235 N.C. App.—No. 3 Pages 427-540

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 26, 2016

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 5 AUGUST 2014

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory orders and appeals—attorney fees award—Industrial Commission—amount of award not yet determined—The Court of Appeals lacked jurisdiction to hear appellant insurance company's argument that the Industrial Commission erred in its determination that an award of attorney fees was appropriate. The Commission had not yet determined the specific amount to be awarded and the Court will not consider an appeal of an attorney fees award until the specific amount of the award has been determined by the trial tribunal. **Salvie v. Med. Ctr. Pharmacy of Concord, Inc., 489.**

Interlocutory orders and appeals—Rule 54(b) certification—An appeal from an interlocutory order in a rezoning case was heard on the merits where the trial court certified pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay appeal of those claims. **Etheridge v. Cnty. of Currituck, 469.**

ATTORNEY FEES

Rezoning—government acted outside legal authority—no abuse of discretion—The trial court did not err in a rezoning case by denying plaintiffs' request for attorney fees. Under the plain language of N.C.G.S. § 6-21.7, a trial court must find that: (1) a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney fees. In this case, the trial court did not explicitly find that defendant abused its discretion in its rezoning decision and there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion. **Etheridge v. Cnty. of Currituck, 469.**

CHILD CUSTODY AND SUPPORT

Motion to modify—insufficient findings of fact and conclusions of law—A custody order denying defendant's motion to modify the custody of his younger two children was remanded for additional findings of fact and conclusions of law fully addressing defendant's motion to modify custody. **D'Alessandro v. D'Alessandro, 458.**

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.

4U HOMES & SALES, INC., PLAINTIFF
v.
HELEN EVETTE McCOY, DEFENDANT

No. COA13-1450

Filed 5 August 2014

Jurisdiction—standing—aggrieved party—appeal from small claims judgment

The trial court lacked jurisdiction over an appeal from a magistrate's judgment in a small claims action for breach of the implied warranty of habitability. Defendant was not an aggrieved party and thus had no standing to appeal the magistrate's judgment where defendant pled damages in excess of the amount available in a small claims action and then obtained all of the relief that defendant was able to obtain in the small claims court.

Appeal by plaintiff and defendant from order entered 13 August 2013 by Judge Ty Hands in Mecklenburg County District Court. Heard in the Court of Appeals 23 April 2014.

Leslie C. Rawls for Plaintiff.

Legal Aid of North Carolina, Inc., by Chadwick H. Crockford & Isaac W. Sturgill, and Legal Services of Southern Piedmont, by Edward P. Byron, for Defendant.

ERVIN, Judge.

Plaintiff 4U Homes & Sales, Inc., and Defendant Helen Evette McCoy appeal from a judgment entered by the trial court rejecting Plaintiff's request that Defendant be summarily ejected from a rental house owned by Plaintiff, awarding Defendant $3,705.00 in compensatory damages for breach of the implied warranty of habitability, and finding in Plaintiff's favor with respect to the unfair and deceptive trade practice and unfair debt collection practice claims that Defendant had asserted against Plaintiff. On appeal, Plaintiff contends that (1) the trial court's determination that Plaintiff had breached the implied warranty of habitability lacked adequate evidentiary support, (2) the trial court erred by determining that the fair rental value of the home as warranted was $495.00 per month, and (3) the trial court erred by failing to account for outstanding rent in calculating the amount of damages to be awarded to Plaintiff.

Defendant, on the other hand, contends that the trial court erred by determining that Defendant had not established that she was entitled to relief on the grounds that Plaintiff had engaged in unfair and deceptive trade and unfair debt collection practices. After careful consideration of the parties' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court lacked jurisdiction to hear Defendant's appeal from the magistrate's judgment, that the trial court's order must be vacated for lack of jurisdiction, and that this case must be remanded to the Mecklenburg County District Court for further remand to the magistrate for reinstatement of the magistrate's original judgment.

I. Factual Background

A. Substantive Facts

1. Plaintiff's Evidence

Cynthia Exum and her husband, Larry Exum, created Plaintiff in 1994 for the purpose of selling and leasing real property. At any given point in time, Plaintiff held from ten to twelve tracts of rental property.

Defendant lived across the street from a property located on Reliance Street, which Plaintiff had acquired in 2010. Although Defendant made inquiry of the Exums about renting the property, they initially declined to enter into such an arrangement with Defendant because they were not ready to rent the property. More specifically, the Exums wanted to have certain cosmetic work done prior to renting the property in order to get a higher monthly rent.

After asking about the property for a year, Defendant told the Exums that she needed to rent the property given that she was about to become homeless due to a pending eviction. As a favor to Defendant, the Exums agreed to rent the property. Once Defendant indicated that she could only afford to pay $350.00 per month in rent, the Exums accepted Defendant's offer given that, in their opinion, the property was in good condition and the amount of rent that Defendant proposed appropriately reflected the property's value. For that reason, the Exums told Defendant that she could rent the property in its current condition for $350.00 or rent it for $650.00 after all repairs had been completed.[1]

1. Although the Exums believed that the $350.00 amount reflected the current value of the property, Ms. Exum asserted that, if the home had simply been repainted and the carpet replaced, the home's rental value would have been $50.00 per month higher.

After considering Plaintiff's offer, Defendant entered into a lease agreement with Plaintiff under which she agreed to rent the property for $350.00 per month from 6 July 2011 until 31 July 2012. In addition, consistently with Plaintiff's routine practice, the lease agreement between Plaintiff and Defendant provided for the payment of a $25.00 late fee. A comparison of the property in question with five other nearby properties on a per square foot basis indicated that the amount of rent that Plaintiff charged Defendant was comparable to that charged for other properties in the area.

The Exums conducted a walkthrough with Defendant prior to allowing her to occupy the property. During that process, Defendant failed to find anything that would tend to render the property unfit for human habitation. A ruptured pipe found on the premises was repaired before Defendant moved in. Although one of the windows was cracked, a replacement window was ordered and installed after Defendant occupied the property. Although Defendant acknowledged that the home was "fit," she also indicated that it needed to be "fixed."

Any repair requests that Defendant made during the time that she occupied the property were honored. For example, when Defendant made Mr. Exum aware in September 2011 that the hot water heater needed repair, he ordered another one on the same day. In the course of fixing the water heater, Mr. Exum noticed that someone had removed the fuse box cover and he made the necessary repairs. In March 2012, Defendant reported a loose toilet to Mr. Exum. After he removed the toilet, Mr. Exum noticed that the subfloor did not suffice to support the toilet, so he replaced and reattached the subfloor and related vinyl tile. In addition, the Exums repaired a broken storm door on the same date. All of these repairs were completed within a few days of notification.

Defendant was behind on her rent payments during the entire lease period. Although the Exums allowed her to make partial payments, Defendant never paid her rent on time. Plaintiff collected a $25.00 late fee from Defendant in February 2012. The Exums declined to renew Defendant's lease at the end of the initial rental period and informed Plaintiff "from time to time" that she would eventually need to move out.

In September 2012, Plaintiff initiated a summary ejectment action against Defendant based upon her failure to make required rental payments. Although Plaintiff obtained a judgment against Defendant, the Exums, instead of taking possession of the property, informed Defendant that she would be evicted if she failed to keep her rent payments current.

Subsequently, Plaintiff forgave four late fees that they were entitled to assess against Defendant under the terms of the lease agreement. However, Defendant failed to pay her rent for the following month in a timely manner.

In January of 2013, Defendant asked Mr. Exum to repair the heater. Two weeks later, the heater broke again. Although the Exums informed Defendant that they could come that Saturday to make the needed repairs, Defendant never returned their phone call. As a result, Mr. Exum went by the home on the following Monday to speak with Defendant and identify a time when he could repair the heater. However, Defendant replied that she would not be home until Thursday and refused to allow Mr. Exum to enter the premises in her absence.

On Thursday, 7 February 2013, the building code inspector inspected the home. After the inspection had been completed, Defendant gave Mr. Exum permission to fix the heater, a process which Mr. Exum completed in thirty minutes. The Exums also spoke with the inspector after the inspection had been completed. On the same date, Plaintiff notified Defendant that her month-to-month tenancy would be terminated and she would have to vacate the property within 45 days. The Exums sent the termination notice because of their belief that Defendant had purposely blocked the making of the needed heater repair and their conviction, in light of their experiences with Defendant, that a continuing landlord-tenant relationship with her would not be successful. According to the Exums, Defendant owes $1,196.93 in past due rent.

A week later, the Exums received an inspection report that contained a list of code violations, with the unrepaired heater being listed as the most critical violation. Although the report asserted that there were no smoke detectors in the home, such devices had been installed before Defendant occupied the residence. Even so, Mr. Exum installed new smoke detectors at the time that he repaired the heater. After receiving the inspection report, the Exums called Defendant to schedule the making of the necessary repairs. However, Defendant did not answer their calls. In spite of the fact that the parties' lease agreement allowed the Exums to enter the premises in order to make repairs, Defendant refused to allow Mr. Exum to enter the home or to take photographs of it. Instead, Defendant slammed the door on Mr. Exum's foot and called her attorney.

In April and May, Plaintiff communicated with Defendant's attorney in an attempt to obtain permission to enter the residence in order to make needed repairs. After Defendant obtained a new attorney in June,

the Exums received authorization to enter the residence and replaced the ceiling, which was sagging, and the windowsills, which were decaying.

2. Defendant's Evidence

Defendant moved into the rental property in July 2011 and made her last rent payment in March 2013. At the time of the initial walkthrough, the home was dirty and smelled of animal urine and feces. In addition, the shower was dripping, the toilet was loose and unstable, and there appeared to be a hole in the floor in the vicinity of the toilet. Defendant requested that all of these conditions be repaired. Finally, Defendant informed the Exums that the ceiling appeared to be about to cave in; however, the ceiling was not repaired until after the February 2013 inspection. Although Defendant informed the Exums that there were no smoke or carbon monoxide detectors in the home immediately after occupying the premises, this deficiency was not rectified until after the February 2013 inspection as well. In spite of these problems, Defendant agreed to rent the property for a monthly amount of $350.00.

Defendant called the inspector in February of 2013. The only violation identified by the inspector of which Defendant had not been previously aware was the fact that the breaker box did not comply with the applicable building code. On the evening following the inspection, Mr. Exum called Defendant to ask what violations had been identified. Although Mr. Exum stated that he had already known what the inspector's findings would be, he indicated that the owner[2] would not pay for the needed repairs given that the monthly rent was only $350.00.

According to Defendant, a monthly rental payment of $350.00 did not reflect the fair market value of the home given the number of code violations that existed at the beginning of her tenancy. Had Defendant been aware of all of the code violations identified by the inspector, she would have only agreed to a $300.00 monthly rental payment. Although Defendant was charged a $25.00 late fee on multiple occasions and although the Exums claimed to have only collected one late fee, Plaintiff's ledger indicated that a late fee of $17.50 had been collected on six occasions. The first portion of any payment that Defendant made was applied to rent, with the remainder being attributed to any outstanding late fee amounts. In view of the fact that Defendant consistently failed to pay her rent on time, the late fee amounts that she was assessed were never actually collected.

2. According to Defendant, the Exums consistently maintained that they did not own the property.

B. Procedural History

On 18 March 2013, Plaintiff filed a complaint seeking to have Defendant summarily ejected from the property on the grounds that she had held over after the expiration of her tenancy and the recovery of $750.00 in past due rent. On 1 April 2013, Defendant filed an answer in which she denied the material allegations of the complaint and asserted counterclaims for breach of the implied warranty of habitability, charging illegal rent, charging illegal fees, and engaging in unfair debt collection and unfair and deceptive trade practices. On 26 April 2013, the magistrate entered a judgment finding that Plaintiff's summary ejectment claim should be dismissed with prejudice, that Defendant had proven all of the counterclaims alleged in her responsive pleading, and that Defendant was entitled to recover a rent abatement in the amount of $5,000.00, which was the maximum that the magistrate could allow by law, and attorney's fees from Plaintiff.

On 1 May 2013, Defendant noted an appeal to the District Court from the magistrate's judgment. On 14 June 2013, Plaintiff filed a reply to the Defendant's counterclaims. The case came on for hearing before the trial court, sitting without a jury, at the 15 July 2013 civil session of the Mecklenburg County District Court. On 13 August 2013, the trial court entered a judgment dismissing Plaintiff's claim for summary ejectment, finding in Plaintiff's favor with respect to Defendant's counterclaims for unfair debt collection and unfair and deceptive trade practices, and awarding Defendant $3,705.00 in compensatory damages for Plaintiff's breach of the implied warranty of habitability. Both parties noted appeals to this Court from the trial court's judgment.

II. Legal Analysis

In its briefs, Plaintiff argues that the trial court erred by finding that Plaintiff breached the implied warranty of habitability, overruling Plaintiff's objection to Defendant's testimony concerning the value of the leased premises as of the date upon which her occupancy began, improperly calculating the amount of damages that should be awarded to Defendant, and failing to find that Plaintiff's summary ejectment claim had been rendered moot by Defendant's surrender of the premises while Defendant contends that the trial court erred by refusing to determine that Plaintiff had engaged in unfair and deceptive trade and unfair debt collection practices. As an initial matter, however, we must determine whether the trial court had the authority to enter the order from which both parties have appealed.

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Put another way, "[s]ubject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). In addition, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009). Although filing an action in the District Court Division that should be brought in the Superior Court Division or vice versa does not ordinarily deprive the court in which the action is filed of subject matter jurisdiction in the absence of the existence of a statutory provision giving one or the other of these two components of the General Court of Justice exclusive jurisdiction over a particular type of claim, *see* N.C. Gen. Stat. § 7A-257 (stating that the "[f]ailure of a party to move for transfer within the time prescribed is a waiver of any objection to the division"; *Peoples v. Peoples*, 8 N.C. App. 136, 143, 174 S.E.2d 2, 7 (1970) (stating that "no order of the district court may be overturned merely because it was not the proper division to enter the order"), the same is not true of actions filed in the small claims court.

At the time that this case was pending in the trial courts, a small claim action was defined as a civil action where:

> (1) The amount in controversy, computed in accordance with [N.C. Gen. Stat. §] 7A-243, does not exceed five thousand dollars ($5,000); and
>
> (2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and
>
> (3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

N.C. Gen. Stat. § 7A-210 (2011).[3] However, N.C. Gen. Stat. §7A-219 provides that:

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3. The General Assembly increased the jurisdictional limitation applicable to small claims actions to $10,000 for all actions filed on or after 1 August 2013. 2013 N.C. Sess. L. c. 159 s. 1 & 6.

> [n]o counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by [N.C. Gen. Stat. §] 7A-210(1) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. Notwithstanding [N.C. Gen. Stat. §] 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action.

Unlike N.C. Gen. Stat. § 7A-243, which establishes the amount in controversy necessary to make an action "proper" in either the District or Superior Court divisions, N.C. Gen. Stat. § 7A-219 absolutely bars the consideration of claims that exceed the "jurisdictional amount" in small claims court, rendering the amount in controversy applicable to actions assigned to the magistrate jurisdictional in nature. *See also Fickley v. Greystone Enters.*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000) (noting that the "plaintiffs [sought] damages in excess of $10,000, which exceeds the $3,000 jurisdictional amount in small claim actions pursuant to the provisions of N.C. Gen. Stat. § 7A-210(1)" in effect at that time).

The proper treatment of cases filed in the small claims court in which counterclaims, some of which may be compulsory, seeking damages in excess of the jurisdictional amount are asserted, has been a source of legislative concern as well. In order to address this issue, the General Assembly gave litigants two options. First, N.C. Gen. Stat. § 7A-220 provides that "the judge shall allow appropriate counterclaims" "[o]n appeal from the judgment of the magistrate for trial de novo before a district judge."[4] Secondly, N.C. Gen. Stat. § 7A-219 provides that,

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4. We suggested this approach in *Fickley*, in which the defendant had filed two successful summary ejectment proceedings against the plaintiffs. *Fickley*, 140 N.C. App. at 259, 536 S.E.2d at 332. Instead of appealing the magistrate's decision in the summary ejectment actions, the plaintiffs instituted a separate action seeking damages for retaliatory eviction and unfair trade practices in the Superior Court. *Id.* In the Superior Court action, the defendant successfully asserted that the plaintiffs' claims constituted compulsory counterclaims that were barred because they had not been asserted before the magistrate. *Id.* at 259-60, 536 S.E.2d at 333. After agreeing that the plaintiffs' claims constituted compulsory counterclaims, *id.* at 260-61, 536 S.E.2d at 333, we noted that they could not

"[n]othwithstanding [N.C. Gen. Stat. §] 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action."[5] As a result, a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court[6] may either assert their claims on appeal to the District Court from an adverse decision by the magistrate or assert those claims in an entirely separate action.[7] However,

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have been properly asserted before the magistrate because the amount in controversy exceeded the jurisdictional limit applicable in small claims court actions. *Id.* at 261, 536 S.E.2d at 333-34. As a result of the compulsory nature of the plaintiffs' claims and the fact that they could have been litigated in an appeal from the magistrate's decision, we determined that the plaintiffs' claims were barred and affirmed the trial court's order. *Id.* at 261-62, 536 S.E.2d at 333-34; *see also Cloer v. Smith*, 132 N.C. App. 569, 575, 512 S.E.2d 779, 782 (1999) (holding that the correct course of action for a defendant who wishes to assert a counterclaim that exceeds the jurisdictional limit applicable to matters heard in the small claims court was to "file [the] action, if at all, with her appeal from the magistrate's decision to the district court").

