant wrote a letter to Matt Savoy wherein defendant asked Mr. Savoy to kill Ronnie Covington because Mr. Covington was talking to police. The letter was written in "Crip code." Mr. Savoy testified that Crip code is "a language that Crip[s] came up with dealing with writing so it would be coded, so if anybody wasn't a Crip or affiliated to them, they wouldn't be able to understand it."[6]

The letter itself was relevant and not unfairly prejudicial because in it defendant solicited the murder of one of the State's primary witnesses against him. Such evidence is highly relevant to defendant's consciousness of guilt. Our Supreme Court has held that "an attempt by a defendant to intimidate a witness in an effort to prevent the witness

6. Defendant has not argued, either before the trial court or on appeal, that Mr. Savoy was not qualified to interpret the letter, nor has defendant challenged the accuracy of Mr. Savoy's interpretation of the letter.

from testifying or to induce the witness to testify falsely in his favor is relevant to show the defendant's awareness of his guilt." *See State v. Mason*, 337 N.C. 165, 171, 446 S.E.2d 58, 61 (1994) (citation, quotation marks, and brackets omitted). Soliciting the murder of a witness is "an attempt . . . to prevent the witness from testifying[.]" *Id.* (citation and quotation marks omitted).[7]

Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter. The State properly introduced the letter itself and asked Mr. Savoy, who testified that he could read Crip code, to translate it on the stand.[8] To understand this evidence, it was important for the jury to know what Crip code is and why defendant would be a person capable of writing in this manner. Additionally, the trial court repeatedly instructed the jury that they were only to consider the gang evidence as an explanation for the note.

Defendant correctly notes that when the prosecutor asked him on cross-examination whether he was a Crip, the trial court overruled his objection without giving a limiting instruction. While it is true that the trial court did not repeat its limiting instruction, no such instruction was requested. Additionally, the question was asked in the context of the prosecutor's cross-examination on the issue of the "Crip code" note. Defendant had denied writing the note and denied even understanding "Crip code." The prosecutor did not encourage the jury to draw an improper inference from this evidence.

In sum, the letter itself was highly relevant and, unlike the cases cited by defendant,[9] here the evidence of defendant's gang membership was properly relevant to his guilt. Under the facts of this case, such evidence "could only be viewed as having a *due* tendency to suggest

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7. Defendant argues that the letter was less probative than it might otherwise be because Mr. Convington was "talking to police" about other offenses that defendant committed as well, such as the string of robberies and defendant did not specify in the letter which testimony he wanted to prevent. So, the argument goes, defendant could have wanted Mr. Covington dead to prevent his testimony in *those* cases instead of at this trial. This argument is nearly so ludicrous that it does not bear addressing. The State's evidence showed that defendant asked someone to murder a primary witness relevant to this trial. The fact that the letter does not specify that defendant wanted him dead for that reason alone does not make it irrelevant to defendant's guilt.

8. Defendant had a full and fair opportunity to cross-examine Mr. Savoy and to impeach him as a biased witness.

9. *E.g.*, *State v. Hinton*, ___ N.C. App. ___, 738 S.E.2d 241 (2013).

a decision on a *proper basis*." *McDougald*, 336 N.C. at 456, 444 S.E.2d at 214 (citation and quotation marks omitted). Defendant has failed to show that the trial court abused its discretion in deciding that any unfair prejudice from the contested evidence did not substantially outweigh its probative value.

VI. Conclusion

For the foregoing reasons, we conclude that defendant has shown no error at his trial.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BILL RAYMOND SIMPSON

No. COA14-103

Filed 5 August 2014

1. Indictment and Information—being a sex offender in a park—subsection of statute not specified—defendant sufficiently appraised of accusation

The trial court had subject matter jurisdiction over a prosecution for being a registered sex offender unlawfully on premises used by minors in violation of N.C.G.S § 14-208.18(a). Although defendant alleged that the indictment failed because the applicable subsection of the statute was not specified, the indictment alleged that defendant was within 300 feet of a batting cage in a park and only one of the three subsections imputed a 300 foot requirement. Additionally, the indictment alleged that defendant was a person required to register as a sex offender and named the location where the purported offense occurred, so that defendant was sufficiently apprised of the nature of the conduct which was the subject of the accusation.

2. Sexual Offenders—presence in park with batting cages—evidence of use primarily intended for minors—insufficient

The trial court erred by denying defendant's motion to dismiss where he was arrested for being a registered sex offender close to

batting cages in a park. While batting cages and ball fields may be used by minors, they are not intended primarily for minors absent special circumstances shown by the State. Here, the State's evidence rose only to a level of conjecture or suspicion that the batting cages and ball field were locations primarily intended for the use, care, and supervision of minors.

On writ of certiorari, defendant appeals from judgment entered 19 September 2012 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 3 June 2014.

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

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

ELMORE, Judge.

Bill Raymond Simpson ("defendant") appeals his conviction of being a registered sex offender unlawfully on premises used by minors in violation of N.C. Gen. Stat. § 14-208.18(a) (2013). Defendant's appeal is before us on writ of certiorari. Defendant argues that his indictment is fatally defective and that the trial court erred in denying his motion to dismiss. After careful review, we hold that defendant's indictment was not fatally defective. However, we agree that the trial court erred in denying defendant's motion to dismiss. Accordingly, we reverse the order denying defendant's motion to dismiss.

I. Background

Defendant is a registered sex offender based on his convictions for second degree rape and felony incest in 1997. Consequently, defendant is to maintain registration on the North Carolina Sex Offender and Public Protection Registry. The State's evidence at trial tended to establish the following: On 2 September 2011, defendant went to Cub Creek Park in Wilkesboro, North Carolina ("the park" or "Cub Creek Park"). The park is a public park in Wilkesboro that features walking trails, ball fields, swings, jungle gyms, picnic areas, a dog park, a stream, a community garden, and batting cages. Defendant was sitting on a bench within the premises of the park, facing and in close proximity to the park's batting cage and ball field. Sergeant Kenneth Coles ("Sergeant Coles"), a neighbor of defendant and off-duty police officer with the Wilkesboro Police

Department, saw defendant. Because he knew that defendant was a registered sex offender, Sergeant Coles notified the police department of defendant's presence near the batting cage. Major Steve Dowell ("Major Dowell") responded to the call and arrived at the park, where he placed defendant under arrest for violating N.C. Gen. Stat. § 14-208.18(a)(2). Section 14-208.18(a)(2) prohibits registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors[.]"