5. Although we need not address the validity of this approach given that it was not used in this instance, another possible resolution of the problem discussed in the text of this opinion might be a request that the entire case be transferred from the small claims court to the District Court. N.C. Gen. Stat. § 7A-257 (stating that "[a]ny party may move for transfer between the trial divisions"); *see also Stanback v. Stanback*, 287 N.C. 448, 457, 215 S.E.2d 30, 37 (1975) (providing that, "[a]lthough the case allocations of Chapter 7A are [mostly] administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation").

6. According to N.C. Gen. Stat. § 7A-210(1), the amount in controversy in small claims actions is computed in accordance with N.C. Gen. Stat. § 7A-243. According to N.C. Gen. Stat. § 7A-243(2), "[w]here monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages." As a result of the fact that Defendant alleged in her counterclaims that she was entitled to receive a $4,000.00 penalty for each of Plaintiff's violations of the Fair Debt Collection Practices Act pursuant to N.C. Gen. Stat. § 75-55 and claims that "numerous" such violations occurred, it is clear from that portion of Defendant's counterclaims, without considering her additional claims for breach of the implied warranty of habitability, retaliatory eviction, the charging of illegal rents and fees, and unfair and deceptive trade practices, that the value of Defendant's counterclaims exceeded the applicable jurisdictional amount. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 310, 677 S.E.2d 1, 10 (2009) (using a similar process to calculate the value of certain claims that a plaintiff attempted to assert in small claims court), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 530, (2010). The validity of this conclusion is reinforced by the fact that the magistrate found that he or she could not award Defendant the full value of the claims that she presented at the summary ejectment hearing.

7. In *Holloway v. Holloway*, __, N.C. App. __, __, 726 S.E.2d 198, 200 (2012), the defendant filed an unsuccessful summary ejectment action against the plaintiff. Although the defendant appealed from the judgment in the small claims court to the District Court, the jury returned a verdict in favor of the plaintiff on appeal as well. *Id.* In a subsequent

neither of these options was applicable in this case since Plaintiff did not appeal from the magistrate's adverse decision against it, and Defendant, instead, elected to assert counterclaims that the magistrate found exceeded applicable jurisdictional limits in the small claims court and then attempted to appeal the magistrate's judgment to the District Court despite the fact that the magistrate found in her favor and awarded her everything that he could have possibly awarded her.

"After final disposition before the magistrate, the sole remedy for an aggrieved party [to a small claims action] is appeal for trial de novo before a district court judge or a jury." N.C. Gen. Stat. § 7A-228(a). As a result, the only party entitled to invoke the District Court's jurisdiction following a decision by the magistrate in small claims court is an "aggrieved party." Although neither this Court nor the Supreme Court has addressed the issue of what constitutes an "aggrieved party" for purposes of N.C. Gen. Stat. § 7A-228(a), the Supreme Court has defined a "person aggrieved" in the appellate context as a person " 'adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' " *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (quoting 3 C.J.S. *Aggrieved* § 333 (1936)). As a result of the fact that Defendant submitted her counterclaims for the magistrate's consideration in small claims court and received the maximum amount of relief available in that forum, we are unable to see how any of her legal rights were adversely affected. Admittedly, as Defendant notes, "a party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be." *Casado v. Melas Corp.*, 69 N.C. App. 630, 635, 318 S.E.2d 247, 250 (1984) (citing *New Hanover Cnty. v. Burton*, 65 N.C. App. 544, 547, 310 S.E.2d 72 74 (1983), and *McCullock v. N.C. R.R. Co.*, 146 N.C. 316, 320, 59 S.E. 882, 884 (1907)). However, this principal applies in situations in which the court had the authority to grant the additional relief that the plaintiff sought to obtain rather than in situations in which the plaintiff requested the court to grant more relief than the court had power to award. In addition, Defendant argues that Plaintiff's challenge to the

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damage action that the plaintiff filed against the defendant, the defendant claimed that the claims the plaintiff sought to assert should have been brought before the District Court on the theory that they were compulsory counterclaims. *Id.* at __, 726 S.E.2d at 200-01. After noting the tension between the relevant statutory provisions in cases that involved compulsory counterclaims that were actually appealed from the small claims court to the District Court, *id.* at __, 726 S.E.2d at 201-02, we held that, since the claims that the plaintiff sought to assert in the separate action had not been ripe at the time that the magistrate's judgment was appealed to the District Court, they were not required to be asserted before the District Court at that time. *Id.* at __, 726 S.E.2d at 202.

trial court's jurisdiction over this case ignores the fact that a tenant is required to assert the breach of the implied warranty of habitability as a defense in the summary ejectment action. Patrick K. Hetrick & James B. McLaughlin, *Webster's Real Estate Law in North Carolina* § 6.04[3] (6th ed. 2012) (stating that a "tenant who is in default in making rent payments can raise the landlords' breach of the statutory warranty of habitability by way of recoupment, counterclaim, defense, or setoff"). However, Defendant's argument overlooks the fact that the use of a breach of the warranty of habitability as a defense in a summary ejectment action does not preclude the assertion of that breach as a counterclaim on appeal to the District Court for a trial *de novo* in the event that the landlord prevails before the magistrate or in a separate action. As a result, neither of Defendant's attempts to explain why a party who pleads damages in excess of the amount available in a small claims action and then obtains all of the relief that he or she is able to obtain in the small claims court is an "aggrieved party" with standing to seek additional relief on appeal to the District Court.

As a result, the record clearly reflects that Defendant had no standing to appeal the magistrate's judgment in small claims court. In view of that fact, we have no choice except to conclude that the District Court had no authority to hear and decide this case, a determination that renders the District Court's judgment void, requires us to vacate the District Court's judgment, *e.g.*, *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (holding that "[a] judgment is void, when there is a want of jurisdiction by the court over the subject matter of the action"), and necessitates a conclusion that the judgment entered by the magistrate was never properly challenged. As a result, the trial court's judgment must be vacated and this case remanded to the District Court for further remand to the small claims court for the reinstatement of the magistrate's judgment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court lacked jurisdiction over this case. As a result, the trial court's order should be, and hereby is, vacated and this case should be, and hereby is, remanded to the Mecklenburg County District Court for further remand to the magistrate with instructions that the original magistrate's judgment be reinstated.

VACATED and REMANDED.

Judges GEER and STEPHENS concur.

BEVERAGE SYSTEMS OF THE CAROLINAS, LLC, PLAINTIFF
v.
ASSOCIATED BEVERAGE REPAIR, LLC, LUDINE DOTOLI AND
CHERYL DOTOLI, DEFENDANTS

No. COA14-185

Filed 5 August 2014

1. Contracts—breach of contract—non-compete agreement—trial court's authority to revise the agreement

The trial court erred in a case involving a non-compete agreement by granting summary judgment against plaintiff on its breach of contract claim. Pursuant to the terms of the agreement, the trial court had express authority to revise the territorial restrictions in the agreement. The matter was remanded for the trial court to revise the geographic territories to include those areas reasonably necessary to protect plaintiff's business interests. Furthermore, there was a genuine issue of material fact as to whether defendant violated the terms of the agreement.

2. Wrongful Interference—tortious interference with contract—implied-in-fact contract—sufficient forecast of evidence

The trial court erred by granting summary judgment in favor of defendant as to its claim for tortious interference with a contract. Plaintiff forecasted evidence for each element of tortious interference with a contract, including that it had implied-in-fact contracts with third parties based on past business dealings, and there was a material issue of fact as to whether defendants interfered with those contracts.

3. Wrongful Interference—tortious interference with prospective economic advantage—genuine issue of material fact

The trial court erred by granting defendants' summary judgment motion on their claim for tortious interference with a prospective economic advantage. There was a genuine issue of fact whether customers refrained from entering into contracts or continuing previous implied contracts with plaintiff but for defendants' unjustified interference.

4. Unfair Trade Practices—violation of non-compete agreement—material issue of fact

The trial court erred in granting summary judgment in favor of defendant on plaintiff's claim for unfair and deceptive practices or

acts. Since there was a material issue of fact whether defendants solicited business away from plaintiff in violation of a non-compete agreement, plaintiff's allegations also maintained an unfair and deceptive practices claim. Furthermore, plaintiff forecasted sufficient evidence that defendant's breach of the non-compete was deceptive and was sufficient to maintain an unfair and deceptive practices claim.

5. Injunctions—likelihood of success—breach of contract

The trial court erred by granting summary judgment on plaintiff's claim for injunctive relief. Because the Court of Appeals reversed and remanded the trial court's order granting summary judgment in favor of defendant on plaintiff's breach of contract claim, the trial court was required to determine whether there was a likelihood of success on the merits of plaintiff's breach of contract claim based on the revised non-compete.

ELMORE, Judge., dissenting.

Appeal by plaintiff from order entered 3 October 2013 by Judge A. Robinson Hassell in Iredell County Superior Court. Heard in the Court of Appeals 20 May 2014.

Jones, Childers, McLurkin & Donaldson, PLLC, by Kevin C. Donaldson and Dennis W. Dorsey, for plaintiff-appellant.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff timely appeals from an order entered 3 October 2013 granting defendants' motion for summary judgment. After careful review, because the trial court had express authority to revise the restrictions of the non-compete agreement, we reverse the trial court's order and remand for the trial court to revise the geographic area covered by the non-compete to include those areas necessary to reasonably protect plaintiff's business interests. Furthermore, since there is a genuine issue of material fact as to whether Ludine Dotoli violated the revised non-compete, we reverse the order granting summary judgment on the breach of contract claim and remand for trial. Finally, because plaintiff presented evidence showing a genuine issue of material fact for the

remaining tort claims and request for injunctive relief, we reverse the order granting defendants' motion for summary judgment and remand for trial.

Background

The pertinent facts alleged in plaintiff's complaint are as follows: In 2009, Mark Gandino ("Gandino") created and organized Beverage Systems of the Carolinas, LLC, a company that supplies, installs, and services beverage products and beverage dispensing equipment in North Carolina ("plaintiff"). Beginning in 2008 and continuing through 2009, Gandino negotiated with Thomas and Kathleen Dotoli, the parents of defendant Ludine Dotoli ("Ludine")[1] (collectively, Thomas, Kathleen, and Ludine are referred to as "the Dotolis"), about the potential purchase of the business and assets of Imperial Unlimited Services, Inc. ("Imperial") and Elegant Beverage Products, LLC ("Elegant") (collectively, Imperial and Elegant are referred to as "the businesses"). On or about 20 July 2009, plaintiff entered into an "Asset Purchase Agreement" (the "Agreement") with Elegant, Imperial, and the Dotolis. The Agreement provided for the sale of Imperial's and Elegant's assets, trade names, customer lists, accounts receivable, current customers and customer contracts, all equipment, and real property.

As part of the Agreement, Thomas, Kathleen, and Ludine agreed to execute a "Non-Competition Agreement" (the "non-compete"). Specifically, section 1 of the non-compete provided that:

> Subject to the provisions of Section 6 hereof, Seller and Shareholder shall not, from the effective date of the Asset Agreement in the states of North Carolina or South Carolina until the earlier of (i) October 1, 2014 (the "Non-Competition Period"), or (ii) such other period of time as may be the maximum permissible period of enforceability of this covenant (the "Termination Date"), without the prior written, consent of Purchaser, directly or indirectly, for himself or on behalf of or in conjunction with any person, partnership, corporation or other entity, compete, own, operate, control, or participate or engage in the ownership, management, operation or control of, or be connected with as an officer, employee, partner, director,

1. Throughout their pleadings and brief, plaintiff and defendants refer to Mr. Dotoli as "Ludine" even though it appears from his affidavit that his name is spelled "Loudine." For consistency, we use the same spelling as the parties in this opinion.

> shareholder, representative, consultant, independent contractor, guarantor, advisor or in any other manner or otherwise, directly or indirectly, have a financial interest in, a proprietorship, partnership, joint venture, association, firm, corporation or other business organization or enterprise that is engaged in the business of the Purchaser or any of its respective affiliates or subsidiaries on behalf of clients (the "Business").

The non-compete went on to say that:

> If, at the time of enforcement of any provisions of Sections 1, 3 or 4 hereof, a court holds that the restrictions stated herein are unreasonable under circumstances then existing, the parties hereto agree that the maximum period, scope or geographical area that are reasonable under such circumstances shall be substituted for the stated period, scope or area, and that the court shall be allowed to revise the restrictions contained in Sections 1, 3 and 4 hereof to cover the maximum period, scope and area permitted by law.

The Dotolis executed the non-compete at the closing on 30 September 2009. Plaintiff claimed that it collectively paid the Dotolis, Imperial, and Elegant $10,000 as consideration for the non-compete.

In March 2011, plaintiff learned that Ludine's wife Cheryl Dotoli ("Cheryl") had created defendant Associated Beverage Repair, LLC, ("Associated Beverage") (for purposes of this opinion, Associated Beverage, Ludine, and Cheryl are collectively referred to as "defendants") and that Ludine was the manager of Associated Beverage. Moreover, plaintiff alleged that it found out that Ludine was soliciting business from plaintiff's existing customers, specifically PF Chang's and Bunn-O-Matic.

On 8 July 2013, plaintiff filed an amended complaint alleging the following causes of action: (1) breach of the non-compete against Ludine; (2) a request for preliminary and permanent injunctive relief against Ludine; (3) tortious interference with contract against all defendants; (4) unfair and deceptive practices against all defendants; (5) tortious interference with prospective economic advantage against all defendants; and (6) punitive damages. On 11 September 2013, defendants filed a motion for summary judgment as to all causes of action. In support of their motion, defendants filed an affidavit by Ludine claiming that "the deepest penetration by either Elegant or Imperial for the conduct of their

business into South Carolina was Rock Hill . . . and to Spartanburg," and the "western-most penetration" included Gaffney. Furthermore, Ludine averred that in North Carolina, the furthest west the companies' business went was Morganton. The eastern-most penetration was to Wake County. Finally, Ludine denied contacting, communicating, or in any way inducing any prior customers of Imperial or Elegance or present customers of plaintiff into switching their business to Associated Beverage.

The matter came on for hearing on 30 September 2013. On 3 October 2013, the trial court entered an order granting defendants' motion for summary judgment as to all claims. Plaintiff timely appealed.

Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 573 (2008) (internal citations omitted).

Arguments

I. The Non-Compete Agreement

[1] Plaintiff first argues that the trial court erred in granting summary judgment on its breach of contract claim against Ludine. Specifically, plaintiff contends that the non-compete is valid as a matter of law and that there is an issue of material fact as to whether Ludine violated it. In the alternative, should the Court determine that the non-compete is unenforceable as to South Carolina, plaintiff argues that the non-compete may still be enforced in North Carolina based on the "blue pencil doctrine." Because the trial court had express authority to revise the territorial restrictions of the non-compete pursuant to the terms of the agreement, we reverse the trial court's order granting summary judgment and remand this issue for the trial court to revise the geographic territories to include those areas reasonably necessary to protect plaintiff's business interests acquired by the purchase of Elegant and Imperial. Furthermore, there is a genuine issue of material fact as to whether Ludine violated the terms of the non-compete for the jury to resolve.

> It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of

> the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public.

Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968). Whether a covenant not to compete is reasonable is a matter of law to be decided by the court. *Id.* at 663, 158 S.E.2d at 843. "Greater latitude is generally allowed in these covenants given by the seller in connection with the sale of a business than in covenants ancillary to an employment contract." *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 333, 178 S.E.2d 781, 787 (1971). Here, only the first two elements need to be addressed since defendants did not argue before the trial court nor on appeal that the non-compete interfered with the interest of the public.

A. Legitimate Interest

"A covenant must be no wider in scope than is necessary to protect the business of the employer." *Hartman v. W.H. Odell & Associates, Inc.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994) (internal quotation marks omitted).

Here, the scope of prohibited employment activities in the non-compete is reasonably necessary to protect plaintiff's business. In his affidavit, Ludine stated that he had not only been the creator and owner of Elegant, but he had also been the "principal technician" of Imperial. Thus, his employment activities for the businesses would have included both employee ones and activities related to management, operation, and control. The non-compete prohibits Ludine from competing, owning, managing, operating or controlling, or be connected to someone who has a financial interest in any business involved in the beverage dispensing or servicing industry. Thus, the non-compete prohibits Ludine from engaging in employment activities he used to perform for Elegant and Imperial, and the scope of the non-compete reasonably protects a legitimate business interest of plaintiff.

B. Time and Territory Reasonableness

The non-compete restricted Ludine's activities for a five-year period following the sale of Elegant and Imperial. Although our Court has stated that "[a] five-year time restriction is the outer boundary which our courts have considered reasonable" and has noted that five-year restrictions "are not favored" in employment contracts, *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000), "[i]n cases where the covenants not to compete accompanied the sale

of a trade or business, time limitations of ten, fifteen and twenty years, as well as limitations for the life of one of the parties, have been upheld by the Supreme Court of North Carolina[,]" *Seaboard Indus.*, 10 N.C. App. at 335, 178 S.E.2d at 788. Furthermore, the five-year restriction was reasonable based on Imperial's past business presence in the industry. Imperial had been operating since 1999. In fact, plaintiff recognized how valuable Imperial's presence was in the beverage dispensing industry and specifically purchased its "goodwill" for $100,000. Accordingly, the time restraint was reasonable.

With regard to the reasonableness of the territory, this Court has noted that

> to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* its customers. The employer must show that the territory embraced by the covenant is no greater than necessary to secure the protection of its business or good will.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917 (internal citations omitted).

Here, the non-compete was limited to North and South Carolina. Ludine's affidavit stated that Imperial's and Elegant's combined business extended from Wake County to Morganton in North Carolina. In South Carolina, Ludine averred that their business only reached as deep as Rock Hill and Spartanburg and as far west as Gaffney. Consequently, the geographic area covered by the non-compete was not limited to places where Elegant and Imperial had former customers and included areas not necessary to maintain plaintiff's customer relationships; thus, it was unreasonable.[2] Plaintiff requests that should the Court find that

2. It should be noted that any area in which plaintiff itself had former or existing customers would also be reasonable to include in the non-compete. However, defendants contended in their motion for summary judgment that "[t]here is no pleading or proof that [plaintiff] operated anywhere in North Carolina or South Carolina prior to concluding purchase of the assets of Imperial and Elegant[.]" Plaintiff did not refute this nor did it provide any evidence in the record that it either had been operating in North or South Carolina prior to the acquisition or that it has existing customers it did not acquire from Imperial or Elegant. Therefore, for purposes of reasonableness, only former customers of Imperial and Elegant will determine the scope of the territory.

the geographic territory in the non-compete is overly broad, the Court should enforce the non-compete only as to North Carolina under the "blue pencil doctrine."

North Carolina has adopted the "strict blue pencil doctrine":

> When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.

Hartman, 117 N.C. App. at 317, 450 S.E.2d at 920. Under this doctrine, the trial court may use its inherent power to enforce the reasonable, divisible provisions of the non-compete. *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961).

We agree with plaintiff that, under the "blue pencil doctrine," the trial court could have, but chose not to, strike the unreasonable territorial provisions of the non-compete. However, the trial court had authority to enforce the non-compete through paragraph six of the non-compete which specifically and expressly gave the trial court authority to "revise the restrictions . . . to cover the maximum period, scope and area permitted by law." In other words, the trial court's ability to revise the non-compete is not subject to the restrictions of the "blue pencil doctrine" which prohibits a trial court from revising unreasonable provisions in non-compete agreements. Instead, here, the parties included a specific provision in the non-compete—specifically, paragraph six—enabling the trial court to revise the non-compete. Given the fact that non-competes drafted based on the sale of a business are given more leniency than those drafted pursuant to an employment contract since the parties are in relatively equal bargaining positions, the trial court should not have held the entire non-compete unenforceable nor should the trial court's power to revise and enforce reasonable provisions of the non-compete be limited under the "blue pencil doctrine." Instead, the trial court should have invoked its power under paragraph six and revised the non-compete to make it reasonable based on the evidence before it.

The facts of this case are distinguishable from those in which the trial court's authority to revise a non-compete is substantially limited by the "blue pencil doctrine" because those non-competes did not give the trial court express authority to revise the agreements. *See Hartman*, 117 N.C. App. at 318, 450 S.E.2d at 920 (ruling that the non-compete "could

not be saved by 'blue penciling' "); *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) (noting that "th[e] Court cannot in the absence of clearly severable territorial divisions, enforce the restrictions only insofar as they are reasonable" under the "blue pencil doctrine"). In contrast, pursuant to the sale of a business, these parties, who were at arms-length with equal bargaining power, agreed to allow the trial court to revise the non-compete to make it reasonable, and the trial court should have done so. In sum, unlike previous cases, the parties here specifically contracted to give the court power to revise the scope of the non-compete should part of it be determined to be unenforceable.

While this precise issue has not arisen in our Courts, i.e., the right of a trial court to revise the provisions of a non-compete based on the express language of the contract for the sale of a business, this Court has noted that similar language has appeared in a franchisor-franchisee contract in *Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, __ N.C. App. __, 747 S.E.2d 256 (2013). In *Outdoor Lighting*, __ N.C. App. at __, 747 S.E.2d at 261, the franchise agreement between the parties gave the franchisor the right to reduce the scope of the non-compete, a right which the franchisor attempted to invoke. In looking at this particular provision, the Court noted that "it appears, given the language of the agreement, that [the franchisor] had the right to modify the non-competition provision in this manner and exercised this authority in an appropriate manner." *Id.* at __, 747 S.E.2d at 265, n.3. However, the Court was not required to "determine the effectiveness of [that] exercise in private 'blue penciling' " because the modified geographic scope was still unreasonable. *Id.* Although *Outdoor Lighting*'s holding does not directly affect the outcome in this case, it indicates a willingness of our Courts to recognize and enforce revised non-compete agreements when the parties contract for the right to revise a non-compete outside the employment context.

Finally, in recognizing the importance of allowing parties who agree that provisions of a non-compete may be revised in an effort to enforce them, we believe that this practice makes good business sense and better protects both a seller's and purchaser's interests in the sale of a business. It not only protects the business interests of the purchaser, which is a notable concern especially in cases where the seller, similar to Elegant and Imperial, has spent a substantial amount of time building up goodwill in a particular industry, but it also allows the seller to make more money than it would have had it just sold the assets of the business. This is especially true in North Carolina where our Supreme Court

has been unwilling to adopt a more flexible approach to the "blue pencil doctrine," leaving the courts with few options to try to enforce non-competes in a rapidly changing economy.[3] In addition, potential buyers may be reluctant to buy a business not only if a seller was unwilling to sign a non-compete but also if that non-compete could not be modified and enforced by the courts. As a final note, it is important to remember that, here, pursuant to the sale of Imperial and Elegant, Ludine agreed to sign the non-compete and was compensated for that agreement as well as getting, arguably, a higher price for the businesses' assets. Then, after allegedly violating the non-compete and being sued by plaintiff, he asked the courts to hold the negotiated-for non-compete invalid.

In support of its conclusion that the trial court could not have revised the non-compete despite the fact that paragraph six explicitly gave it the power to, the dissent notes that the language of paragraph six limits the trial court's authority to revise to that "permitted by law." Thus, according to the dissent, paragraph six "by its very terms makes the 'blue pencil' doctrine applicable." However, this interpretation of the language of paragraph six would construe the provision meaningless. By this logic, the parties would be giving the trial court authority to revise the agreement but, in the same sentence, restrict its power under the "blue pencil doctrine" which expressly prohibits any and all revisions by the trial court.

Instead, in interpreting the language of paragraph six, the phrase "permitted by law" applies to how the trial court revises the agreement, requiring it to revise under the parameters of reasonableness in terms of time and territory. On remand, the trial court is tasked with revising the territorial restrictions of the non-compete to make them reasonable based on the former client base of Imperial and Elegant. Thus, by the terms of this opinion, the trial court is revising the scope in such a way as to make it enforceable, i.e., "permitted," by law.

For all the above mentioned reasons, we reverse the trial court's order and remand this matter to the trial court to revise the non-compete provisions after determining where in North Carolina and South Carolina it would be reasonable to enforce the non-compete based on Elegant's and Imperial's former customer base.

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3. Judge Steelman highlighted this issue in his concurring opinion in *MJM Investigations, Inc. v. Sjostedt*, 205 N.C. App. 468, 698 S.E.2d 202, 2010 WL 2814531, *5 (No. COA09-596) (July 20, 2010) (unpublished), noting that: "The law of restrictive covenants should be re-evaluated by our Supreme Court in the context of changing economic conditions."

In addition, although, as a matter of law, the trial court should have revised the non-compete to make it reasonable and enforceable, there exists a genuine issue of material fact as to whether Ludine violated the non-compete. Plaintiff alleged that its customers claimed that Ludine was attempting to solicit their business to Associated Beverage. Although Ludine refutes this in his affidavit, "[c]ontradictions or discrepancies in the evidence must be resolved by the jury rather than the trial judge[,]" *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 481, 562 S.E.2d 887, 897 (2002). Thus, once the trial court revises the non-compete to include only those areas reasonably necessary to protect plaintiff's business interests, the issue of whether Ludine violated the non-compete should be tried to determine whether Ludine violated the non-compete.

II. Tortious Interference with a Contract

[2] Next, plaintiff argues that the trial court erred in granting summary judgment as to its claim for tortious interference with a contract. Specifically, plaintiff contends that it had implied-in-fact contracts with third parties based on past business dealings and that there is a material issue of fact as to whether defendants interfered with those contracts.

> To establish a claim for tortious interference with contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Sellers v. Morton, 191 N.C. App. 75, 81, 661 S.E.2d 915, 921 (2008).

Here, plaintiff has forecasted evidence that it had implied contracts with third-party customers. Although it is undisputed that plaintiff did not have express contracts with third-party customers, plaintiff presented evidence showing conduct that created implied contracts. "An implied in fact contract is a genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words." *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 35-36, 604 S.E.2d 327, 333 (2004); *see also Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) ("An implied contract refers

to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding."). Defendants described the businesses' relationship with its customers as: "so long as Imperial provided its services competently and at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its accounts and successfully promoted and sold the coffee and tea products provided to Elegant by its vendors, Elegant continued representing its suppliers." Thus, there was evidence of a substantial business relationship between the businesses and third-party customers based on the prior dealings between the parties. Accordingly, plaintiff satisfied its burden of showing a genuine issue of fact as to this first element since "the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a 'real' contract or genuine agreement between the parties[,]" *Miles*, 167 N.C. App. at 36, 604 S.E.2d at 333.

With regard to the second element, it is undisputed defendants knew about those contracts since plaintiff acquired those customers when it purchased Elegant and Imperial. Thus, defendants would have been aware of those contracts. As to the third element, plaintiff has forecasted evidence that Ludine, on behalf of Associated Beverage, induced or attempted to induce the customers to switch their business to defendants.

Regarding the fourth element, this Court has noted that: "In order to demonstrate the element of acting without justification, the action must indicate no motive for interference other than malice." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003) (internal quotation marks omitted). Plaintiff alleged that defendants maliciously interfered with the contracts in violation of the non-compete. As discussed above, because there is a genuine issue of fact as to whether Ludine violated the non-compete once it has been revised on remand, there is also a genuine issue of fact as to whether he acted without justification.

Finally, with regard to the last element, plaintiff forecasted evidence that it suffered damages in the form of lost business and lost profits. Specifically, plaintiff claimed that although it used to generate $70,000 in business, it now only generates $20,000 based on defendants' alleged interference with third-party customers. Thus, in sum, plaintiff has forecasted evidence for each element of tortious interference with a contract, and the trial court erred in granting defendants' motion for summary judgment as to this claim.

III. Tortious Interference with a Prospective Economic Advantage

[3] Next, plaintiff argues that the trial court erred in granting defendants' summary judgment motion on its claim for tortious interference with a prospective economic advantage.

"In order to maintain an action for tortious interference with prospective advantage, a [p]laintiff must show that [the] [d]efendants induced a third party to refrain from entering into a contract with [the] [p]laintiff without justification. Additionally, [the] [p]laintiff must show that the contract would have ensued but for [the] [d]efendants' interference." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286 (2002).

Here, as discussed, plaintiff alleged that third-party customers switched their business to defendants instead of continuing their business relationships with plaintiff. Furthermore, as noted above, defendants were not justified in their conduct because, according to plaintiff's contentions, they did so in violation of the non-compete signed by Ludine. Accordingly, there is a genuine issue of fact whether customers refrained from entering into contracts or continuing previous implied contracts with plaintiff but for defendants' unjustified interference. Therefore, the trial court erred in granting summary judgment on this claim.

IV. Unfair and Deceptive Practices or Acts

[4] Next, plaintiff argues that the trial court erred in granting summary judgment as to his claim for unfair and deceptive practices or acts. Specifically, plaintiff contends that since there is a material issue of fact whether defendants solicited business away from plaintiff and whether Ludine's breach of the non-compete was accompanied by aggravating factors, the unfair and deceptive practice claim survives as well.

"Although [N.C. Gen. Stat. § 75-1.1] was intended to benefit consumers, its protections do extend to businesses in appropriate situations." *DaimlerChrysler Corp.*, 148 N.C. App. at 585, 561 S.E.2d at 286. To prevail on a claim of unfair and deceptive practices, a plaintiff must show: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

Here, plaintiff's unfair and deceptive practices claim rests on its claims for Ludine's breach of the non-compete, tortious interference with contract, and tortious interference with an economic advantage.

Initially, we note that plaintiff's claims for tortious interference with contract and tortious interference with an economic advantage allege that defendants engaged in an unfair method of competing with plaintiff. As discussed above, since there is a material issue of fact whether defendants solicited business away from plaintiff in violation of the non-compete, plaintiff's allegations may also maintain an unfair and deceptive practice claim.

With regard to plaintiff's contention that its unfair and deceptive practices claim could be based upon Ludine's breach of the non-compete, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75–1.1. The plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833 (2000) (internal quotation marks and citations omitted). Here, plaintiff has pled sufficient facts showing aggravating circumstances accompanying Ludine's alleged breach of the non-compete to support its unfair and deceptive practices claim. This Court has noted that "[a]ggravating circumstances include conduct of the breaching party that is deceptive[,]" and, when determining whether conduct is deceptive, "its effect on the average consumer is considered." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002). As discussed, Ludine had been involved in the industry for over fifteen years and had built significant goodwill in this particular area. As part of the sale of Elegant and Imperial, Ludine agreed to sign a non-compete agreement, which would presumably have been an important part of plaintiff's willingness to buy the businesses. Then, according to plaintiff, Ludine purposefully violated it in an effort to solicit customers to his wife's new business. Given that plaintiff has pled facts alleging that Ludine purposefully violated an agreement which served as important consideration for plaintiff's decision to buy Imperial and Elegant, plaintiff has sufficiently pled facts showing the egregious nature of Ludine's breach of the non-compete to survive summary judgment. Accordingly, plaintiff has forecasted evidence that Ludine's breach of the non-compete was deceptive and was sufficient to maintain an unfair and deceptive practice claim.

V. Injunctive Relief

[5] Finally, plaintiff contends that the trial court erred in granting summary judgment on its claim for injunctive relief. Specifically, plaintiff alleges that it has shown the likelihood of success on the merits of its case; thus, it is entitled to pursue injunctive relief.

"Because a preliminary injunction is an extraordinary measure, it will issue only upon the movant's showing that: (1) there is a likelihood of success on the merits of his case; and (2) the movant will likely suffer irreparable loss unless the injunction is issued." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004) (internal quotation marks omitted). Here, because it held the non-compete unenforceable, the trial court necessarily found that plaintiff failed to show there was a likelihood of success on its breach of contract claim. However, as discussed above, because we are reversing the trial court's order and remanding the non-compete to the trial court to exercise its authority to revise the geographic scope of the non-compete based on paragraph 6 of the non-compete, the trial court must determine whether there is a likelihood of success on the merits of plaintiff's breach of contract claim based on the revised non-compete. Should the trial court conclude there is, it must also determine "whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 406, 302 S.E.2d 754, 762 (1983). Based on these considerations, the trial court should determine whether plaintiff is entitled to injunctive relief.

Conclusion

Because the trial court had the express authority to revise the geographic scope of the non-compete based on the terms of the agreement, we remand for the trial court to revise the territorial area of the non-compete to include those areas where Elegant and Imperial had former customers. Since there is a genuine issue of material fact whether Ludine violated the revised non-compete, we reverse the order granting summary judgment on plaintiff's breach of contract claim. In addition, we conclude that plaintiff has presented evidence showing a genuine issue of material fact on its remaining tort claims and request for injunctive relief. Therefore, we reverse the order granting summary judgment on those claims and remand for trial.

REVERSED AND REMANDED.

Judge McGEE concurs.

ELMORE, Judge., dissenting.

Because I believe the "blue pencil" doctrine applies to the parties' provision in the non-compete purportedly enabling the trial court to

rewrite or modify the unreasonable territory restrictions, I would affirm the trial court's order granting summary judgment for defendants on plaintiff's claim of breach of the non-compete. I would also affirm the trial court's order granting defendants' motion for summary judgment on plaintiff's cause of action for tortious interference with a contract because plaintiff did not forecast enough evidence of conduct to show that it formed an implied contract-in-fact with its customers. As such, plaintiff's claims for tortious interference with a prospective economic advantage, unfair and deceptive trade practices, and injunctive relief would necessarily fail, and I would affirm the trial court's order as to those issues.

I. Analysis

a.) Breach of the non-compete

Plaintiff argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claim for breach of the non-compete. I disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). We must consider "the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]" *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997).

While I agree with the majority that the geographic area covered by the non-compete was overbroad and thus unreasonable, the majority further concludes that "the trial court had authority to enforce the non-compete through paragraph six of the non-compete which specifically and expressly gave the trial court authority to 'revise the restrictions' 'to cover the maximum period, scope and area permitted by law.' " Thus, the majority rules that the "blue pencil" doctrine is inapplicable in the present case due to the parties' aforementioned agreed upon provision.

Parties to a contract "may bind themselves as they see fit . . . unless the contract would violate the law or is contrary to public policy." *Lexington Ins. Co. v. Tires Into Recycled Energy & Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (citation and quotation marks omitted). The "blue pencil" doctrine, in part, serves to prevent a court from "draft[ing] a new contract for the parties." *Seaboard Indus.*,

Inc. v. Blair, 10 N.C. App. 323, 337, 178 S.E.2d 781, 790 (1971). The doctrine drastically restricts a court's authority to modify an overly broad territory restriction: "A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant." *Hartman v. W.H. Odell & Associates, Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994).