Defendant was indicted by superseding indictment for violating N.C. Gen. Stat. § 14-208.18(a)(2) and attaining habitual felon status on 23 July 2012. The matter came on for trial on 19 September 2012. The jury found defendant guilty of violating N.C. Gen. Stat. § 14-208.18(a)(2), and the State dismissed the habitual felon charge. The trial court sentenced defendant to a minimum of 19 months to a maximum of 23 months imprisonment. Defendant now appeals.

II. Analysis

A. Defective Indictment

[1] Defendant argues that the trial court lacked subject matter jurisdiction over this case because the indictment charging him with violating N.C. Gen. Stat. § 14-208.18(a) failed to allege an essential element of the offense—that the batting cages and ball field were located on a premise *not* intended primarily for the use, care, or supervision of minors. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-924(a)(5)(2013), a valid indictment must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner." N.C. Gen. Stat. § 15-153 (2013). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). The trial court need not subject the indictment to "hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of

the statute, either literally or substantially, or in equivalent words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *cert. dismissed*, 366 N.C. 405, 735 S.E.2d 329 (2012). "An arrest of judgment is proper when the indictment 'wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)). "The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *State v. Marshall*, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (2008) (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)).

The superseding indictment, by which the Grand Jury charged defendant with violating N.C. Gen. Stat. § 14-208.18(a), alleged that

> the defendant named above unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender and having been previously convicted of an offense in Article 7A of Chapter 14 of the General Statutes, be within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina.

In North Carolina, it is unlawful for a person required to register as a sex offender under Chapter 14, Article 27A to knowingly be in any of the following locations:

> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
>
> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are **not** intended primarily for

> the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
>
> (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C. Gen. Stat. § 14-208.18(a) (2013) (emphasis added).

Here, both the original indictment and the superseding indictment charged defendant with violating N.C. Gen. Stat. § 14-208.18(a) but neither specified whether it was under subsection (1), (2), or (3). Quoting *State v. Daniels* in his brief, defendant calls our attention to the fact that the three subsections of N.C. Gen. Stat. § 14-208.18(a) present "three distinct scenarios in which a defendant may unlawfully be on certain premises[,]" thus creating three distinct crimes. *State v. Daniels*, ___ N.C. App. ___, ___, 741 S.E.2d 354, 360 (2012), *appeal dismissed*, *review denied*, 366 N.C. 565, 738 S.E.2d 389 (2013). Defendant notes that (a)(1) prohibits an offender from being in a place intended primarily for the use, care, or supervision of minors. It does not impute a 300 feet requirement. Alternatively, (a)(2) prohibits an offender from being within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are *not* intended primarily for the use, care, or supervision of minors. Defendant contends that the indictment is "confusing" as "it reads like it is either alleging (a)(1) incorrectly, imputing a 300 foot radius where that is not an element of the offense, or simply incompletely alleging (a)(2)" because the park is not defined as a location *not* intended primarily for the use, care, or supervision of minors. Given that the indictment "does not plainly or lucidly reveal the crime [defendant] was accused of committing[,]" defendant argues that it "is fatally defective and the judgment entered thereon must be vacated."

We are not persuaded. It is clear from the indictment that defendant was charged with violating N.C. Gen. Stat. § 14-208.18(a)(2). The essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18(a)(2) are that the defendant was knowingly (1) within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense

involving a victim who was under the age of sixteen at the time of the offense.

Notably, only one of three subsections of N.C. Gen. Stat. § 14-208.18(a) imputes a 300 feet requirement, and that is (a)(2). Here, the indictment alleges that defendant, who is a person required to register as a sex offender, came "within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field[.]" It also specifies that ball fields and batting cages were located in Cub Creek Park in Wilkesboro. The inclusion of the language "within 300 feet" should have been sufficient to put defendant on notice that he was charged with violating N.C. Gen. Stat. § 14-208.18(a)(2). Additionally, because the indictment also alleged that defendant was a person required by Article 27A of Chapter 14 to register as a sex offender and named Cub Creek Park as the location where the purported offense occurred, we hold that defendant was sufficiently apprised of the nature of the conduct which was the subject of the accusation. *See* N.C. Gen. Stat. § 15A-924(a)(5) (2013). The fact that the indictment did not allege that the park was a location not primarily intended for the use, care, or supervision of minors does not render the indictment fatally defective on these facts. Accordingly, the indictment was sufficient to confer subject matter jurisdiction upon the trial court.

B. Motion to Dismiss

[2] Defendant next asserts that the trial court erred in denying his motion to dismiss. Defendant specifically argues that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). To defeat a motion to dismiss, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted). In considering a motion to dismiss, the court must look at the evidence in the light most favorable to the State. *Id.* at 665, 652 S.E.2d at 213. "A motion to dismiss should be granted, however, when the facts and circumstances warranted by the evidence do no more than

raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424 (2011) (quotation marks and citation omitted).

Pursuant to § 14-208.18(a)(2), the State has the burden to present substantial evidence that defendant: (1) knowingly was within 300 feet of a location *intended primarily* for the use, care, or supervision of minors that is part of a place which is not intended for the use, care, or supervision of minors, including property open to the general public; and (2) at a time when he was required to register as a sex offender based on a conviction for any offense in Article 7A of Chapter 14 of the North Carolina General Statutes or any offense where the victim of the offense was under the age of 16 years at the time of the offense. (emphasis added). Defendant does not challenge the State's evidence as to the second element; his only contention is that the State failed to present substantial evidence that the batting cages and ball field were primarily intended for use by minors.

Section (a)(1) gives guidance to help determine what qualifies as a location "intended primarily" for minors, mentioning places "including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds." N.C. Gen. Stat. § 14-208.18(a)(1). While batting cages and ball fields *may* be used by minors, they are not *intended primarily* for minors absent special circumstances shown by the State. Here, the State failed to offer substantial evidence that the batting cages and ball field in the park were primarily intended for children. Officer Kerr testified that "[m]y stepson plays baseball at Cub Creek Park. They also have swing sets and playground type equipment there." Kerr's testimony regarding the fact that the park includes playground equipment is irrelevant since defendant was not charged with being within 300 feet of that equipment, and we have no way of knowing where that equipment is in reference to the benches by the ball field where defendant was found. Furthermore, Kerr's testimony that his stepson plays at Cub Creek Park has no bearing on whether the ball field and batting cages were "intended primarily" for use by minors because it is unclear how old his stepson is and whether he is even a minor. In fact, the trial court pointed this out to the State, noting that the State's witnesses failed to "specify how old their children were. You didn't say whether they were minors, whether they were adults or whether they were children. But they have to be minors, they just can't be children. If they're 19, they're not minors."

Sergeant Coles also testified about who uses the batting cages and ball field, noting that "[y]ou have several ball fields where very minor small children play, as well as teenagers and even adults[.]" Moreover, Sergeant Coles claimed that his son plays there on occasion. However, once again, the State elicited no evidence as to how old Sergeant Coles's son was at the time of trial. Furthermore, Coles's testimony that not only children play at the park but also "teenagers and even adults" contravenes the State's assertion that the ball field and batting cages were intended primarily for minors. Sergeant Coles's testimony that on the date of the offense there were some "young kids" in a line for the batting cage, estimated at eight to thirteen years old, similarly fails to establish that the location was intended primarily for use by minors. Based on the State's logic, the entire park would be off limits—as would countless other municipal sites which are visited by both adults and children that are sometimes used by minors as well as adults.

In sum, the testimony of Deputy Kerr and Sergeant Coles did not amount to evidence that the ball field and batting cages of the park were *intended primarily* for the use of minors. Instead, at most, their testimony established that these places were sometimes used by minors. Thus, we hold that the State's evidence rises only to a level of conjecture or suspicion that the batting cages and ball field were locations *primarily intended* for the use, care, and supervision of minors and we would reverse the order denying defendant's motion to dismiss.

III. Conclusion

We conclude that the indictment returned against defendant for the purpose of charging him with violating N.C. Gen. Stat. § 14-208.18(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. However, the State failed to present substantial evidence that the ball field and batting cages of the park were "intended primarily for the use, care, or supervision of minors," as required by N.C. Gen. Stat. § 14-208.18(a)(2). Accordingly, we reverse the order denying defendant's motion to dismiss.

Reversed.

Judges McGEE and HUNTER, Robert C., concur.

TRUHAN v. WALSTON

[235 N.C. App. 406 (2014)]

DANIEL JOSEPH TRUHAN, Plaintiff-Appellee
v.
SUSAN P. WALSTON and DAVID M. WALSTON, Defendants and
Third-Party Plaintiff-Appellant Susan P. Walston
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, and WESTERN SURETY COMPANY,
Third-Party Defendants

No. COA14-43

Filed 5 August 2014

1. Police Officers—automobile accident—negligence action—summary judgment for officer—erroneous

In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, the trial court's grant of summary judgment for plaintiff (the officer) was reversed and the case was remanded for further action on defendant's counter-claims. Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries and, considering a number of other factors such as the terrain, the speed limit, the population and the time of day of the pursuit, there was a high probability of injury to the public despite the absence of significant law enforcement benefits.

2. Immunity—governmental—police officer in car accident—immunity not available

In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, summary judgment for the officer and the insurance companies would have been improper on the basis of governmental immunity, at least as to potential damages up to the amount of a $25,000.00 bond,. Furthermore, it has been recognized that actions brought pursuant to N.C.G.S. § 20-145 fall outside the general rule of governmental immunity.

Appeal by Defendant and Third-Party Plaintiff Susan P. Walston from orders entered 7 October 2013 and 4 November 2013 by Judge Kendra D. Hill in Superior Court, Wayne County. Heard in the Court of Appeals 6 May 2014.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bryan T. Simpson and Natalia K. Isenberg, for Daniel Joseph Truhan, Plaintiff-Appellee and Western Surety Company, Third-Party Defendant-Appellee.

Poyner Spruill LLP, by Timothy W. Wilson, for North Carolina Farm Bureau Mutual Insurance Company, Third-Party Defendant-Appellee.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for United Services Automobile Association, Third-Party Defendant-Appellee.

Whitley Law Firm, by Ann C. Ochsner, for Susan P. Walston, Defendant and Third-Party Plaintiff-Appellant.

McGEE, Judge.

We review an order from the trial court that (1) granted summary judgment in favor of Daniel Joseph Truhan ("Plaintiff"), Western Surety Company ("Western Surety"), North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"), and United Services Automobile Association ("United Services") (collectively, "Third-Party Defendants"); (2) dismissed all counterclaims, and third-party claims of Defendant Susan P. Walston ("Defendant"); and (3) denied the motion for summary judgment filed by Defendant, Defendant David M. Walston, and unnamed Defendant Argonaut Great Central Insurance Company ("Argonaut"). Therefore, the following recitation of the "facts" presents the evidence that was before the trial court in the light most favorable to Defendant and ignores evidence favorable to Plaintiff. *Peter v. Vullo*, __ N.C. App. __, __, 758 S.E.2d 431, 434 (2014) (for summary judgment "the evidence presented by the parties must be viewed in the light most favorable to the non-movant") (citations omitted).

The following is the evidence taken in the light most favorable to Defendant. The North Carolina Highway Patrol ("Highway Patrol") received a call from Kaye Howell ("Ms. Howell"), a witness to a two-vehicle accident, at approximately 7:08 a.m. on 30 December 2009. Ms. Howell then called Wayne County Communications to report the accident, and to inform them that no emergency services were needed because there had been no injuries. The Highway Patrol also called Wayne County Communications to report the accident and also informed them that there were no injuries. However, the Highway Patrol did inform Wayne County Communications that the accident was on a curve in the road and a trooper could not get to the scene right away; therefore, traffic control was needed. Ms. Howell called Wayne County Communications again to inform them that a woman who was

involved in the accident was arguing with a man she apparently knew, who had arrived at the scene, and that the woman had pushed the man. Ms. Howell asked for the estimated time of arrival of the dispatched deputy, because the woman was "getting a little bit out of hand." However, Joshua Carroll, who was also involved in the accident, stated: "At no time while I was present at the scene of the collision did I observe any physical violence by anyone."

Plaintiff was a deputy for the Wayne County Sheriff's Office. He was leaving a Kangaroo Express located at Highway 117 and Carolina Commerce Drive in Goldsboro on 30 December 2009. Plaintiff overheard the call from the Highway Patrol to Wayne County Communications requesting that a Wayne County deputy respond to the accident and provide traffic control. Plaintiff indicated to Wayne County Communications that he was free, closer to the accident, and could respond. Plaintiff received the okay to respond to the accident at approximately 7:19 a.m. About one minute later, Wayne County Communications began receiving calls of a second accident involving injuries at Highway 117 North and Woodview Drive, approximately one and one-half miles from the Kangaroo Express. This second accident involved Plaintiff and Defendant.

At the time of the accidents, Plaintiff had been working as a deputy for just under three years. Plaintiff was a warrant officer and spent his days serving warrants. Plaintiff only responded to calls when no patrol deputy was available, or there was some other circumstance that warranted departure from Plaintiff's usual duties. Before becoming a deputy, Plaintiff had worked briefly for the Goldsboro Police Department as a school resource officer. Plaintiff explained his "skill, ability, and training" for high speed driving as follows:

> I know my limitations of driving. I know when I'm on the limits of traction or handling a vehicle. Everybody – you know if you're going into a curve whether you're going too fast. You can – it's a perception thing. It's not something I can quantify to you. At no time during that time did I feel that I had exceeded my ability to control that vehicle.