Here, the provision that purportedly gives the trial court authority to rewrite the non-compete's unreasonable territory restrictions states, in part:

> If, at the time of enforcement . . . a court holds that the restrictions stated herein are unreasonable under the circumstances then existing, the parties hereto agree that . . . the court shall be allowed to revise the restrictions contained . . . to cover the maximum period, scope and area **permitted by law**."

(emphasis added). The language of the provision expressly limits a court's revision to that "permitted by law." Thus, the provision by its very terms makes the "blue pencil" doctrine applicable. Alternatively, the provision is unenforceable as it violates the "blue pencil" doctrine on its face. Under either scenario, the "blue-pencil" doctrine applies.

The trial court was correct by not *rewriting* the non-compete to make it reasonable because the law makes clear that a court cannot engage in such action. However, the trial court has the authority to *enforce* portions of a non-compete that are reasonable and disregard the remaining portions if the non-compete divides the restricted area into distinct units. *See Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961). While the non-compete in the case at bar divides the restricted territory into North Carolina and South Carolina, the trial court did not enforce any portion of the non-compete because neither of those restrictions taken separately are reasonable, even in light of the deference given towards non-compete covenants resulting from business sales. In sum, the non-compete's territory restrictions were unreasonable, and the trial court was without legal authority to rewrite or modify the territory restrictions irrespective of the parties' contractual provision providing otherwise.

While the majority relies on *Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, ___ N.C. ___ App. ___, 747 S.E.2d 256 (2013) in support of its holding, that case addressed a franchisor's (a party to the non-compete), as opposed to a trial court's, right to modify

a non-compete outside the context of a business sales contract. *Id.* at ___, 747 S.E.2d at 265, n.3. The majority asserts that *Outdoor Lighting* "indicates a willingness of our courts to recognize and enforce revised non-compete agreements[.]" However, the majority's ruling in this case takes a far more drastic approach, ordering the trial court to undertake the revising and rewriting of the non-compete rather than the contracting party.

In light of these reasons, I would affirm the trial court's order granting summary judgment for defendants on plaintiff's claim of breach of the non-compete because the covenant is unenforceable and invalid.

b.) Tortious Interference With a Contract

Next, the majority agrees with plaintiff's argument that the trial court erred in granting defendants' motion for summary judgment on plaintiff's cause of action for tortious interference with a contract. Plaintiff avers that a contract implied-in-fact existed between itself and its customers acquired from the agreement. I disagree.

The first element of tortious interference with contractual rights is "(1) the existence of a valid contract between plaintiff and a third party[.]" *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 462, 524 S.E.2d 821, 826 (2000) (citation omitted). Mutual assent of both parties to the terms of a contract "is essential to the formation of any contract . . . so as to establish a meeting of the minds." *Connor v. Harless*, 176 N.C. App. 402, 405, 626 S.E.2d 755, 757 (2006) (citation and quotation omitted). Mutual assent is typically formed "by an offer by one party and an acceptance by the other, which offer and acceptance are *essential* elements of a contract." *Id.* (citation and quotation omitted) (emphasis in original). An implied contract-in-fact is "as valid and enforceable as an express contract." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted). The formation of an implied contract "arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts." *Id.* (citation omitted). The conduct of the parties shall imply an offer and acceptance. *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 337, 641 S.E.2d 721, 724 (2007).

Here, plaintiff concedes that "there are no written [customer] contracts. The [defendants] didn't have any when they sold the business nor did [plaintiff]." However, plaintiff alleges that defendants "w[ere] aware of the contracts and customers transferred to [plaintiff] at the time of purchase of the Business."

In support of its contention that a contract implied-in-fact existed with customers, plaintiff referenced 1.) Gandino's affidavit stating that plaintiff conducted business with customers who "had engaged in a regular course of conduct and business relationships with Imperial and/or Elegant since at least 2007"; and 2.) Ludine Dotoli's affidavit that "the arrangement was that so long as Imperial provided competent services at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its account and successfully promoted and sold the coffee and tea products provided to it by its vendors, Elegant continued representing its suppliers." Contrary to the majority's holding, the forecast of evidence put forth by plaintiff suggesting a general business relationship with its customers was insufficient evidence to constitute an offer, acceptance, mutual assent, or obligation to fulfill specific terms of an agreement. Thus, I would affirm the trial court's order granting defendants' motion for summary judgment on this issue because plaintiff did not forecast enough evidence of conduct to show that it formed an implied contract-in-fact with its customers.

c.) Tortious Interference With a Prospective Economic Advantage

Plaintiff also argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's cause of action for tortious interference with a prospective economic advantage. I disagree.

A plaintiff bringing a cause of action for tortious interference with a prospective economic advantage must establish that "the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference." *MLC Auto., LLC v. Town of S. Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010) (citation omitted).

As previously discussed, plaintiff did not establish the existence of any contracts with its customers. Thus, plaintiff's forecast of evidence necessarily does not and cannot identify any actual contract that defendants induced customers to refrain from entering. Moreover, plaintiff never specifically alleges defendants' inducement to refrain from entering a contract, but merely states, "[a]bsent the Defendants' interference, [plaintiff] would have maintained its customer base[,]" "Defendants have purposely and intentionally interfered with the contracts . . . of [plaintiff] with the intent to steal the customers[,]" "Defendants have directly contacted and solicited the customers of [plaintiff][,]" and "Defendants have interfered with [plaintiff's] business relationships[.]"

While plaintiff had an expectation of a business relationship with its customers, it forecasts no evidence in the record to show that but for defendants' actions, contracts with its customers would have been formed. Plaintiff merely makes general and speculative allegations regarding potential future contracts: "As a result of Defendants' interference with [plaintiff's] business relationships and business expectancy, [plaintiff] has suffered damages . . . in excess of $10,000.00." Plaintiff's expectation of a business relationship with current customers is insufficient by itself to establish a tortious interference with a prospective economic advantage claim. *See Dalton v. Camp*, 353 N.C. 647, 655, 548 S.E.2d 704, 710 (2001) (rejecting a claim for tortious interference with a prospective economic advantage claim because "while [plaintiff] may have had an expectation of a continuing business relationship with [customer], at least in the short term, he offers no evidence showing that but for [defendant's] alleged interference a contract would have ensued"). Thus, I would affirm the trial court's order granting summary judgment in favor of defendants on this issue.

d.) Unfair and/or Deceptive Trade Practices

Next, plaintiff argues that the trial court erred in granting summary judgment for defendants on plaintiff's claim for unfair and deceptive trade practices. I disagree.

Plaintiff contends that claims involving breach of a covenant not to compete, tortious interference with contracts, and tortious interference with a prospective economic advantage form the basis for claims of unfair and deceptive trade practices. Even if we assume *arguendo* that this is true under North Carolina law, plaintiff argues that the trial court erred in granting summary judgment on the issue of unfair and deceptive trade practices because "[plaintiff] has set forth sufficient evidence to establish material questions of fact as to each element of its claims" for tortious interference with a contract, tortious interference with a prospective economic advantage, and breach of the non-compete. Since I would rule that plaintiff failed to establish genuine issues of material facts on those claims, plaintiff's claim for unfair and deceptive trade practices would necessarily also fail.

e.) Injunctive Relief

Finally, plaintiff argues that it is entitled to injunctive relief because it has established that the trial court erred in granting summary judgment for defendants. However, since I would hold that the trial court did not err in granting summary judgment, plaintiff's argument for injunctive relief would be meritless.

II. Conclusion

In sum, I would affirm the trial court's order granting defendants' motion for summary judgment because no genuine issue of material fact exists as to plaintiff's claims for breach of the non-compete, tortious interference with a contract, tortious interference with a prospective economic advantage, unfair and deceptive trade practices, and injunctive relief.

CHRISTINA D'ALESSANDRO, Plaintiff
v.
ADAM D'ALESSANDRO, Defendant

No. COA14-58 & COA14-68

Filed 5 August 2014

1. Contempt—civil—appointment of counsel—possibility of incarceration

The trial court erred in a civil contempt and child custody case by ordering that defendant be incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing that resulted in his incarceration.

2. Child Custody and Support—motion to modify—insufficient findings of fact and conclusions of law

A custody order denying defendant's motion to modify the custody of his younger two children was remanded for additional findings of fact and conclusions of law fully addressing defendant's motion to modify custody.

Appeal by defendant from Orders entered 2 July 2013 and 12 July 2013 by Judge Lori G. Christian in District Court, Wake County. Heard in the Court of Appeals 21 May 2014.

Lane & Lane, PLLC by Freddie Lane, Jr. and Melissa C. Rush-Lane, for defendant-appellant.

No appellee brief filed.

STROUD, Judge.

Defendant appeals from two orders, one addressing motions by both parties for contempt as to a child custody order and defendant's motion to modify custody, and the other holding defendant in civil contempt for failure to pay child support as ordered. For the reasons stated below, we reverse the orders holding defendant in civil contempt due to the trial court's failure to inquire as to defendant's desire for counsel and his ability to pay for legal representation. We remand the order as to modification of custody for additional findings of fact.

I. Background

The parties were married on 27 May 2000 and two children were born to their marriage—Madeline[1], born in 2002, and Cathy, born in 2004. Plaintiff also has a son, Andy, born in 1997 from a prior relationship, who was not adopted by defendant. On 28 January 2011, plaintiff filed a lawsuit in Wake County District Court, File No. 11 CVD 1280, seeking temporary and permanent custody as well as an emergency custody order of the two children of the marriage. On 14 February 2011, defendant filed his answer and counterclaims to the custody complaint, seeking custody of the two children of the marriage and also including a counterclaim for custody of Andy. On 13 May 2011, the trial court entered an order for temporary custody, granting the parties joint legal custody of the two children of the marriage, with primary physical custody to plaintiff, and granting sole legal custody of Andy to plaintiff.

On 27 June 2011, Wake County Child Support Enforcement filed a complaint in Wake County District Court, File No. 11 CVD 9780, for child support on behalf of Christina D'Alessandro, seeking to establish child support for the two children of the marriage. A child support order ("child support order") was entered on 2 December 2011. This order found that defendant had voluntarily left his employment with Advanced Irrigation Repair, where he was earning $2600.00 per month, and that he had 20 years of experience in landscape irrigation. The trial court further found that defendant had not provided any support to plaintiff since July 2011. The child support order set defendant's child support obligation in the amount of $607.00 per month, effective 1 July 2011, and established child support arrears owed by defendant of $3035.00, to be paid at the rate of $13.00 per month.

During 2011, the parties, mostly defendant, filed numerous motions regarding custody disputes—defendant filed at least eleven—but we will not address the details of these motions and resulting orders as they

1. We will use pseudonyms to protect the privacy of the minor children.

are not relevant to the issues in this appeal. Ultimately, on 26 April 2012, the trial court entered an order for permanent custody in Wake County File No. 11 CVD 1280 which granted sole legal and physical custody of all three children to plaintiff. However, the trial court also found that defendant was a "de facto" parent of Andy and that plaintiff had acted in a manner inconsistent with her constitutionally protected rights as a parent in creating a family unit with defendant and allowing defendant to share decision-making responsibilities as a parent of Andy, and granted defendant visitation with Andy.

The trial court made extensive findings as to defendant's animosity toward plaintiff, his controlling behaviors, his anger and inability to communicate with plaintiff, his disparaging comments about plaintiff to the children, his inappropriate discussions with the children about the plaintiff and the difficulties that the extensive conflict between the parents was causing the children. This order set out a detailed visitation schedule, required the parties to communicate through Our Family Wizard for the next 18 months, to have Andy and Cathy engage in therapy, and to participate in the children's therapy as recommended by the therapist.

Some other relevant requirements of the custody order were for defendant to pay half of "uninsured medical and counseling expenses for the minor children;" to register for an anger management class within 30 days; to pay plaintiff's attorney fees in the amount of $5,000.00, to be paid at a rate of $100.00 per month starting on 1 May 2012; and not to remove the children from school without written consent from plaintiff except for regular visitation.

On 27 August 2012, the trial court entered an order granting plaintiff's motion to intervene as plaintiff in the child support action and removing the matter from the "IV-D docket and transfer[ing] to the courtroom of the assigned family court District Court Judge for all further hearings." This order also released the attorneys for Wake County Human Services Child Support Enforcement as attorneys of record.

During 2012, both before and after entry of the child support order and custody order noted above, the parties filed various motions and several orders were entered, most of which are not relevant for the purposes of this appeal. Overall, these motions and orders demonstrate that the parties continued to have many disputes regarding visitation, and defendant persistently continued to fail to pay child support as ordered. Of these numerous motions, we will discuss only the motions which

were addressed in the trial court's orders now on appeal and which are relevant to the issues raised on appeal[2] :

1. On 7 May 2012, plaintiff filed a motion for order to show cause in File No. 11 CVD 1280 as to defendant's failure to pay $100 per month towards her attorney fees and to abide by the child custody order in various ways.

2. On or about 2 November 2012[3], defendant served upon plaintiff a motion *pro se* in file No. 11 CVD 1280 to modify child custody and visitation and child support, based on allegations regarding plaintiff's remarriage, claims of her emotional and physical neglect of the children, and that plaintiff had "commited (sic) fraud to obtain the current order."

3. On 10 May 2013, plaintiff filed a motion for an order to show cause in File No. 11 CVD 9780 as to defendant's failure to pay child support in violation of the child support order, alleging that he had paid only $26.00 since the 20 February 2013 hearing.

All of these motions, filed in both court files, were heard by the trial court on 20 February 2013. Plaintiff was represented by counsel, and defendant appeared *pro se*. The trial court entered two orders as a result of this hearing:

1. On 2 July 2013, in file No. 11 CVD 1280, the trial court entered an order on civil contempt and on defendant's motion to modify custody which allowed defendant's motion to modify custody but ordered only that defendant would no longer have the same visitation with Andy as the other two children and that Andy would be permitted to initiate visitation in the future; held defendant in civil contempt as to his failure to comply with the custody order; and held that defendant would be required to pay plaintiff's attorney's fees as set forth in the order in File No. 11 CVD 9780.

2. On 12 July 2013, in File No. 11 CVD 9780, the trial court held defendant in civil contempt for failure to pay child support in the amount of $10,933.00; awarded plaintiff $10,000.00 in attorney fees, to be paid at a rate of $1000.00 per month; and remanded defendant into custody of the Sheriff of Wake County, to remain until paying $10,000.00 to purge

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2. The orders disposed of the other pending motions but neither party has challenged the trial court's disposition of those motions on appeal.

3. Defendant's motion for modification apparently was not filed with the trial court prior to the hearing but was served upon plaintiff's counsel and this motion was heard by the consent of the parties.

himself of contempt, which sum would be first applied to child support arrearages and then to attorney's fees.

Defendant timely filed notice of appeal from both orders. Both appeals were heard by this panel on the same hearing date. Although the trial court did not formally consolidate the two actions, both were heard together and as a practical matter, were treated as consolidated. We have therefore consolidated these cases for purposes of the appeals and issue one opinion addressing both.

II. Contempt

[1] Defendant raises the issue of the trial court's failure to inquire as to his desire for appointed counsel when it considered plaintiff's motions for contempt. In one order, defendant was held in civil contempt for his failure to comply with various provisions of the custody order, including his failure to pay for uninsured counseling expenses and to pay the attorney's fees at the rate of $100.00 per month, and in the other, he was held in civil contempt for failure to pay child support as required by the child support order. The trial court, in both cases,[4] "immediately remanded [defendant] into the custody of the Wake County Sheriff's Department," to "remain in custody until such time as he has purged his contempt by paying $10,000.00."

Where a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues. *King v. King*, 144 N.C. App. 391, 394-95, 547 S.E.2d 846, 848 (2001). A defendant may waive his right to representation but the record must reflect that he was advised of this right and he must voluntarily waive it. *See id.* This requirement has been long established by both the United States Supreme Court and the North Carolina Supreme Court:

> In light of the Supreme Court's opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. . . .
>
> At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood

4. The trial court actually included this provision in the order entered in File No. 11 CVD 9780, but ordered in File No. 11 CVD 1280 that "Defendant is held in civil contempt under the terms and conditions set forth in the contempt order in Wake County File No. 11 CVD 9780."

> that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him.

McBride v. McBride, 334 N.C. 124, 131-32, 431 S.E.2d 14, 19 (1993).

At the hearing on 20 February 2013, when all of the pending motions were heard, defendant appeared *pro se*. There was obviously a likelihood that defendant may be incarcerated if held in contempt, as he had been previously held in contempt and incarcerated after a prior motion, and on 20 February 2013 defendant had to respond to two show cause orders, one alleging violation of the custody order and one alleging violation of the child support order. But there is no indication in the record that defendant was advised of his right to have counsel appointed to represent him on the contempt motions at this hearing. The only mention of the issue appears in the transcript, after a long colloquy during which the trial court identified all of the various pending motions filed by both parties which were to be heard that day:

> THE COURT: Okay. Now, I'm moving on to your motions, Mr. Williams.
>
> MR. WILLIAMS: Yes, Your Honor. May 7th, 2012 motion to show cause. [Pause.]
>
> MR. WILLIAMS: And that should've been— an order was issued in that as well.
>
> THE COURT: And Mr. D'Alessandro has signed waivers, I'm assuming.
>
> MR. WILLIAMS: This is the one where he was, Your Honor, wanted for arrest. I'm assuming he has.
>
> THE COURT: Do you have a copy of that order? Of that order to show cause?
>
> MR. WILLIAMS: I've got the motion.

Unfortunately, it appears from our record that Mr. Williams' assumption—that defendant had signed waivers—was unfounded. Perhaps

he had signed waivers at other hearing dates, as this matter had been rescheduled several times, but nothing in the record in either File No. 11 CVD 1280 nor File No. 11 CVD 9780 shows that he waived his right to counsel for the hearing on 20 February 2013. And it would appear that had the trial court inquired, defendant might have been found, at least potentially, to be indigent and thus entitled to court-appointed counsel, as he claimed to be unable to pay the sums ordered by the trial court. *Cf. Young v. Young*, ___ N.C. App. ___, ___, 736 S.E.2d 538, 544 (2012) (noting that a defendant must show that he is indigent to be entitled to court-appointed counsel). Throughout the hearing, defendant steadfastly insisted he could not afford to pay plaintiff:

> [Defendant]: . . . . I can't financially comply. I can't be in compliance. As much as I try to honor, you know, every order out of the court, physically it's impossible to live, eat, and pay all that is required.
>
> . . . .
>
> [Defendant]: That is all cumulative total of the 115, the 200 percent of my income that is tied up in these orders that is——where do I start? At the point of separation, we were $750,000 in debt, and I have some paperwork in here to verify that.
>
> [Court]: How much were you in debt?
>
> [Defendant]: About $750,000, Your Honor.
>
> [Court]: That's marital debt?
>
> [Defendant]: That was both marital and business. It was all together.
>
> [Court]: Okay. And?
>
> [Defendant]: She has since gone through the bankruptcy process. But quite honestly, I can't even afford to file for bankruptcy. Business bankruptcy costs about $30,000 in attorneys fees. And a personal bankruptcy, Chapter 13, would be at least $3,000.

We must therefore "conclude that the trial court erred by ordering that the defendant be incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing resulting in his incarceration." *McBride*, 334 N.C. at 132, 431 S.E.2d at 20. Accordingly, we reverse both orders to the extent that they hold defendant in contempt of the custody order and the child support order.

III. Modification of custody

[2] Although the orders must be reversed as to the contempt provisions as discussed above, defendant did not have any right to appointment of counsel to represent him regarding his November 2012 motion to modify the custody order, so we will address his arguments regarding the provisions of the 2 July 2013 order as to modification of custody. The trial court's order of 2 July 2013 addresses modification of custody to a very limited extent. The only findings of fact which could be considered as relevant to the modification issue[5] are as follows:

> 7. The minor child [Andy] did not exercise visitation with Defendant for several months.
>
> 8. The Court spoke with [Andy] and finds that
>
> a. the minor child loves the Defendant but feels that the Defendant has purposefully rejected him as demonstrated by Defendant's unwillingness to hug the child prior to today's hearing;
>
> b. the minor does now and always has considered Defendant to be his father but considers prior actions of Defendant to be further evidence that Defendant has rejected him, including Defendant's earlier choice not to visit with the child.
>
> 9. The custody order was violated in that [Andy] did not visit with the Defendant; however, the lack of visitation was not willful on the part of the Plaintiff because the minor child refused to go based on his belief that Defendant had rejected him.
>
> 10. The parties agree at the hearing that there has been a substantial change in circumstances affecting the minor child [Andy] such that a modification of his custody and visitation is warranted.
>
> 11. It is in the best interest of the minor child that he have some contact with the Defendant that is initiated by the Defendant but that visitation with Defendant should be modified from the prior order.

5. These findings seem mostly directed to address the defendant's motion to hold plaintiff in contempt as to denial of visitation with Andy, an issue defendant has not raised on appeal. But as they address some of the visitation issues, they could be considered as relevant to the motion to modify custody.

Based on these findings of fact and the conclusion of law that "[t]here has been a substantial change in circumstances affecting the welfare of the minor child [Andy] as to warrant a modification of his custody and visitation[,]" the trial court ordered as follows:

> 3. The Defendant's motion to modify child custody is granted as to the visitation provision relating to [Andy] as follows:
>
> a. Defendant shall have no further visitation obligation in regards to the minor child, [Andy,] unless initiated by [Andy];
>
> b. Defendant shall initiate a dinner visit with the minor child within 1 month of this hearing (February 20, 2013);
>
> c. Defendant shall not make any negative comments to the minor child regarding Plaintiff or her spouse. Defendant shall not discuss custody or custody related matters with [Andy].

On appeal from this order, defendant argues that the trial court failed to make findings of fact and conclusions of law fully addressing his motion to modify custody. Although there were several motions heard on 20 February 2013, defendant correctly points out that his evidence as to the motion to modify custody took up most of the time devoted to the hearing. In fact, when the trial court was reviewing the various pending motions and determining how to proceed to hear them all in an orderly manner, plaintiff's counsel agreed that defendant should present his evidence first, stating that "I believe the longer hearing is going to be his motion to modify custody, and that's his burden."

Defendant alleged several reasons to modify custody for all three children in his motion, and his evidence addressed these reasons as to all three children. Specifically, defendant presented evidence regarding his claims that plaintiff had "emotionally and physically neglected" the three children, not just Andy. His motion requested "51% legal and physical" custody of all three children, and at the hearing, he clarified that he was asking to be granted primary physical and legal custody of all three children. Defendant argues that "the court order is devoid of any findings, conclusions or decree with respect to" the two biological children of the parties and that the trial court "should have ruled upon whether there was sufficient evidence to warrant modification of the permanent custody order with respect to the younger children."

Defendant does not challenge the limited findings of fact and conclusion of law as to the modification of the custody order regarding Andy, but argues that the trial court simply failed to address his motion for modification of custody as to the two younger biological children of the marriage, and he is correct. The order is devoid of any mention of the fact that he sought complete modification of the custodial arrangements for all three children. Thus, we cannot review the trial court's determinations as to the other two children.

> Our Supreme Court has explained why it is essential for trial courts to include a specific finding of a substantial change in circumstances affecting the welfare of the child prior to modifying a custody order:
>
> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.
>
> Requiring this specific finding also ensures the modification is truly necessary to make a custody order conform to changed conditions when they occur. Finally, such findings are required in order for the appellate court to determine whether the trial court gave due regard to the factors expressly listed in N.C. Gen. Stat. § 50–13.7.

Davis v. Davis, ___ N.C. App. ___, ___, 748 S.E.2d 594, 599 (2013) (citations and quotation marks omitted).

It would appear from the lack of findings of fact and conclusions of law as to the two biological children that the trial court did not find defendant's requests to be supported by the facts, the law, or perhaps both, but still the trial court needs to make findings of fact so that it is clear that defendant's motion to modify custody was addressed in full.

The need for this type of finding is even greater in a case such as this, which has been protracted and contentious, to the detriment of all three children. The absence of these findings of fact and conclusions of

law serves to "invite constant litigation by a dissatisfied party so as to keep the involved child[ren] constantly torn between parents and in a resulting state of turmoil and insecurity." *Id.* We must therefore remand the order concerning modification of custody to the trial court to make additional findings of fact and conclusions of law addressing the denial of defendant's motion to modify custody as to the two younger children. The trial court need not make any additional findings as to Andy, as the order modified visitation as to Andy and defendant has not challenged this modification on appeal.

IV. Conclusion

For the reasons stated above, the orders of 2 July 2013 and 12 July 2013 are reversed as to any provisions holding defendant in civil contempt of the trial court's prior orders, and the order of 2 July 2013 is remanded to the trial court for additional findings of fact and conclusions of law addressing its denial of defendant's motion for modification of custody of the two younger children.

12 July 2013 Order in 11 CVD 9780: REVERSED.

2 July 2013 Order in 11 CVD 1280: REVERSED in part, REMANDED in part.

Judges STEPHENS and McCULLOUGH concur.

ETHERIDGE v. CNTY. OF CURRITUCK

[235 N.C. App. 469 (2014)]

E. RAY ETHERIDGE, FRED G. ETHERIDGE, AND MARY KATHERINE R. ETHERIDGE, PLAINTIFFS
v.
COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA13-834

Filed 5 August 2014

1. Appeal and Error—interlocutory orders and appeals—Rule 54(b) certification

An appeal from an interlocutory order in a rezoning case was heard on the merits where the trial court certified pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay appeal of those claims.

2. Zoning—spot zoning—no reasonable basis

The trial court did not err by granting summary judgment in favor of plaintiffs as to their claim for illegal spot zoning. Defendants conceded that the rezoning constituted spot zoning as defined and the evidence did not show that there was a reasonable basis for the rezoning.

3. Attorney Fees—rezoning—government acted outside legal authority—no abuse of discretion

The trial court did not err in a rezoning case by denying plaintiffs' request for attorney fees. Under the plain language of N.C.G.S. § 6-21.7, a trial court must find that: (1) a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney fees. In this case, the trial court did not explicitly find that defendant abused its discretion in its rezoning decision and there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion.

Appeal by plaintiffs and defendants from order entered 25 April 2013 by Judge Walter H. Godwin, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 22 January 2014.

Currin & Currin, by Robin T. Currin and George B. Currin, for plaintiffs.

Currituck County Attorney Donald I. McRee, Jr., for defendants.

CALABRIA, Judge.

Currituck County ("the County") and the Currituck County Board of Commissioners ("the Board") (collectively "defendants") appeal from the portion of the trial court's order granting summary judgment in favor of E. Ray Etheridge, Fred G. Etheridge, and Mary Katherine R. Etheridge (collectively "plaintiffs") as to plaintiffs' claim of illegal spot zoning. Plaintiffs appeal the portion of the trial court's order denying their request for attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.7 (2013). We affirm.

I. Background

This appeal concerns a dispute over a 1.1 acre parcel of land ("the property") owned by Currituck Grain, Inc. ("Currituck Grain") in the town of Shawboro in Currituck County, North Carolina. Prior to 5 December 2011, the property was zoned agricultural under Currituck County's Unified Development Ordinance ("the UDO"). The adjoining parcels of land on three sides of the property were also zoned agricultural, and the parcel on the remaining side of the property was zoned general business.

Currituck Grain entered into a contract with Daniel Clay Cartwright ("Cartwright") by which Cartwright would purchase the property to establish what he called a "recycling center," which would handle, stockpile, and sell scrap metal and materials, rock, mulch, concrete, and dirt. Cartwright's proposed use was not permitted in an agricultural zoning district, but it was permitted in a heavy manufacturing zoning district with a special use permit.

On 23 September 2011, Cartwright submitted an application to have the property rezoned to Conditional District – Heavy Manufacturing. The County Planning Board ("the Planning Board") reviewed Cartwright's rezoning application ("the application") and recommended that it should be denied because, *inter alia*, the proposed use was inconsistent with the current rural zoning classification and was inconsistent with the County's comprehensive land use plan. The Board then conducted a hearing regarding the application on 5 December 2011. At the conclusion of the meeting, the Board voted 6-1 to approve the application.

On 25 January 2012, plaintiffs filed a complaint against defendants in Currituck County Superior Court seeking to have the rezoning of the property invalidated. Plaintiffs' complaint included claims of illegal spot

zoning, arbitrary and capricious rezoning, and violation of due process. Plaintiffs sought a preliminary and permanent injunction against the rezoning as well as attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.7. On 23 March 2012, plaintiffs filed an amended complaint which added an additional claim for violation of N.C. Gen. Stat. § 153A-341 and the UDO. Plaintiffs then filed a motion for summary judgment as to all claims other than their claim for a preliminary and permanent injunction. After a hearing, the trial court entered an order granting summary judgment in favor of plaintiffs as to their claim for illegal spot zoning and denying plaintiffs' request for attorney's fees. The trial court also denied plaintiffs' motion for summary judgment as to their remaining claims. Plaintiffs and defendants each appeal.

II. Jurisdiction

[1] As an initial matter, we note that this appeal is interlocutory because the trial court's order did not resolve all of plaintiffs' claims since it explicitly denied both parties summary judgment as to those remaining claims and there is no subsequent final disposition of those claims in the record. Appeal from an interlocutory order is proper if

> (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Myers v. Mutton, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002). In the instant case, the trial court's order entered final judgments as to plaintiffs' claims for illegal spot zoning and attorney's fees and certified pursuant to Rule 54(b) that there was no just reason to delay appeal of those claims. Accordingly, this appeal is properly before us. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("When the trial court [properly] certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory.").

III. Defendants' Appeal – Spot Zoning

[2] Defendants' sole argument on appeal is that the trial court erred by granting summary judgment in favor of plaintiffs as to plaintiffs' claim for illegal spot zoning. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C.

569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

> Spot zoning is defined, in pertinent part, as a zoning ordinance or amendment that "singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected." *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972), quoted in *Chrismon* [*v. Guilford Cty.*], 322 N.C. [611,] 627, 370 S.E.2d [579,] 588-89 [(1988)] The practice [of spot zoning] may be valid or invalid, depending on the facts of the specific case. *Chrismo*n, 322 N.C. at 626, 370 S.E.2d at 588. In order to establish the validity of such a zoning ordinance, the finder of fact must answer two questions in the affirmative: (1) did the zoning activity constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. *Id.* at 627, 370 S.E.2d at 589.

Good Neighbors of S. Davidson v. Town of Denton, 355 N.C. 254, 257-58, 559 S.E.2d 768, 771 (2002) (footnotes omitted).

In the instant case, defendants conceded at oral arguments that the rezoning at issue constituted spot zoning as defined by our Supreme Court. However, they still contend that summary judgment in favor of plaintiffs was inappropriate because the undisputed evidence is that there was a reasonable basis for the rezoning. Defendants are mistaken.

In order to determine whether there was a reasonable basis for a spot zoning, this Court considers the following factors:

> (1) "the size of the tract in question"; (2) "the compatibility of the disputed zoning action with an existing comprehensive zoning plan"; (3) "the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and" (4) "the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts." *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589. With these factors in mind, "the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case." *Id.*

Childress v. Yadkin Cty., 186 N.C. App. 30, 37, 650 S.E.2d 55, 61 (2007).

In the instant case, the first two factors, the size of the tract and the compatibility of the rezoning with the County's comprehensive plan, clearly weigh against the reasonableness of the rezoning. The rezoned property is only 1.1 acres in size and, as noted by the Planning Board, the rezoning is inconsistent with the County's comprehensive plan. In their brief, defendants do not dispute that these factors should weigh against the rezoning's reasonableness. Instead, defendants argue that, consistent with *Chrismon*, the third and fourth factors support a determination that there was a reasonable basis for the spot zoning. *See Chrismon*, 322 N.C. at 633-34, 370 S.E.2d at 592 ("[W]e find that, because of the quite substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning in this instance.").

A. Benefits vs. Detriments

Defendants first contend that the rezoning would create substantial benefits for the community. Our Supreme Court has stated that the analysis of this factor "is expressly limited to examining the ordinance's beneficial and detrimental effects on the property owner, his neighbors, and the surrounding community." *Good Neighbors*, 355 N.C. at 259, 559 S.E.2d at 772.

> One example of a qualifying benefit is a showing that neighboring property values would increase as a result of the rezoning. Other benefits previously recognized by the Court, as illustrated in *Chrismon*, include: (1) a showing of broad-based support for the proposed use of the property, and (2) a showing that many of the surrounding landowners were likely to use the expanded services offered by the property owner seeking the zoning change.

Id. at 259-60, 559 S.E.2d at 772.

In the instant case, defendants argue that the rezoning will be beneficial because the proposed recycling center would (1) create three to four jobs; (2) allow for dilapidated structures on the property to be rehabilitated; (3) allow county citizens to dispose of their unwanted metals; and (4) make use of a railroad siding. In addition, defendants note that Commissioner J. Owen Etheridge ("Commissioner Etheridge") stated that he witnessed support for the rezoning from twenty-eight of thirty-three attendees at a preliminary community meeting regarding Cartwright's application.

Many of the benefits from the rezoning proposed by defendants are not supported by any evidence presented at the public hearing. For instance, there was no evidence presented that the surrounding community would be particularly likely to use the recycling center or that there was a specific need for a recycling center in the property's location. In *Mahaffey v. Forsyth County*, this Court held that a spot zoning to facilitate the establishment of an automobile parts store could not be said to benefit the community because "auto parts are a common and easily obtainable product and, if such a retail establishment were said to be 'beneficial to a rural community,' then virtually any type of business could be similarly classified." 99 N.C. App. 676, 683, 394 S.E.2d 203, 208 (1990), *aff'd per curiam*, 328 N.C. 323, 401 S.E.2d 365 (1991). The recycling center in the instant case likewise provides only a generalized benefit that has no specific connection to the surrounding rural community.

Commissioner Etheridge's statement that he personally witnessed significant support for the rezoning at a preliminary public hearing is also not supported by any evidence in the record. Moreover, even assuming, *arguendo*, that the statement was accurate, it still fails to establish that there was substantial community support for the rezoning. Commissioner Etheridge's statement acknowledges that multiple individuals were opposed to the rezoning at the meeting he attended, and at the actual public meeting where the rezoning was considered, the vast majority of individuals who addressed the rezoning spoke in opposition to it. Thus, there was not the type of overwhelming public support for the rezoning that would be necessary to establish that the rezoning was beneficial to the surrounding community. *Cf. Chrismon*, 322 N.C. at 630, 370 S.E.2d at 590 (benefit of spot zoning demonstrated when eighty-eight local residents signed a petition supporting the rezoning, multiple members of the community spoke in favor of the rezoning, and only one property owner spoke in opposition to it).