Plaintiff had received no training for emergency driving beyond the Basic Law Enforcement Training certification curriculum he had taken at Wayne Community College in 2004.

Wayne County Sheriff's Office policy recognizes three kinds of police driving:

> Emergency Response Driving: is driving to the scene of a call where there may be a danger to life, or a threat to officer safety, or reported violence or threat of imminent violence.
>
> Pursuit Driving: is the attempt to apprehend a person subject to arrest who is fleeing in a vehicle, and includes "catch up" driving for traffic enforcement purposes before a violator attempts to flee.
>
> Routine driving: is all on-duty driving other than "emergency response driving" [or] "pursuit driving" and includes routine patrol, service of warrants, transportation of prisoners, going to location of non-emergency calls, or other driving in performance of duty.

POLICY TITLE: Emergency Response & Vehicle Pursuits, Wayne County Sheriff's Office General Order (Revised January 7, 2002).

According to the evidence most favorable to Defendant, in the approximately one to two minutes between the time Plaintiff received the call regarding the first accident and the time Plaintiff and Defendant were involved in the second accident, the following occurred. Plaintiff headed north on Highway 117, passed an exit that connected with Interstate 95, passed a school, and passed a fire station before he reached the intersection of Highway 117 and Woodview Drive. The fire station was about three tenths of a mile south of Woodview Drive. At some point before his collision with Defendant, Plaintiff activated his blue lights, but he did not activate his siren. Trooper L. J. Bunn ("Trooper Bunn") of the Highway Patrol, who investigated the accident, believed the speed limit along part of that section of the road was thirty-five miles per hour ("mph").

According to a collision analysis report produced by Collision Analyst William J. Kluge, Jr., along that mile-and-a-half section of road, Plaintiff reached speeds over one hundred mph, passed automobiles traveling both north and south, and had his accelerator fully depressed at times. The speed limit at the site of the accident was forty-five mph. Four and one-half to five seconds before the collision, Plaintiff was traveling eighty-six to eighty-seven mph, and was accelerating. Plaintiff was maintaining full throttle acceleration "for at least a couple of seconds when [Defendant's truck] would have come into view[,]" and maintained full throttle acceleration until approximately one-half second before the impact, at which time Plaintiff removed his foot from the accelerator and began to depress the brake. Plaintiff was traveling approximately

ninety-five mph at the time of impact. Plaintiff "should have been on alert and noticed [Defendant's truck] before [Defendant] began to make her turn and [should have] adjusted his speed accordingly."

Continuing with evidence presented in the light most favorable to Defendant, Defendant left her house on Woodview Drive, a residential street, shortly after 7:00 a.m. on 30 December 2009. As Defendant approached the intersection of Woodview Drive and Highway 117, she slowed down, and came to a complete stop at the stop sign. Defendant pulled forward to obtain a better view up and down Highway 117, and again stopped. Defendant looked to the left, looked to the right, looked back to the left, and then pulled onto Highway 117, initiating a left-hand turn onto Highway 117 South. Before Defendant pulled onto Highway 117, she did not see any vehicles coming from the left, but did see a truck coming from the right, which turned into a drive, then Defendant looked to the left again and saw no vehicles. As Defendant "made [her] effort to leave the stop sign, there was nobody to the left." As Defendant was entering the southbound lane of Highway 117, she saw blue lights out of the corner of her eye and was immediately hit by Plaintiff's cruiser.

Both Plaintiff and Defendant were seriously injured in the accident. Plaintiff filed his complaint on 29 February 2012, alleging that Defendant was negligent, and that Defendant's negligence caused the accident and Plaintiff's injuries. Plaintiff also brought suit against Defendant's husband, David M. Walston, pursuant to "the Family Purpose Doctrine." Defendant answered and counterclaimed on 23 May 2012. Defendant denied that any negligence on her part caused the accident, alleged that Plaintiff's negligence was responsible for her injuries, and requested both compensatory and punitive damages. Defendant filed a "Motion for Leave to Amend Counterclaim and File Third Party Complaint" against Farm Bureau, United Services, and Western Surety, Third-Party Defendants, on 14 December 2012. Defendant's motion was granted by order filed 21 December 2012.

Plaintiff answered Defendant's amended counterclaim and third-party complaint on 31 Jan 2013, and pleaded the affirmative defenses of governmental immunity and contributory negligence. Plaintiff and Western Surety moved for summary judgment against Defendant on 20 June 2013, arguing that Defendant's counterclaims should fail as a matter of law. Farm Bureau filed a motion for summary judgment on 25 June 2013, and United Services filed a motion for summary judgment on 9 July 2013. Defendant, along with David M. Walston and Argonaut, filed a motion for summary judgment on 8 August 2013. The trial court, in an order entered 7 October 2013, granted summary judgment in favor

of Plaintiff, Western Surety, Farm Bureau, and United Services "as to all claims, counterclaims and/or third-party claims asserted against them by Defendant[.]"

In that same order, the trial court denied the motion for summary judgment filed by Defendant, David M. Walston, and Argonaut. On 4 October 2013, Defendant filed a Motion for Reconsideration of the grant of summary judgment in favor of Plaintiff, Western Surety, Farm Bureau, and United Services or, in the Alternative, for Certification of Order as a Final Judgment. By order entered 4 November 2013, the trial court denied Defendant's motion for reconsideration, but granted Defendant's motion for certification pursuant to Rule 54(b), whereby the trial court certified as a final judgment the order granting summary judgment in favor of Plaintiff, Western Surety, Farm Bureau, and United Services. Defendant appeals.

I.

> "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."
>
> > The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden, the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Peter, __ N.C. App. at __, 758 S.E.2d at 434 (citations omitted). " '[I]ssues of negligence are generally not appropriately decided by way of summary judgment, [unless] there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established[.]' " *Greene v. City of Greenville*, __ N.C. App. __, __, 736 S.E.2d 833, 835, *disc. review denied*, __ N.C. __, 747 S.E.2d 249 (2013).

II.

[1] In Defendant's first argument, she contends the trial court erred in granting summary judgment in favor of Plaintiff because her "forecast of the evidence establishes a genuine issue of material fact regarding [Plaintiff's] gross negligence." We agree.