In addition, two real estate professionals who spoke at the hearing stated that they believed that the proposed recycling center would decrease property values both in the immediate vicinity of the property and in the Shawboro community as a whole. There was no evidence to the contrary presented during the meeting. Finally, both Currituck County Sheriff Susan Johnson ("Sheriff Johnson") and a representative from the North Carolina Department of Cultural Resources ("the DCR") submitted letters to the Board expressing their concerns with the rezoning. Sheriff Johnson was concerned because businesses similar to the proposed recycling center had experienced increases in crime and other

suspicious activity, and the DCR was concerned that the proposed recycling center would adversely affect two nearby historic properties.

In light of this evidence, defendants have failed to make a clear showing that the benefits of the rezoning outweighed its detriments. Consequently, this factor also weighs against the reasonableness of the rezoning.

B. Relationship of Uses

Defendants next argue that the proposed uses under the rezoning would be consistent with the uses allowed or occurring on adjacent properties. The *Chrismon* Court stated the following regarding this factor:

> In determining whether a zoning amendment constitutes spot zoning, the courts will consider the character of the area which surrounds the parcel reclassified by the amendment. *Most likely to be found invalid is an amendment which reclassifies land in a manner inconsistent with the surrounding neighborhood.*
>
> 1 R. Anderson, *American Law of Zoning* § 5.16 at 383 (3d ed. 1986) (emphasis added). One court has described the evil to be avoided as "an attempt to *wrench* a single small lot from its environment and give it a new rating *which disturbs the tenor of the neighborhood." Magnin v. Zoning Commission*, 145 Conn. 26, 28, 138 A. 2d 522, 523 (1958) (emphasis added).

Chrismon, 322 N.C. at 631, 370 S.E.2d at 591. The Court went on to note that "significant disturbances such as the rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable" under this factor. *Id.* In *Budd v. Davie County*, this Court cited this language in concluding that a spot rezoning from residential-agricultural to industrial to permit the installation of a sand dredging operation "would destroy the tenor of the quiet residential and agricultural neighborhood." 116 N.C. App. 168, 178, 447 S.E.2d 449, 455 (1994). Similarly, in *Good Neighbors*, our Supreme Court held that a spot rezoning to permit chemical storage in an area "specifically zoned for farms and residences" was unreasonable under this factor. 355 N.C. App. at 262, 559 S.E.2d at 773.

In the instant case, the property was rezoned from agricultural, which is the least intense residential district under the UDO, to heavy

manufacturing, which was the most intense industrial district. Thus, like the spot zonings found to be unreasonable in *Budd* and *Good Neighbors*, the rezoning in this case impermissibly "wrench[es] a single small lot from its environment and give[s] it a new rating which disturbs the tenor of the neighborhood." *Chrismon*, 322 N.C. at 631, 370 S.E.2d at 591 (emphasis omitted).

However, defendants contend that the rezoning should still be considered reasonable pursuant to this factor because (1) the previous use of the property, a granary, was in greater conflict with the surrounding properties than the proposed recycling center; and (2) the County may still place limitations upon the property that would bring it into harmony with the surrounding properties when Cartwright seeks a required special use permit. Defendants' first contention is immaterial, because previous uses of the rezoned property are not considered as part of this factor. *See Good Neighbors*, 355 N.C. at 261, 559 S.E.2d at 773 (This factor consists of "evaluating the relationship between the uses envisioned under the new zoning and *the uses currently present in adjacent tracts* . . . ." (emphasis added)).

In support of its second contention, defendants cite *Purser v. Mecklenburg County*, 127 N.C. App. 63, 488 S.E.2d 277 (1997). In *Purser*, the property at issue was rezoned from residential to a conditional-use district to allow for a "Neighborhood Convenience Center," which would provide retail establishments that were consistent with the daily needs of the nearby residents. *Id.* at 65, 488 S.E.2d at 278. This Court found that under those circumstances, the "relationship of uses" factor weighed in favor of the reasonableness of the spot zoning because "the development of the Center was governed by a conditional use site plan that was designed to integrate the Center into the neighborhood and insure that it would be in harmony with the existing and proposed residential uses on the surrounding property." *Id.* at 70-71, 488 S.E.2d at 282.

Purser is distinguishable from the instant case. Unlike in *Purser*, defendants in the instant case have presented no evidence that the recycling center has been designed to be integrated into the surrounding area. The only condition on the rezoning cited by defendants in their brief is an eight-foot fence which is to be installed around the property. However, defendants fail to adequately explain how this fence will significantly diminish the impact of the recycling center on surrounding properties. Consequently, we conclude that defendants have failed to clearly show that the proposed recycling center would be consistent with the uses of adjoining properties.

Ultimately, defendants have failed to meet their burden to make a clear showing pursuant to any of the *Chrismon* factors that the rezoning was a reasonable spot zoning. Accordingly, the trial court properly granted summary judgment in favor of plaintiffs because the rezoning constituted illegal spot zoning. Defendants' argument is overruled.

IV. Plaintiffs' Appeal – Attorney's Fees

[3] Plaintiffs' sole argument on appeal is that the trial court erred by denying their request for attorney's fees. Specifically, plaintiffs contend that defendant's illegal spot zoning constituted an abuse of discretion and that, as a result, N.C. Gen. Stat. § 6-21.7 required the trial court to award attorney's fees as a matter of law. We disagree.

Ordinarily, the "recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion." *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). However, "[w]e review a trial court's decision whether to award *mandatory* attorney's fees *de novo*." *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008) (emphasis added).

In the instant case, plaintiffs sought to recover attorney's fees pursuant to N.C. Gen. Stat. § 6-21.7, which states:

> In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

N.C. Gen. Stat. § 6-21.7. This statute permits a party that successfully challenges an action by a city or county to recover attorney's fees if the trial court makes certain findings of fact. When the court finds *only* that the city or county acted outside the scope of its legal authority, the award of attorney's fees is discretionary. *See Brock and Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38 (2010) ("[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act."). However, if the court additionally finds that the city's or county's action constituted an abuse of discretion, then the award of attorney's fees is mandatory.

See Internet E., Inc. v. Duro Communications, Inc., 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) ("The word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory.' ").

In the instant case, the trial court properly determined that the rezoning constituted illegal spot zoning and thus that the County acted outside the scope of its legal authority. *See Alderman v. Chatham County*, 89 N.C. App. 610, 616, 366 S.E.2d 885, 889 (1988) ("[U]nless there is a clear showing of a reasonable basis, spot zoning is beyond the authority of the county or municipality." (internal quotations and citation omitted)). However, the court did not find that the County's action was an abuse of discretion and instead ordered both parties to be "responsible for their own attorney's fees and costs." Plaintiffs argue that the trial court's failure to award them attorney's fees was error because (1) the County's action was necessarily an abuse of discretion as a matter of law; or (2) in the alternative, that the record supports a determination that the County abused its discretion. Plaintiffs are mistaken.

Plaintiffs first contend that "illegal spot zoning is always outside the scope of the County's legal authority and always an abuse of discretion and, therefore, once it is determined that illegal spot zoning occurred, the Trial Court is required to award attorney's fees." In support of this argument, plaintiffs rely on the principle noted in this Court's opinion in *Summers v. City of Charlotte*, which states, in relevant part:

> Local governments have been delegated the power to zone their territories and restrict them to specified purposes by the General Assembly. *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968). This authority "is subject both to the . . . limitations imposed by the Constitution and to the limitations of the enabling statute." *Id.* Within those limitations, the enactment of zoning legislation "is a matter within the discretion of the legislative body of the city or town." *Id.*

149 N.C. App. 509, 517, 562 S.E.2d 18, 24 (2002). Plaintiffs contend that since local governments only have discretion to enact zoning legislation when they are acting within the limitations imposed by the Constitution and by statute, any action which exceeds those limitations must also exceed the discretionary authority of the local government such that the action constitutes an abuse of discretion as a matter of law, which in turn requires an automatic award of attorney's fees.

Plaintiffs' contention cannot be reconciled with the plain language of N.C. Gen. Stat. § 6-21.7. Pursuant to that statute, a "finding by the

court that the city or county acted outside the scope of its legal authority," such as a finding that a local government engaged in illegal spot zoning, does not, in and of itself, trigger the mandatory award of attorney's fees. N.C. Gen. Stat. § 6-21.7. Instead, the trial court must also explicitly consider and "find[] that the city's or county's action was an abuse of its discretion" in order to trigger the mandatory award of fees. *Id.* Plaintiffs' proposed interpretation of the statute would collapse these two distinct required inquiries into one, essentially deleting a portion of the statute. Such an interpretation is impermissible because our Courts "have no power to add to or subtract from the language of the statute." *Zaldana v. Smith*, ___ N.C. App. ___, ___, 749 S.E.2d 461, 463 (2013) (internal quotation and citation omitted), *disc. rev. denied*, ___ N.C. ___, ___ S.E.2d ___ (2014).

"[A]n abuse of discretion occurs when a determination 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Bishop v. Ingles Mkts., Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 121 (2014) (quoting *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999)). Contrary to plaintiffs' argument, the language of N.C. Gen. Stat. § 6-21.7 clearly indicates that the General Assembly believed that a local government could erroneously act outside the scope of its legal authority but yet not be acting in a manner "so arbitrary that it could not have been the result of a reasoned decision." *Id.* Thus, we conclude that under the plain language of the statute, the trial court is always required to separately determine both (1) that a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney's fees. Plaintiffs' proposed interpretation to the contrary must be rejected.

Nonetheless, plaintiffs still argue that "the undisputed facts of the case sub judice are particularly egregious and further demonstrate the County's abuse of discretion in approving the rezoning." Specifically, plaintiffs note that during the hearing which considered the rezoning request, concerns with the proposed rezoning were raised by (1) the Planning Board, because the rezoning was inconsistent with the comprehensive plan; (2) Sheriff Johnson, because the proposed use would potentially require the hiring of a new law enforcement officer; (3) the DCR, which was concerned that the proposed use would have negative effects on two nearby historic properties; and (4) nearby landowners. Plaintiffs also contend that the record reflects that the Board failed to properly consider and analyze the relevant spot zoning reasonableness factors after being informed about those factors by the County Attorney.

Plaintiffs argue that the Board's approval of the rezoning in these circumstances irrefutably demonstrates an abuse of discretion.

However, the evidence cited by plaintiffs was not the only information before the Board. Cartwright explained the benefits that the recycling center would bring to the community and informed the Board how he expected the center would operate, including the steps he would take to limit the center's impact on nearby landowners. In addition to Cartwright, three individuals spoke in favor of the rezoning at the public hearing. Two of these individuals specifically referenced prior uses of the property and suggested that the recycling center would not impact the area surrounding the property in a materially different manner than these prior uses. The third individual supported the rezoning because he felt there was a need for industry in Currituck County.

Based upon the information presented during the hearing, Commissioner Etheridge made the following motion in favor of the rezoning:

> Mr. Chairman, since I live in the Shawboro community and I will be affected by this one way or the other, I am going to make a motion to recommend approval of this. And I do so citing that it is consistent with the land use plan, and the request is reasonable and in the public interest. It also promotes orderly growth and development in our community, and it follows the long history of industrial uses that have been in this area.
>
> One, it's a rail siding with three rail spurs, the largest one in Currituck County. It has had a cotton gin, an asphalt plant, two different fertilizer plants, agricultural chemical storage, granaries, as I said to [inaudible], lime off--they offloaded lime there. DOT has--NCDOT, DOT, has used this property to offload rail cars of highway maintenance materials. Various contracting firms have offloaded rail cars at this site. North Carolina Power has, on occasion, offloaded large electrical equipment here. So it has a history of being an industrial area, or the railroad would have never put the siding there to begin with.
>
> So with that, and the fact that there was overwhelming support at the community meeting--I think the report was thirty-three people there, twenty-eight supported it. Here tonight it appears to be somewhat overwhelming support

> from the general community. And the general community we're talking about is Currituck and Shawboro in particular. And I look out here and I see people from Shawboro and throughout the county. And I think it is time that we take the foot of government off the throat of starting businesses in this county and we do what we can to make sure.
>
> Now, in this additional zoning permit, I would also add that we add opaque fencing to be determined height-wise, and a special use permit that every factor that the staff and Mr. Cartwright can work on to mitigate any possible negative impacts be looked at and then addressed at the special use permit.

This statement is the only information on the record regarding the Board's reasoning for the approval of the rezoning, which occurred shortly after Commissioner Etheridge's motion was made. The motion demonstrates that the Board considered most of the *Chrismon* reasonableness factors prior to approving the rezoning. Commissioner Etheridge specifically cited his belief that the rezoning was consistent with the UDO, noted benefits to the community such as economic growth and significant community support, and discussed how the newly zoned property would be consistent with surrounding property uses, including how the recycling center's impact would be mitigated through the special use permit process. While we have determined that Commissioner Etheridge's reasoning was insufficient to meet the County's legal burden of making "a clear showing of a reasonable basis for the zoning," *Good Neighbors*, 355 N.C. at 258, 559 S.E.2d at 771, we cannot conclude that the Board's reliance on the information cited by Commissioner Etheridge was so unreasonable that the legislative act of the rezoning "could not have been the result of a reasoned decision." *Bishop*, ___ N.C. App. at ___, 756 S.E.2d at 121. Accordingly, the trial court did not err by determining that the rezoning was not an abuse of discretion by the County.[1] Since there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion, there was also sufficient evidence for the court, in its discretion, to deny plaintiffs' motion for attorney's fees. Thus, we conclude the trial court did not abuse its discretion by denying that motion. This argument is overruled.

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1. Although the trial court did not explicitly find that the County did not abuse its discretion by enacting the rezoning, such a finding is implicit in the court's decision to have both parties bear their own costs and attorney's fees.

V. Conclusion

The trial court properly awarded summary judgment in favor of plaintiffs for their illegal spot zoning claim because there was no genuine issue of material fact as to whether the rezoning constituted illegal spot zoning. Pursuant to N.C. Gen. Stat. § 6-21.7, if the trial court finds only that a local government acted outside the scope of its authority, the award of attorney's fees is discretionary. However, if the trial court additionally finds that the local government's action was an abuse of discretion, the award of attorney's fees becomes mandatory. Since the court properly determined that the County did not abuse its discretion when it approved the illegal spot zoning of the property, it was not required to award attorney's fees to plaintiffs. The trial court did not abuse its discretion by ordering the parties to pay their own attorney's fees and costs. The trial court's order is affirmed.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

KEEN LASSITER, AS GUARDIAN AD LITEM FOR JAKARI BAIZE, A MINOR, PLAINTIFF
v.
NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED A/K/A NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY HEALTH SCIENCES, TERRY DANIEL, M.D. AND DAYSPRING FAMILY MEDICINE ASSOCIATES, PLLC, DEFENDANTS

No. COA14-165

Filed 5 August 2014

Costs—expert witness fees—witnesses not under subpoena

The trial court erred in a medical malpractice case by granting expert witness fees as costs to defendants pursuant to N.C.G.S. § 7A-305 when the witnesses were not under subpoena.

Appeal by plaintiff from orders entered 9 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 21 May 2014.

Pulley, Watson, King & Lischer, P.A., by Charles F. Carpenter and Tracy K. Lischer, and Edwards & Edwards, L.L.P., by Joseph T. Edwards and Sharron R. Edwards, for plaintiff-appellant.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellees North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences.

Carruthers & Roth, P.A., by Richard L. Vanore, Norman F. Klick, Jr., and Robert N. Young, for defendant-appellees Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC.

McCULLOUGH, Judge.

Plaintiff Keen Lassiter as *guardian ad litem* for Jakari Baize appeals an order granting expert witness fees as costs to defendants Terry Daniel, M.D., and Dayspring Family Medicine Associates, PLLC, pursuant to section 7A-305 of the North Carolina General Statutes. Based on the reasons stated herein, we reverse and remand the orders of the trial court.

I. Background

On 8 December 2010, Chinatha Clark as *guardian ad litem* for Jakari Baize filed a complaint against defendants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital, Wake Forest University Health Sciences (collectively "defendants Baptist and Wake Forest"), Terry Daniel, M.D., and Dayspring Family Medicine Associates, PLLC (collectively "defendants Daniel and Dayspring") for medical malpractice.

In February of 2011, defendants filed motions for the court to schedule a discovery conference.

On 6 July 2012, plaintiff Keen Lassiter as *guardian ad litem* for Jakari Baize filed an "Amended Designation of Expert Witnesses."

Following a hearing held on 13 January 2012, the trial court entered a "Discovery Scheduling Order" ("DSO"). The DSO was amended by order entered 4 February 2013. Plaintiff was ordered to designate, on or before 1 May 2012, all expert witnesses intended to be called at trial. The trial court also stated that "[p]laintiff shall make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012."

Prior to the 15 November 2012 deadline, the following witnesses were deposed by defendants: Kitty B. Carter-Wicker, M.D. on 27 July

2012; Thomas Hegyi, M.D. on 3 August 2012; Richard Inwood, M.D. on 22 August 2012; Marcus C. Hermansen, and M.D. on 25 September 2012.

On 20 December 2012, plaintiff filed a "Motion to Amend Discovery Scheduling Order" seeking an extension of the deadline to depose his expert witnesses.

On 27 December 2012, defendants filed a "Motion to Strike and Exclude Certain Expert Witnesses Designated by Plaintiff," arguing that plaintiff had failed to comply with the provisions of the DSO. Defendants argued that plaintiff failed to provide dates, prior to the 15 November 2012 deadline, for the depositions of the following expert witnesses: Richard C. Lussky, M.D.; J.C. Poindexter, Ph.D.; Lois Johnson, M.D.; Ann T. Neulicht, M.D.; and Steven Shapiro, M.D. Defendants asserted that they would be prejudiced if the aforementioned expert witnesses were not stricken and precluded from testifying at trial.