Defendant argues that N.C. Gen. Stat. § 20-145, which allows police officers to exceed the posted speed limit in certain situations, applied to Plaintiff on the morning of the accident, but that, because Plaintiff's conduct rose to the level of gross negligence, Defendant should recover in negligence from Plaintiff. N.C. Gen. Stat. § 20-145 states:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties. *This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

N.C. Gen. Stat. § 20-145 (2011) (emphasis added).[1] This Court has discussed relevant factors in the N.C. Gen. Stat. § 20-145 analysis as pertains to pursuit as follows:

> N.C. Gen. Stat. § 20-145 exempts police officers from speed laws when pursuing a law violator. However, the exemption "does not apply to protect the officer from the consequence of a reckless disregard of the safety of others." Our Supreme Court has held that "an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care." Grossly negligent behavior is defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." . . . .
>
> When determining whether an officer's actions constitute gross negligence, we consider: (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit, and (3) the officer's conduct during the pursuit.

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1. N.C. Gen. Stat. § 20-145 was amended effective 1 October 2013. We cite to the version in effect at the time of the collision.

> Relevant considerations under the first prong include whether the officer "was attempting to apprehend someone suspected of violating the law" and whether the suspect could be apprehended by means other than high speed chase. . . . .
>
> When assessing prong two, we look to the (1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit.
>
> . . . .
>
> Under the third prong we look to [the officer's] conduct during the pursuit. Relevant factors include (1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit.

Greene, __ N.C. App. at __, 736 S.E.2d at 835-36 (citations omitted). We believe similar factors are useful in evaluating an officer's conduct when "emergency response driving" to the scene of an incident, as well.

We note — absent knowledge that there is a reasonable risk of death, serious bodily injury, or some other grave threat — that the need for an officer to engage in emergency response driving is not as apparent as when engaging in a vehicle pursuit. A vehicle fleeing at high speed constitutes, by its very nature, a great risk of death or injury to multiple persons. When engaged in a pursuit, an officer often must drive at high speed to maintain contact with the fleeing vehicle. Of course, an officer must still engage in risk analysis and cease pursuit if the risk of harm to others becomes too great. *Id.* The justification for an emergency response to the scene of an incident may not be as immediately apparent.

We will view the three factors stated in *Greene* in the light most favorable to Defendant:

A. The reason for the pursuit

Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries. Though a witness informed Wayne County Communications that a woman was arguing with a man and had pushed him, and though Plaintiff testified he was concerned

there was a "violent" situation in the vicinity of a school, there is no evidence in the audio recording from that morning that Plaintiff was ever informed of any disturbance. Therefore, we do not consider the disturbance in our summary judgment analysis, as it is for the trier of fact to resolve the issue of whether Plaintiff was aware of the disturbance prior to his collision with Defendant. However, even assuming *arguendo* Plaintiff was aware of the disturbance, there is no evidence that the disturbance was serious, or that anyone was in danger of being injured, much less seriously injured. Plaintiff admitted that he did not believe there was any officer safety issue involved. Investigating officer Lieutenant Carter Hicks ("Lieutenant Hicks"), of the Wayne County Sheriff's Office, testified that policy dictates, even in emergency response situations, that officers must "drive in due regards to the safety of others[;]" that this policy applies to all driving, not just pursuits, and that he considers "domestic violence calls[,] unless there's a life-threatening situation involved[,]" to be non-emergency response situations. Lieutenant Hicks testified that the situation involving Plaintiff required Plaintiff to "balance the need to pursue or apprehend a violator against the risk of damage to property or injury to persons." "Deputies . . . must always be aware that their first obligation is to protect the public." Policy dictated that Plaintiff had to evaluate the reason for the emergency response "and seriousness of the suspected violation." Blair Tyndall ("Mr. Tyndall"), the Director of Emergency Medical Services and Safety for Wayne County, testified that Plaintiff, when deciding how fast to proceed to the accident site, should have weighed the fact that he was "responding to a motor vehicle accident that had already occurred." Mr. Tyndall "felt" like Plaintiff was not following "due regard there under [N.C. Gen. Stat. § 20-145] for safety to others." Mr. Tyndall also believed Plaintiff was in violation of Wayne County Emergency Response and Vehicle Pursuit Policy that stated: "Driving that is a wanton and reckless disregard for safety of others is illegal and never justified by any emergency, no matter how serious." Mr. Tyndall understood that emergency response driving could be justified when "driving to the scene where there may be a danger to life, or a threat to officer's safety, or reported violence or threat of imminent violence[,]" but he "was not aware that there was any of those occurring at the accident [Plaintiff] was responding to." In Mr. Tyndall's opinion, Plaintiff was "operating unsafely[.]"

B. The probability of injury to the public due to Plaintiff's decision to begin and maintain emergency response driving

(a) Time and location of the pursuit. Plaintiff began his high-speed response at approximately 7:19 in the morning, and crashed a minute or

two later. This was a time when people were generally heading to work, and children were heading to school. It is uncertain from the evidence presented whether school was in session at the time of the accident, but Plaintiff testified that he believed it was. Along that section of Highway 117 are located a school, an on/off ramp for a nearby interstate, a fire station, and multiple residential driveways and side streets. Although that section of Highway 117 was not heavily developed, Defendant was pulling out of a residential neighborhood onto Highway 117 when Plaintiff's vehicle impacted her vehicle.

(b) The population of the area. The area was not densely populated, but there was a mix of residential, commercial, and governmental buildings along the highway. Highway 117 also connects Goldsboro with Pikeville and other towns.

(c) The terrain for the chase. Highway 117 is mostly flat, but has some curves in the section on which Plaintiff was traveling on the morning of 30 December 2009. There was "a right-hand curve that ended about 2/10th of a mile south of the intersection" of Highway 117 and Woodview Drive. A witness, who Plaintiff passed while driving north on Highway 117, stated there was a line of trees that prevented the witness from seeing Defendant's vehicle until Defendant's vehicle began to pull out onto Highway 117.

(d) Traffic conditions. There is no evidence suggesting heavy traffic on Highway 117 at the time of the accident, but there were a number of automobiles in the area. One witness stated that Plaintiff passed him as they were both traveling north on Highway 117. Another, heading south, passed Plaintiff, and then saw the collision in his rear-view mirror. Two other witnesses in separate vehicles were very near the scene of the accident when it happened, one of whom considered honking her horn to warn Defendant not to pull out, but worried that might cause more harm by making Defendant hesitate.

(e) The speed limit. The speed limit was forty-five mph. Trooper Bunn believed the speed limit was thirty-five mph just south of where the accident occurred. Plaintiff was traveling at speeds over one hundred mph, and was accelerating at a speed of approximately ninety-five mph immediately before the collision.

(f) Weather conditions. There is no evidence of adverse weather conditions; however, it was early morning in winter.