Following a hearing held at the 14 January 2013 term of Johnston County Superior Court, the trial court entered an order, denying plaintiff's motion to amend the DSO and granting, in part, defendants' motion to strike and exclude certain expert witnesses. Dr. Lussky, Dr. Poindexter, and Dr. Neulicht were excluded from testifying as experts; Dr. Shapiro was only allowed to testify as a treating physician and not as an expert; and Dr. Johnson was to be made available for deposition no later than 1 March 2013.

On 22 July 2013, plaintiff filed a "Notice of Voluntary Dismissal Without Prejudice" of all claims against all defendants.

On 2 August 2013, defendants Daniel and Dayspring filed a motion to tax costs against plaintiff pursuant to section 41(d)[1] of the North Carolina Rules of Civil Procedure and sections 7A-305 and 6-20 of the North Carolina General Statutes. Defendants Daniel and Dayspring alleged that they had "incurred reasonable and necessary expenses for stenographic and videographic services, the cost of deposition transcripts, travel expenses of defense counsel for depositions and expert witness fees for the depositions of plaintiffs' expert witnesses in the total amount of $39,749.60[.]"

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1. N.C. Gen. Stat. § 1A-1, Rule 41 (2013), entitled "Voluntary dismissal; effect thereof," provides in subsection (d) the following: "Costs. – A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis."

Also on 2 August 2013, defendants Baptist and Wake Forest filed a motion to tax costs against plaintiff pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure. Defendants Baptists and Wake Forest alleged that they had incurred "reasonable and necessary costs in the amount of $29,609.80" in the preparation and defense of plaintiff's action.

Following a hearing held at the 26 August 2013 civil session of Johnston County Superior Court, the trial court entered orders taxing certain costs against plaintiff on 9 September 2013. The trial court denied expenses incurred by defendants for video conferencing, stenographic preparation of a deposition summary, and room rent which were found to be "not reasonable and necessary." However, the trial court held as follows:

> [defendants] incurred expenses recoverable under North Carolina General Statute § 7A-305 for stenographic and videographic services and expert witness fees for depositions of expert witnesses taken pursuant to the provisions of the [DSO] entered in this action which the Court concludes did not need to be subpoenaed in light of the language of the [DSO] and that those expenses set forth below were, in the Court's discretion, reasonable and necessary[.]

The trial court ordered $23,799.61 to be taxed as costs against plaintiff to be paid to defendants Baptist and Wake Forest and $24,738.76 to be taxed as costs against plaintiff to be paid to defendants Daniel and Dayspring.

On 30 September 2013, plaintiff entered notice of appeal from these two orders.

II. Standard of Review

"Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) (citations omitted).

III. Discussion

The sole issue on appeal is whether the trial court erred by granting expert witness fees as costs to defendants pursuant to section 7A-305 of the North Carolina General Statutes.

Pursuant to N.C. Gen. Stat. § 6-20,

> [i]n actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are *subject* to *the limitations* on assessable or recoverable costs *set forth in G.S. 7A-305(d)*, unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2013) (emphasis added). N.C. Gen. Stat. § 7A-305(d)(11) grants the trial court explicit statutory authority, to award as discretionary costs, "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2013). In addition, N.C. Gen. Stat. § 7A-314 provides, *inter alia*, that

> (a) A witness under subpoena . . . shall be entitled to receive five dollars ($ 5.00) per day, or fraction thereof, during his attendance[.]
>
> (b) A witness entitled to the fee set forth in subsection (a) of this section . . . shall be entitled to receive reimbursement for travel expenses . . . .
>
> . . . .
>
> (d) An expert witness . . . shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. . . .

N.C. Gen. Stat. § 7A-314(a), (b), and (d) (2013). "In sum, before a trial court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena." *Peters*, 210 N.C. App. at 26, 707 S.E.2d at 741.

Both plaintiffs and defendants agree that N.C. Gen. Stat. § 7A-305, read in conjunction with N.C. Gen. Stat. § 7A-314, limits the trial court's power to award expert fees as costs only when the expert is under subpoena. However, plaintiff argues that because none of the expert witnesses were subpoenaed, the DSO did not modify or waive the requirement of a subpoena, and the parties did not waive the subpoena requirement, the trial court erred by granting expert witness fees. On the other hand, defendants contend that the DSO eliminated the need to subpoena expert witnesses for deposition.

Both plaintiff and defendants cite to our holding in *Jarrell v. The Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559, 698 S.E.2d

190 (2010), in furtherance of their respective arguments. In *Jarrell*, the plaintiffs challenged an order granting the defendants' motion for costs, "specifically disputing that portion totaling $5,715.40 in costs associated with out-of-state expert witnesses." *Id.* at 560, 698 S.E.2d at 191. Two expert witnesses were served with subpoenas to testify, but the plaintiffs argued that the out-of-state expert witnesses appearances at trial were not subject to subpoena because the subpoenas served upon them were ineffective to compel their attendance. *Id.* at 564, 698 S.E.2d at 193. The defendants argued that their discovery scheduling order "expressly waived the statutory requirement that expert witnesses must testify pursuant to subpoena before the prevailing party may recover expert fees." *Id.* at 561, 698 S.E.2d at 191-92. Our Court reviewed the language of the *Jarrell* discovery scheduling order and directed our attention to a paragraph that stated that "[a]ll parties agree that experts need not be issued a subpoena either for deposition or for trial and waive that requirement of the statute as it may affect the recovery of costs." *Id.* at 561, 698 S.E.2d at 192.

In *Jarrell*, our Court reiterated the following:

> [w]here § 7A-314 specifically authorizes the court to tax expert witness fees as costs, only "witness[es] under subpoena, bound over, or recognized" are included. Read *in pari materia*, with specific statutes prevailing over general ones, § 7A-314 limits the trial court's broader discretionary power under § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena.

Id. at 563, 698 S.E.2d at 193.

Although our Court agreed with the defendants that the "the express terms of the DSO would [have] render[ed] inapplicable the statutory provisions detailing recovery of expert witness costs," it did not consider the substance of the defendants' argument for failure to raise it at the trial level. *Id.* at 561-62, 698 S.E.2d at 192. Our Court ultimately ruled that the plaintiffs lacked standing to challenge the validity of the subpoenas served on the non-party expert witnesses. *Id.* at 560, 698 S.E.2d at 191. In addition, our Court held that because the "[p]laintiffs are not entitled to argue that [the expert witnesses'] appearance was voluntary in fact, [the] [d]efendants have met not only the requirements of § 7A-305(d)(11) but have also overcome the hurdle imposed by § 7A-314 'that the cost of an expert witness cannot be taxed unless the witness has been subpoenaed.' " *Id.* at 565, 698 S.E.2d at 194.

Based on a thorough review, we hold that the facts of *Jarrell* are distinguishable from the case *sub judice*. In *Jarrell*, the expert witnesses were subpoenaed while the expert witnesses at issue here were never issued a subpoena. Another important distinguishing factor is that the discovery scheduling order language in *Jarrell* was explicit in terms of waiving the requirement of issuing an expert witness a subpoena in order to recover costs. Here, the DSO language merely provided that "[p]laintiff shall make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012." There was no mention by the parties that the expert witnesses at issue did not need to be issued subpoenas for deposition or for trial and we do not interpret this DSO language as a waiver of the statutory requirements detailing recovery of expert witness costs. Based on the foregoing, we hold that the trial court erred by awarding costs for expert witnesses when the witnesses were not under subpoena. *See Stark v. Ford Motor Co.*, __ N.C. App. __, __, 739 S.E.2d 172, 176 (2013) (citing *Jarrell*, Ford Motor Company conceded and our Court agreed that the trial court erred in awarding fees for expert witnesses incurred while the expert witnesses were not under subpoena).

IV. Conclusion

We reverse the trial court's 9 September 2013 orders to the extent it awarded costs for expert witnesses when the witnesses were not under subpoena. We also remand to the trial court for a determination of an award of costs consistent with this opinion.

Reversed and remanded.

Judges STEPHENS and STROUD concur.

SALVIE v. MED. CTR. PHARMACY OF CONCORD, INC.

[235 N.C. App. 489 (2014)]

JOHN SALVIE, EMPLOYEE, PLAINTIFF
v.
MEDICAL CENTER PHARMACY OF CONCORD, INC., EMPLOYER, AIMCO MUTUAL INSURANCE COMPANY, CARRIER; AND/OR ACTION DEVELOPMENT COMPANY, LLC, ALLEGED EMPLOYER, NONINSURED, AND MITCHELL W. WATTS, INDIVIDUALLY, DEFENDANTS

No. COA13-1279

Filed 5 August 2014

1. Workers' Compensation—jurisdiction—dispute over who must pay plaintiff's claim

The Industrial Commission did not err in a workers' compensation case by determining that it lacked jurisdiction over a dispute between an insurer and its insured regarding premium fraud. Plaintiff's right to workers' compensation benefits and the amount of benefits to which he was entitled had already been decided and the dispute was over who must pay plaintiff's claim.

2. Appeal and Error—interlocutory orders and appeals—attorney fees award—Industrial Commission—amount of award not yet determined

The Court of Appeals lacked jurisdiction to hear appellant insurance company's argument that the Industrial Commission erred in its determination that an award of attorney fees was appropriate. The Commission had not yet determined the specific amount to be awarded and the Court will not consider an appeal of an attorney fees award until the specific amount of the award has been determined by the trial tribunal.

Appeal by defendant AIMCO Mutual Insurance Company from Opinion and Award entered 9 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 March 2014.

Prather Law Firm, P.C., by J.D. Prather, for defendant-appellant.

Smith Law Firm, P.C., by John Brem Smith, for defendants-appellees Medical Center Pharmacy, LLC and Action Development Company, LLC.

DAVIS, Judge.

AIMCO Mutual Insurance Company ("AIMCO") appeals from the Opinion and Award of the North Carolina Industrial Commission dismissing its claims and awarding Action Development Company, LLC ("Action Development") and Mitchell Watts ("Mr. Watts") attorneys' fees. On appeal, AIMCO contends that the Commission erred in (1) concluding that it lacked jurisdiction over AIMCO's claims; and (2) awarding attorneys' fees to Action Development and Mr. Watts pursuant to N.C. Gen. Stat. § 97-88.1. After careful review, we affirm in part and dismiss the appeal in part.

Factual Background

On 20 January 2004, John Salvie ("Plaintiff") suffered a compensable injury by accident to his back while delivering medical equipment. Medical Center Pharmacy of Concord, Inc. ("Medical Center Pharmacy") filed a Form 60 admitting Plaintiff's right to compensation and paid temporary total disability benefits to him. Plaintiff subsequently settled his claim with AIMCO, Medical Center Pharmacy's insurance carrier, in an Agreement of Final Settlement and Release on 5 January 2011. The Industrial Commission approved the settlement by order filed 31 January 2012. Plaintiff's right to workers' compensation benefits is not at issue in this case, and he is not a party to this appeal.

AIMCO initiated the present action in the Industrial Commission by filing a Form 33 request for a hearing on whether AIMCO's admission of liability for Plaintiff's workers' compensation benefits had been caused by either (1) mutual mistake of the parties; or (2) fraud or misrepresentation on the part of Medical Center Pharmacy or its owner, Mr. Watts. AIMCO also sought a determination as to whether Plaintiff was a joint or lent employee of Action Development[1] or of Mr. Watts individually. AIMCO alleged that because Plaintiff performed most of his work for Action Development and was jointly employed by Action Development and Medical Center Pharmacy at the time of his injury, Action Development was "jointly liable for the workers' compensation benefits paid [to Plaintiff] under the legal theory of 'lent' employment."

The matter came on for hearing on 25 June 2012 before Deputy Commissioner Adrian Phillips. Deputy Commissioner Phillips filed an opinion and award on 17 January 2013 concluding that (1) the Commission lacked jurisdiction "over what is now a dispute between an insurer, AIMCO, and its insured regarding premium fraud"; (2) Action

1. Action Development is a real estate holding company and — like Medical Center Pharmacy — is owned by Mr. Watts.

Development was not subject to the Workers' Compensation Act because it did not employ the requisite number of employees; and (3) Action Development and Mr. Watts were entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. AIMCO appealed to the Full Commission, and on 9 August 2013, the Commission entered its Opinion and Award affirming Deputy Commissioner Phillips' decision. AIMCO gave timely notice of appeal to this Court.

Analysis

I. Jurisdiction of the Industrial Commission

[1] AIMCO argues that the Industrial Commission erred in determining that it lacked jurisdiction over AIMCO's claims against Action Development and Mr. Watts. We disagree.

The Industrial Commission is not a court of general jurisdiction. Rather, it is a quasi-judicial administrative board created to administer the Workers' Compensation Act and has no authority beyond that conferred upon it by statute. *Cornell v. W. & S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004). The Workers' Compensation Act specifically "relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist the Act has no application." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966).

When reviewing an Opinion and Award, the jurisdictional facts found by the Commission are not conclusive even if there is evidence in the record to support such findings. *Terrell v. Terminix Servs., Inc.*, 142 N.C. App. 305, 307, 542 S.E.2d 332, 334 (2001). Instead, "reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record." *Id.*

Here, it is undisputed that — as the Commission determined in finding of fact 26 — "Plaintiff does not have a stake in the current case." Therefore, because AIMCO's claim does not implicate the rights of Plaintiff (the injured employee) and instead merely seeks a determination of whether Action Development or Mr. Watts should be required to reimburse AIMCO for some portion of the benefits already paid to Plaintiff, we affirm the Commission's determination that it lacked jurisdiction over the matter.

In so holding, we are guided by our Supreme Court's decision in *Clark v. Gastonia Ice Cream Co.*, 261 N.C. 234, 134 S.E.2d 354 (1964). In *Clark*, an employee filed a workers' compensation claim against his

employer, Gastonia Ice Cream Company ("the Company"), claiming that he had suffered a compensable injury by accident on 3 May 1960. *Id.* at 234, 134 S.E.2d at 355. The Company asserted that on the date of the employee's injury it was covered by an insurance policy issued by Lumbermens Mutual Casualty Company ("Lumbermens") and moved for Lumbermens to be made a party to the proceeding. *Id.* at 234-35, 134 S.E.2d at 355-56. The Company introduced evidence at the hearing before the deputy commissioner tending to show that Lumbermens had agreed to issue a policy beginning 20 April 1960 despite the fact that the written policy stated that the policy period was from 9 May 1960 to 1 June 1961. *Id.* at 237, 134 S.E.2d at 357-58. After concluding that the employee had suffered a compensable injury, the Commission determined that it possessed jurisdiction to determine the respective liabilities of the Company and Lumbermens and concluded that the Company was not covered by the policy on the date the employee's injury occurred. *Id.* at 237, 134 S.E.2d at 357.

Our Supreme Court held that the Commission lacked jurisdiction to determine the rights and liabilities between the Company and Lumbermens and set aside the Commission's findings and conclusions on that issue. *Id.* The Court explained that the Commission is an administrative board with "limited jurisdiction created by statute and confined to its terms," and consequently, whether the Commission had jurisdiction over the Company's action to recover from Lumbermens the payments it was required to make to the employee "depend[ed] solely upon whether such jurisdiction was conferred by statute." *Id.* at 238, 134 S.E.2d at 358 (citation and quotation marks omitted).

The Supreme Court then determined that N.C. Gen. Stat. § 97-91 — which gives the Commission jurisdiction to decide questions arising under the Workers' Compensation Act — did not confer upon the Commission jurisdiction over an indemnity dispute that was not germane to the employee's right to compensation. The Court reasoned that questions arising under the Act "would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents." *Id.* at 240-41, 134 S.E.2d at 360. The Court explained that, as a general rule,

> when it is ancillary to the determination of the employee's rights, the . . . [C]ommission has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, and construction of extent of coverage. . . . On the other hand, when the rights of the employee

> in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack. Or it may occur when the insured and insurer have some dispute entirely between themselves about the validity or coverage of the policy or the sharing of the admitted liability.

Id. at 239-40, 134 S.E.2d at 359 (citation and quotation marks omitted). The Supreme Court concluded that the Workers' Compensation Act neither expressly nor impliedly gives the Commission jurisdiction to decide matters that are purely between an employer and its insurer and that do not impact the rights of the injured employee. *Id.* at 240, 134 S.E.2d at 359.

This principle was further applied in *TIG Ins. Co. v. Deaton, Inc.*, 932 F.Supp. 132 (W.D.N.C. 1996).[2] In that case, TIG Insurance Company ("TIG"), one of the insurance carriers for an injured employee's employer, filed an action against the employer seeking the recovery of benefits that TIG had paid to the injured employee. *Id.* at 135. The employer moved to dismiss the claim, arguing that the North Carolina Industrial Commission had exclusive jurisdiction to hear the case. *Id.* at 136. Citing *Clark*, the federal district court rejected the employer's argument, stating that

> [i]n the case at bar, the dispute is essentially over who must pay [the employee's] claim, not whether or how much [the employee] will be paid. Therefore, this dispute is not "ancillary to the determination of the employee's right" but wholly distinct from it. There is no indication in the record that a decision in this case will in any way effect whether or how much [the employee] will receive on his claim. Thus it appears to this Court that, under the previous rulings of the North Carolina Supreme Court, the Industrial Commission does not have any jurisdiction to hear this case, let alone exclusive jurisdiction.