C. Plaintiff's conduct during the pursuit

When considering the evidence in the light most favorable to Defendant, we have to assume that Plaintiff failed to activate his siren. Trooper Bunn testified that Plaintiff should have had his lights and siren on, and that it is a violation for any law enforcement vehicle to initiate emergency driving without activating both. Trooper Bunn explained: "I mean, as far as traffic hazard; somebody pull out in front of you, they will know you're coming. If you got your blue lights on, they're not going to hear your siren – I mean, know you're coming until you're right there on them." Lieutenant Hicks testified that Plaintiff was required to notify Communications that he was initiating emergency response driving, but Plaintiff failed to notify and "identify that he [was] running an emergency response of some sort[.]" Plaintiff was traveling at speeds that prevented him from utilizing the "four-second path of travel rule," and the "industry standards for visual lead time." According to the Basic Law Enforcement Training Driver Training manual: "The four-second path of travel is the vehicle's immediate path of travel. When you consider a four-second path of travel, you have time to take an escape route, or you have sufficient stopping distance from any object that may appear in your path of travel." Further:

> A visual lead time of twelve (12) seconds in rural areas . . . provides officers with needed time to appropriately select an immediate path of travel. It also gives officers time to search the areas beside the road, adjust their speed, or to make lane changes well in advance of any problems."

Plaintiff "did not consider the residential homes along [Highway] 117 during his emergency response" and therefore "failed to consider the number of intersections (public streets, residential driveways, etc.)." Plaintiff could not recall traffic conditions at the time of the accident, and was not monitoring his speed. Plaintiff was accelerating out of a curve at the time the accident occurred. "It is reasonable to believe that [Plaintiff] experienced tunnel vision." "The effectiveness of the eyes' central and peripheral visions is reduced and becomes more narrow and blurred as the vehicle's speed is increased." Plaintiff should have been able to see Defendant's vehicle as he approached, but he did not. Plaintiff should have been operating at a speed allowing him to brake or take evasive action to avoid the collision with Defendant's vehicle, but he was not. According to Collision Analyst Kluge, had Plaintiff been traveling at a speed at or below seventy-four mph, the collision would not have occurred. Trooper Bunn testified that he could not recall why he had not charged Plaintiff for not engaging his siren or for excessive

speed, but he opined: "I think he could have been at a lower speed, I mean, going to an accident." "I'd say [Plaintiff should have been going] 55 or 60 at the most. I mean, it was a [property damage] wreck. It wasn't no life-and-death situation there." In his Safety Director's Report, Mr. Tyndall stated that Plaintiff was "in violation of the sheriff's department standing policy for vehicle use and response. This is also [Plaintiff's] second incident in 2009 with a motor vehicle collision. Recommend appropriate disciplinary action and remedial law enforcement drivers training." Mr. Tyndall believed Plaintiff was not operating his vehicle with "due regard for safety" and was exhibiting "a wanton and reckless disregard for safety of others[.]"

This Court addressed a similar situation in *Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 ("*Jones I*"), *aff'd*, 360 N.C. 81, 622 S.E.2d 596 (2005), *opinion withdrawn and superseded on reh'g*, 361 N.C. 144, 638 S.E.2d 202, *and reversed in part based upon dissenting opinion*, 361 N.C. 144, 638 S.E.2d 202 (2006) ("*Jones II*"), together with *Jones I*, ("*Jones*"). The facts in *Jones* were as follows:

> [A]t approximately 9:00 a.m., Officer Tracy Fox ("Officer Fox") was dispatched to investigate a domestic disturbance[.] Soon after arriving at the scene, Officer Fox determined that she would need assistance and called for backup. Dispatch, upon receiving her call, issued a "signal 20" requiring all other officers give way for Officer Fox's complete access to the police radio by holding all calls. Officer Joseph M. Kelly ("Officer Kelly"[)] was approximately 2½ miles from [the disturbance], as were fellow Officers H.M. Crenshaw ("Officer Crenshaw") and R.D. Gaither ("Officer Gaither").
>
> In response to the first call by Officer Fox, Officers Kelly, Crenshaw, and Gaither got in their separate vehicles and began driving towards [the disturbance]. Officer Fox then made a second distress call, stating with a voice noticeably shaken, that she needed more units. Officers Kelly and Crenshaw activated their blue lights and sirens and increased the speed of their vehicles[.] Officer Gaither took a different route.
>
> At approximately 9:09 a.m. on the same morning, Linda Jones ("plaintiff") was leaving her sister's apartment complex at the southwest corner of the intersection of Liberty Street and Elizabeth Street ("the intersection"). The posted speed limit for motorists traveling upon Liberty

> Street was 35 miles per hour. At the curb of Liberty Street, plaintiff observed no vehicles approaching, but heard sirens coming from an undeterminable direction. A bystander outside the apartment complex also heard the sirens, but could not determine their direction. Plaintiff, some 95 feet west of the intersection, began to cross Liberty Street outside of any designated cross walk and against the controlling traffic signal. At this point in the road, Liberty Street had three undivided lanes: two eastbound lanes (the second or middle eastbound lane was for making northbound right turns only) and a westbound lane. Reaching the double yellow lines dividing the two eastbound lanes which she crossed, plaintiff first saw a police vehicle heading towards her in the westbound [lane]. The vehicle came over the railroad tracks on the eastern side of the intersection. Sergeant Willie Long, an eyewitness who was in his vehicle at the corner of Grace Drive and Liberty Street, and plaintiff both observed Officer Kelly's vehicle go completely airborne over the railroad tracks. Once his vehicle crossed the railroad tracks, defendant saw plaintiff at a distance of between 300-332 feet and standing at the double-yellow lines.
>
> Plaintiff turned and began running back in the direction from which she came, across the two eastbound lanes. Officer Kelly, crossing the intersection and accelerating, turned his vehicle with one hand into the eastbound lanes and struck plaintiff on her side as she was retreating to the curb. She was launched six feet into the air over the vehicle and landed in a gutter approximately 76 feet down along the eastbound lane of Liberty Street. Officer Kelly's vehicle traveled approximately 160 feet after striking plaintiff and came to a complete stop in the eastbound lane of Liberty Street. Plaintiff suffered severe injuries.
>
> While Officer Kelly was en route to Officer Fox's two distress calls, he was aware at least four other officers were responding. . . . . [A]n accident reconstruction expert determined Officer Kelly's speed to have varied between 55 and 74 miles per hour.

Jones I, 168 N.C. App. at 434-35, 608 S.E.2d at 388-89. This Court held that, on these facts, the "plaintiff has not forecast sufficient evidence to show a genuine issue of material fact as to gross negligence on the part

of Officer Kelly, [and that] defendants are entitled to judgment as a matter of law." *Jones I*, 168 N.C. App. at, 443, 608 S.E.2d at 393. The Court in *Jones I* reasoned:

> In response to Officer Fox's two distress calls, Officer Kelly responded to apprehend the threatening suspect and defuse what he believed to be a life or death situation of a fellow Durham police officer. In pursuit of the situation, there was some dispute as to what speed Officer Kelly was alleged to have been traveling. In a light most favorable to plaintiff, this speed varied between 55 and 74 miles per hour on a road where the speed limit was 35 miles per hour.

Jones I, 168 N.C. App. at 441, 608 S.E.2d at 393. Our Supreme Court eventually reversed on this issue in *Jones II*, adopting the dissenting opinion in *Jones I*. *Jones II*, 361 N.C. at 146, 638 S.E.2d at 203. The dissent in *Jones I*, adopted by *Jones II*, reasoned:

> [T]he question is whether the evidence raises any genuine issue of material fact on the issue of gross negligence. Regarding gross negligence by a law enforcement officer, this Court has held:
>
> > An officer 'must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury.' 'Gross negligence' occurs when an officer consciously or **recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.**
>
> Viewed, as it must be, in the light most favorable to the plaintiff, the record evidence would allow a jury to find that: (1) Kelly was not pursuing an escaping felon, but was responding to Officer Fox's call for assistance with a situation whose nature Kelly knew nothing about; (2) Kelly knew other officers had also responded to the call for backup, so that Officer Fox was not solely dependent on his aid; (3) Kelly was familiar with the street where the accident occurred, and knew it was a densely populated urban area; (4) as Kelly approached the accident site he was driving between 50 and 74 mph, and did

> not have his blue light and siren activated; (5) Kelly knew that the intersection of Liberty and Elizabeth Streets had been the site of several previous accidents, and that there were "people hanging out" there; (6) Kelly knew from previous experience that the safest maximum speed on the relevant stretch of Liberty Street was 45 mph; (7) Kelly did not apply his brakes when he saw plaintiff in his way; (8) Kelly lost control of his vehicle and struck plaintiff with such force that she suffered serious injuries; and (9) Kelly's failure to drive at a safe speed for road conditions was a violation of the Basic Law Enforcement Training manual. I conclude that this evidence, if believed by the jury, tended to show a "high probability of injury to the public despite the absence of significant countervailing law enforcement benefits," and thus raises a genuine issue of material fact on the question of gross negligence.

Jones I, 168 N.C. App. at 444, 608 S.E.2d at 394-95 (citations omitted).

Viewed in the light most favorable to Defendant, the record evidence in this case would allow a jury to find that: (1) Plaintiff was responding to a minor traffic accident involving only property damage, and the sole purpose of Plaintiff's response was to provide traffic flow assistance; (2) Plaintiff, against department policy, initiated emergency response driving without any justifiable reason, and without notifying his department; (3) Plaintiff engaged his blue lights at some point, but failed to engage his siren, which was also a violation of department policy; (4) Plaintiff sped along Highway 117 at speeds topping one hundred mph where the posted speed limit was forty-five mph and possibly even thirty-five mph at certain points; (5) Plaintiff was a warrant officer and he did not usually engage in driving that required high speeds; (6) Plaintiff had no high-speed driving training beyond that obtained in his Basic Law Enforcement Training; (7) Plaintiff sped past a school, not knowing whether the school was in session; (8) Plaintiff also sped past an Interstate exit and a fire station before reaching Defendant's residential neighborhood; (9) Plaintiff, because of his high speed, either did not see Defendant before she pulled out to cross the north-bound lane and head south on Highway 117, or saw Defendant and did not take appropriate measures to avoid a collision; (10) if Plaintiff did not see Defendant, it was either because he was traveling around a blind curve, or because he was not paying proper attention to the road ahead of him, perhaps suffering from tunnel vision due to his excessive speed; (11) Plaintiff was traveling ninety-five mph and still accelerating until immediately before he made contact with Defendant's vehicle, when he finally removed

his foot from the accelerator and apparently attempted to depress the brake; (12) this was the second automobile accident Plaintiff had been involved in in a single year; and (13) the accident would not have occurred had Plaintiff been engaged in "routine driving," which was all that was warranted in this situation – in fact, the accident would probably not have occurred had Plaintiff simply been driving at a speed less than seventy-five miles per hour.

We find there was a " 'high probability of injury to the public despite the absence of significant countervailing law enforcement benefits[.]' " *Id.* We hold these facts are, at a minimum, as persuasive as the facts in *Jones* and, therefore, as our Supreme Court did in *Jones II*, we reverse the trial court's grant of summary judgment in favor of Plaintiff and remand for further action on Defendant's counter-claims against Plaintiff.

III.

[2] Defendant also argues the trial court erred, to the extent, if any, that it based its award of summary judgment to Plaintiff, Western Surety, Farm Bureau, and United Services on the defense of governmental immunity. We agree.

It does not appear that the trial court granted summary judgment in favor of Plaintiff based upon governmental immunity. It is clear that the Wayne County Sheriff's Office had a $25,000.00 bond, issued by Western Surety, that was in effect at the time of the 30 December 2009 accident. "According to N.C. Gen. Stat. § 58-76-5, a sheriff waives governmental immunity by purchasing a bond as is required by N.C. Gen. Stat. § 162-8." *White v. Cochran*, __ N.C. App. __, __, 748 S.E.2d 334, 339 (2013). Therefore, summary judgment would have been improper on the basis of governmental immunity, at least as to potential damages up to the amount of the $25,000.00 bond issued by Western Surety. *Id.*

Furthermore, this Court has recognized actions brought pursuant to N.C. Gen. Stat. § 20-145 as falling outside the general rule of governmental immunity. *Young v. Woodall*, 119 N.C. App. 132, 139-40, 458 S.E.2d 225, 230 (1995) ("*Young I*"), *rev'd*, 343 N.C. 459, 471 S.E.2d 357 (1996) ("*Young II*"), (together with *Young I*, "*Young*"). In *Young*, a Winston-Salem police officer, Officer Woodall, was sued, wherein the

> plaintiff apparently argue[d] Officer Woodall failed to exercise reasonable care in the exercise of an alleged ministerial or proprietary function carried out for his own private purposes in contravention of departmental policy. Plaintiff also allege[d] that Officer Woodall failed to

> comply with the statutory standard of care codified in N.C. Gen. Stat. § 20-145.

Young I, 119 N.C. App. at 137, 458 S.E.2d at 228. The City of Winston-Salem had purchased liability insurance that would cover the alleged negligence of Officer Woodall, but only for any damages in excess of $2,000,000.00. *Id.* at 136, 458 S.E.2d at 228. This Court held:

> In summary, we conclude that the City of Winston-Salem and Officer Woodall, in his official capacity, are entitled to partial summary judgment based on governmental immunity for any damages up to and including two million dollars, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. We also conclude that Officer Woodall, in his individual capacity, is entitled to summary judgment, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. As to the contention that Officer Woodall failed to observe the standard of care provided in section 20-145, we affirm the trial court's denial of summary judgment on behalf of the City of Winston-Salem and Officer Woodall.

Id. at 139-40, 458 S.E.2d at 230. Stated another way, this Court held that governmental immunity did not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. Our Supreme Court granted discretionary review, and reversed in part, holding that the Court of Appeals had applied the wrong standard pursuant N.C. Gen. Stat. § 20-145, ordinary negligence, instead of the appropriate standard, gross negligence. *Young II*, 343 N.C. at 462, 471 S.E.2d at 359. Our Supreme Court reversed after applying the gross negligence standard and determining that the actions of Officer Woodall did not meet that standard. *Id.* at 463, 471 S.E.2d at 360.

Our Supreme Court did not overrule that part of the Court of Appeals' decision holding that governmental immunity did not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. In fact, though not specifically addressing this issue, our Supreme Court implicitly accepted this Court's holding that governmental immunity does not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. Bound by this precedent, we hold in the present case that Defendant's counterclaim based upon the alleged gross negligence of Plaintiff pursuant to N.C. Gen. Stat. § 20-145 is not barred by governmental immunity.

Reversed and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 AUGUST 2014)

ANDREWS v. PARRISH No. 13-1067	Wake (08CVD15341)	Affirmed
BROOKS v. MARTIN No. 13-1040	Harnett (13CVS25)	Affirmed
BROUSARD v. BROUSARD No. 14-301	Pitt (13CVS87)	Dismissed
CNTY. OF FORSYTH v. CANTERBURY No. 14-45	Forsyth (11CVD3167-68)	Reversed
GARREN v. WATTS No. 13-1085	Buncombe (11CVS6276)	Affirmed
IN RE B.A.S. No. 14-114	Henderson (12JT38)	Affirmed
IN RE BULLOCK No. 14-149	Granville (11SPC84)	Affirmed
IN RE D.M.W. No. 14-48	Forsyth (13J94)	Affirmed
IN RE K.B.G. No. 14-206	Mitchell (09J32)	Affirmed
IN RE K.C. No. 14-210	Edgecombe (12JA59-62)	Affirmed
IN RE KING No. 13-1314	Property Tax Commission (11PTC838)	Vacated and Remanded
IN RE L.E.S.W. No. 14-132	Davidson (11JT152) (12JT8)	Affirmed
IN RE T.M. No. 14-293	Durham (10J273)	Affirmed
LOVING v. WEBB No. 13-1082	Cumberland (12CVS7501)	Affirmed
MORGAN v. INTERIM HEALTHCARE No. 13-942	N.C. Industrial Commission (899078)	Affirmed

OKAFOR v. OKAFOR No. 13-1441	Guilford (12CVS10235)	Affirmed
ROBERTS v. ROBERTS No. 13-1210	Durham (09CVD307)	Affirmed
ROBERTS v. WARD No. 14-144	Madison (12CVD166)	Affirmed
STATE v. ADLAN No. 14-92	Guilford (12CRS94068)	No Error
STATE v. ALLEN No. 14-105	Henderson (12CRS513172) (12CRS53173) (13CRS50)	No Error
STATE v. AUTRY No. 14-218	Sampson (12CRS1594-95) (12CRS50683-84)	No Error
STATE v. BLOW No. 13-1238	Henderson (12CRS961)	No Error
STATE v. BROWN No. 14-35	Guilford (11CRS77219)	No Error
STATE v. BUNN No. 14-15	Durham (12CRS52074)	No prejudicial error
STATE v. CLOER No. 13-1423	Mecklenburg (10CRS237504)	Affirmed
STATE v. COFFIELD No. 14-19	Edgecombe (12CRS53619-20)	No Error
STATE v. DAVIS No. 13-1313	Forsyth (10CRS31069) (10CRS61853-54)	No Error
STATE v. DOBIE No. 13-1143	Mecklenburg (12CRS14674) (12CRS14676)	No Error
STATE v. DUNSTON No. 14-401	Durham (04CRS50087)	Affirmed
STATE v. EDWARDS No. 13-1290	Sampson (11CRS50400-02) (12CRS1596) (12CRS1599-1601)	No Error

STATE v. GRIFFIN No. 13-1213	Mecklenburg (12CRS200756)	No Error
STATE v. HAIZLIP No. 13-1286	Guilford (12CRS24422) (12CRS76539) (12CRS76540)	No Error
STATE v. HUGHES No. 14-73	Mecklenburg (12CRS200980-84)	No Error
STATE v. JOLLY No. 14-194	Guilford (12CRS24828) (12CRS92661)	No prejudicial error
STATE v. LOTT No. 13-719	Wake (11CRS218625-28) (11CRS218636-39) (11CRS218666)	No Error
STATE v. MATHES No. 13-955	Buncombe (12CRS61691)	No Prejudicial Error
STATE v. MOORE No. 14-141	Columbus (11CRS51346)	No Error
STATE v. MUTTER No. 13-1167	Buncombe (12CRS495) (12CRS53764-65) (12CRS54197)	No Error
STATE v. PERKINS No. 13-1352	Wake (09CRS211758-60) (09CRS211765)	No Error
STATE v. SELLERS No. 14-362	Davidson (11CRS53249) (12CRS758)	No Error
STATE v. SMITH No. 13-742-2	Cabarrus (09CRS7224)	Vacated and Remanded
STATE v. ST. GEORGE No. 14-180	Lenoir (13CRS50039) (13CRS700035)	No Error
STATE v. STYLES No. 14-281	McDowell (02CRS52509-11)	Vacated and Remanded
STATE v. SURRATT No. 13-1413	Cleveland (09CRS57002-03)	No Prejudicial error

STATE v. TAYLOR No. 14-21	Wake (11CRS214547)	No Error
STATE v. TUCKER No. 14-219	Forsyth (11CRS55247)	Reversed and Remanded
STATE v. WILLIAMS No. 13-1309	Burke (11CRS52730)	No Error
TOWNSEND v. SIMMONS No. 13-1320	Guilford (12SP555)	Affirmed
WELLS FARGO BANK, N.A. v. FISCHER No. 13-1273	Mecklenburg (12CVS12252)	Affirmed
WRIGHT v. ATL. ORTHOPEDICS, P.A. No. 14-136	New Hanover (11CVS4080)	Affirmed

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