Id. at 137.

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2. "With regard to matters of North Carolina state law, neither this Court nor our Supreme Court is bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive." *Davis v. Urquiza*, ___ N.C. App. ___, ___, n. 1, 757 S.E.2d 327, 331, n. 1 (2014) (citation and quotation marks omitted).

We find the reasoning in *TIG* persuasive and a correct application of our Supreme Court's decision in *Clark*. As in *TIG*, the insurance provider here, AIMCO, is seeking the reimbursement of benefits that it paid to an injured employee, Plaintiff. Plaintiff's right to workers' compensation benefits (and the amount of benefits to which he is entitled) has already been decided and the dispute now is "over who must pay [Plaintiff's] claim." *Id.* As such, we hold that the Commission properly concluded that it did not possess jurisdiction over this dispute.[3]

II. Attorneys' Fees

[2] AIMCO next argues that the Commission erred in concluding that it brought the present claim without reasonable grounds in violation of N.C. Gen. Stat. § 97-88.1 such that Action Development and Mr. Watts were entitled to the recovery of attorneys' fees. However, although the Commission concluded that an award of attorneys' fees was appropriate, it has not yet ordered the specific amount to be awarded. In its Opinion and Award, the Commission stated as follows:

> AIMCO Mutual Insurance Company shall pay attorney's fees to counsel for Action Development Company, LLC and Mitchell Watts. Counsel for Action Development Company, LLC and Mitchell Watts shall submit to the Full Commission an Affidavit and itemized statement of time expended defending AIMCO's claim for assessment of a reasonable attorney's fee.

Consequently, this portion of the appeal is interlocutory. *See Medlin v. N.C. Specialty Hosp., LLC*, ___ N.C. App. ___, ___, 756 S.E.2d 812, 821 (2014) (dismissing portion of appeal concerning award of attorneys' fees as interlocutory where trial court reserved ruling on amount of award and appellant failed to argue that award of attorneys' fees affected substantial right).

We note that the unresolved issue of the specific amount of attorneys' fees to be awarded does not render AIMCO's *entire* appeal interlocutory. *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (holding that order may be final for purposes of appeal "even when the trial court reserves for later determination collateral issues such as attorney's fees and costs"). However, we have previously held

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3. Because we conclude that the Commission lacked jurisdiction based on the fact that Plaintiff's rights under the Workers' Compensation Act were not at stake, we do not reach the issue of whether Action Development employed the requisite number of employees to be subject to the Act.

that this Court will not consider an appeal of an attorneys' fees award until the specific amount of the award has been determined by the trial tribunal. *See Triad Women's Center, P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010) ("[A]n appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded."). Otherwise, as we explained in *Triad*,

> we would be required to visit the attorneys' fees issue twice: one appeal addressing, in the abstract, whether [the party] may recover attorneys' fees at all and, if we upheld the first order, a second appeal addressing the appropriateness of the actual monetary award.

Id. Accordingly, while we possess jurisdiction over the first issue raised by AIMCO in this appeal, we must dismiss for lack of appellate jurisdiction the portion of AIMCO's appeal challenging the Industrial Commission's determination that an award of attorney's fees was appropriate. *Id.*

Conclusion

For the reasons stated above, we (1) affirm the Industrial Commission's Opinion and Award concluding that it lacked jurisdiction over AIMCO's claims; and (2) dismiss the portion of AIMCO's appeal challenging the Commission's conclusion that Action Development and Mr. Watts were entitled to recover attorneys' fees.

AFFIRMED IN PART; DISMISSED IN PART.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
EDDIE DANIEL BERRY

No. COA13-953

Filed 5 August 2014

1. Evidence—redacted report—stipulation—jury instruction—not an expression of opinion—not prejudicial

The trial court did not err in a sexual offenses case by instructing the jury to accept as true a redacted interview report by a licensed social worker that was entered into evidence by the State. The trial court did not express an opinion in its limiting instruction to the jury, and taken as a whole, the instructions did not prejudice defendant.

2. Evidence—stipulation—plain error not applicable

The trial court did not commit plain error in a sexual offenses case by admitting a licensed clinical social worker's redacted report into evidence. Defendant stipulated to the admission of the report at trial and agreed to the language of the stipulation and limiting instruction. The concept of plain error is not applicable to stipulations entered into at trial.

3. Constitutional Law—effective assistance of counsel—stipulation to report—trial strategy

Defendant did not receive ineffective assistance of counsel in a sexual offenses case when his trial attorney stipulated to the admission of a licensed clinical social worker's redacted report and failed to object to the trial court's instruction regarding the report. The record did not provide sufficient information to determine whether trial counsel's decision to agree to the stipulation of the report was the result of a legitimate trial strategy.

Judge HUNTER, Robert C. concurs in part and dissents in part.

Appeal by defendant from judgment entered 28 February 2013 by Judge James E. Hardin Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

STEELMAN, Judge.

In accepting a stipulation of the parties and giving an instruction to the jury on how to consider the stipulation, the trial court did not express an opinion on a question of fact to be decided by the jury in violation of N.C. Gen. Stat. § 15A-1222 or express an opinion as to whether a fact had been proved in violation of N.C. Gen. Stat. § 15A-1232. Plain error review is not applicable to appellate review of a stipulation entered into by defendant at trial. The record does not provide sufficient information for this court to rule on defendant's ineffective assistance of counsel claim, and that claim is dismissed without prejudice to defendant raising the claim in a motion for appropriate relief filed by the trial court.

I. Factual and Procedural Background

Eddie D. Berry (defendant) met Annalean Rogers (Annalean) in June of 2000. Shortly thereafter he moved into the apartment she shared with her four children: daughters A.R. and B.R. and sons C.R. and D.R. Defendant married Annalean on 5 July 2004 and assumed the role of stepfather to A.R. and her siblings.

At the time of the trial, A.R. was eighteen years old. A.R. testified that defendant sexually assaulted her for the first time a couple of weeks before defendant and Annalean got married. A.R. testified that the sexual assaults continued for several years. The final incident occurred on 4 July 2009. After this incident, A.R. called her uncle, Roy Rogers (Roy), and told him what had happened. A.R. called the police and gave a statement to Officer Robert Lovette (Officer Lovette) of the Graham Police Department. On 15 February 2010, defendant was indicted for taking indecent liberties with a child. A superseding indictment was issued on 26 November 2012 charging defendant with one count of indecent liberties with a child and one count of statutory rape.

At trial, by stipulation of the parties, the State entered into evidence a redacted interview report by Janet Hadler (Hadler), a clinical social worker who interviewed A.R. Her report contained some statements that contradicted A.R.'s trial testimony. The report also contained the following:

> TSCC: This report should be used as only one source of information about the individual being evaluated. In this

> respect, no decisions should be based solely on the information contained in this report. The raw and standardized scores contained in this report should be integrated with other sources of information when making decisions about this individual. [A.R.]'s TSCC is considered to be valid. . . . [A.R.]'s scores were in the clinically significant range for the following TSCC Clinical Scales/Subscales: Anxiety (T-score 67), . . . Fantasy (T-score 68), Sexual Concerns (T-score 120), Sexual Preoccupation (T-score 105), and Sexual Distress (T-score 133.) According to the manual, T-scores at or above 65 are considered clinically significant. For the SC (sexual concerns) scale and it's [sic] subscales SC-P and SC-D, T-scores at or above 70 are considered clinically significant. The manual states, "children with especially elevated scores on the SC scale may have been prematurely sexualized or sexually traumatized. This can occur as a result of childhood sexual abuse, [sic] exposure to pornography, witnessing sexual acts, or, in the case of adolescents, sexual assault by a peer."

Hadler was unable to testify at trial due to a family illness. The parties stipulated that redacted portions of Hadler's report be received as evidence for the purpose of corroborating A.R.'s testimony. The stipulation read as follows:

> Janet Hadler, licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.].

During a conference with counsel outside of the presence of the jury, the trial judge indicated that he would allow the report to be entered into evidence as State's Exhibit 6 pursuant to the agreed upon stipulation, which would be marked as State's Exhibit 7. The trial judge further indicated that:

> I'll then give a limiting instruction that is consistent with pattern instruction 101.41 out of the civil pattern instructions regarding stipulations which will essentially say that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you

> [members of the jury] as true without further proof. Those facts have been stated in the record as it relates to stipulation as described in State's Exhibit 7 since the parties have so agreed. You will take these facts as true for the purpose of this case.

The State's attorney and defendant's trial counsel assented to this instruction, and made no objection.

In the presence of the jury, the State's attorney read the agreed-upon stipulation to the jury and moved, without objection, to enter State's Exhibits 6 and 7 into evidence. The State's attorney then moved to publish copies of Hadler's redacted report to the jury. The trial judge, before allowing the redacted report to be published to the jury, instructed the jury as follows:

> Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.
>
> The agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described.
>
> Since the parties have so agreed, you are to take these facts as true for the purposes of this case.

On 26 February 2013, the jury returned guilty verdicts against defendant for one count of taking indecent liberties with a minor and one count of statutory rape; he was sentenced to 336 to 415 months active imprisonment.

Defendant appeals.

II. Stipulation and Limiting Instruction

[1] In his first argument, defendant contends that the trial court erred by instructing the jury to accept as true a redacted interview report by a licensed social worker that was entered into evidence by the State. We disagree.

A. Standard of Review

A trial judge's expression of opinion on a question of fact violates the statutory mandates of N.C. Gen. Stat. §§ 15A-1222 and 1232, and

therefore is preserved for *de novo* appellate review as a matter of law. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

B. Analysis

The parties advised the trial judge that they had agreed to the following stipulation:

> Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that a portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.]

This stipulation was read verbatim to the jury by Mr. Thompson, the Assistant District Attorney prosecuting the case. Mr. Thompson then clarified, "That stipulation, Your Honor, is State's Exhibit 7. The actual portion of the evidence we're introducing is State's Exhibit 6." Judge Hardin then gave a limiting instruction to the jury which stated that, "The agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described. Since the parties have so agreed, you are to take these facts as true for the purpose of this case."

"A stipulation is a judicial admission and ordinarily is binding on the parties who make it." *State v. Murchinson*, 18 N.C. App. 194, 197, 196 S.E.2d 540, 541 (1973) (citing *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963)).

On appeal, defendant argues that the limiting instruction given by the trial judge violated N.C. Gen Stat. § 15A-1222 because it constituted "an opinion in the presence of the jury on any question of fact to be decided by the jury." Defendant argues that the wording of the instruction and the fact that the jury was handed only Exhibit 6 (the interview report) after the stipulation was read, rather than Exhibit 6 and 7 (the stipulation), that the jury could have reasonably interpreted the instruction to mean they should take the facts of Hadler's redacted report as true, resulting in a prejudicial error to defendant.

The stipulation, as read to the jury, stated that the redacted report "may be considered for the purpose of corroboration of the witness, [A.R.]." The trial judge then gave his limiting instruction. The redacted report was admitted pursuant to the stipulation that it may be used for

purposes of corroboration. There is no indication whatsoever that the trial judge expressed an opinion on any question of fact to be decided by the jury in violation of N.C. Gen. Stat. § 15A-1222 or as to whether a fact had been proved in violation of N.C. Gen. Stat. § 15A-1232. The information contained in Exhibit 7, the stipulation, was to be accepted by the jury as true without further proof. The information in Exhibit 6, the redacted report, was to be used for the purposes of corroboration of A.R.'s testimony. There was no question of fact for the trial judge to express an opinion, with regard to either the stipulation or the redacted report.

"In determining whether the trial judge has expressed an impermissible opinion in its instructions to the jury, '[t]he charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it.'" *State v. Smith*, 160 N.C. App. 107, 120, 584 S.E.2d 830, 838 (2003) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)). As long as the jury instructions, viewed in context, present the law "fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." 160 N.C. App. at 120, 584 S.E.2d at 839. We hold that these principles apply not only to the final jury charge, but also to limiting instructions given by the court during trial.

The parties clearly stated that the stipulation was Exhibit 7 and that the interview referenced therein was Exhibit 6. When reading the stipulation, Mr. Thompson stated, "That stipulation, Your Honor, is State's Exhibit 7. The actual portion of the evidence we're introducing is State's Exhibit 6." Judge Hardin then stated, "I want to make sure that you understand that the State of North Carolina and the defendant have agreed or *stipulated that certain facts shall be accepted by you as true without further proof*." (emphasis added) This makes it clear that the facts to be accepted as true were those contained in the stipulation (Exhibit 7).

"[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Green*, 129 N.C. App. 539, 545, 500 S.E.2d 452, 456 (1998) *aff'd*, 350 N.C. 59, 510 S.E.2d 375 (1999) (citing *State v. Larrimore*, 340 N.C. 119, 154-55, 456 S.E.2d 789, 808 (1995)). There is no reason to believe that the stipulation or limiting instruction had a prejudicial effect on the result of the trial.

Judge Hardin did not express any opinion to the jury in his instructions concerning the stipulation. Judge Hardin simply instructed the jury

as to the parties' stipulation. Nothing in his instructions to the jury indicated any personal opinion as to the facts of the case.

The dissent acknowledges that a "totality of the circumstances" test should be used to determine whether a trial court has made an improper expression of opinion. *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (quoting *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001). However, it then proceeds to parse the language used by Judge Hardin to support its conclusions.

The trial court did not express opinion in his limiting instruction to the jury, and taken as a whole, the instructions did not prejudice defendant.

This argument is without merit.

III. Admissibility of Report

[2] In his second argument, defendant contends that the trial court committed plain error by admitting Hadler's redacted report into evidence. We disagree.

A. Standard of Review

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

B. Analysis

Defendant's trial counsel made no objection to the information contained in the report at trial and stipulated to the admission of the redacted report into evidence. However, even in the face of his trial stipulation, defendant argues on appeal that the admission of Hadler's redacted report is still reviewable under plain error.

Generally, plain error analysis applies only to jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998). We have been unable to find any case law supporting the proposition that evidence received pursuant to a stipulation may be reviewed under plain error. *See State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 745 (2013) (finding that "while the law is clear on when our courts are permitted to use the plain error analysis, it is not clear whether stipulations fall within the purview of such parameters."), *appeal dismissed*, ___ N.C. ___, 752 S.E.2d 493 (2013).

"Plain error review is appropriate when a defendant fails to preserve the issue for appeal by properly objecting to the admission of evidence at trial." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citing *State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190 (2001)).

A stipulation is a judicial admission, voluntarily made by the parties to admit evidence at trial. In the instant case, defendant entered into a written stipulation with the State. It would be indefensible to allow a defendant to enter into a stipulation and then to challenge the evidence admitted pursuant to the stipulation on appeal. The essence of plain error is the failure of a defendant to object, coupled with a "fundamental error" by the trial court in allowing the evidence to be received even in the absence of an objection. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." *Rural Plumbing and Heating, Inc. v. H. C. Jones Const. Co.*, 268 N.C. 23, 31, 149 S.E.2d 625, 631 (1966) (citing *Austin v. Hopkins*, 227 N.C. 638, 43 S.E.2d 849 (1947)).

The conduct of defendant in entering into a stipulation at trial and then seeking to repudiate it on appeal is more akin to invited error than plain error. "[A] defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review." *State v. Jones*, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416

(2001)). Therefore, "[a]lthough defendant labels this [issue on appeal] as 'plain error,' it is actually invited error because, as the transcript reveals, defendant consented to the manner in which the trial court gave the instructions to the jury." *State v. Fox*, 216 N.C. App. 153, 160, 716 S.E.2d 261, 266-67 (2011) (citing *State v. Wilkinson*, 344 N.C. 198, 235–36, 474 S.E.2d 375, 396 (1996)).

In the instant case, defendant agreed to the language of the stipulation and limiting instruction at trial. Defendant made no objection at trial to the limiting instruction, stipulation, or to the substance of the redacted report when it was entered into evidence. We hold that the concept of plain error is not applicable to stipulations entered into at trial.

This argument is without merit.

IV. Ineffective Assistance of Counsel

In his third argument, defendant contends that he received ineffective assistance of counsel when his trial attorney stipulated to the admission of the report and failed to object to the trial court's instruction regarding the report. We disagree.

A. Standard of Review

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. Analysis

Generally, to establish a claim for ineffective assistance of counsel, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*

v. Washington, 466 U.S. 668, 694, 80 L.Ed.2d 674, 698 (1984). The Supreme Court has noted that, "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689, 80 L.Ed.2d at 694.

In the present case, the record does not provide sufficient information to determine whether trial counsel's decision to agree to the stipulation of the report was the result of a legitimate trial strategy. The report that was entered into evidence arguably bolstered defendant's position by demonstrating the victim's lack of coherence in her story of the events. Defendant's claim of ineffective assistance of counsel is dismissed without prejudice to filing a motion for appropriate relief in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judge BRYANT concurs.

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

I concur with the portions of the majority opinion regarding plain error review of stipulations on appeal and defendant's argument that he was denied effective assistance of counsel. However, because I believe that the trial court's instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts of this case as true, in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 (2013), I respectfully dissent and conclude that defendant should be granted a new trial.

Background

Defendant was indicted for taking indecent liberties with a child on 15 February 2010. A superseding indictment charging defendant with one count of indecent liberties with a child and one count of statutory rape was issued on 26 November 2012.

At trial, defendant's stepdaughter, A.R., testified that defendant sexually abused her repeatedly over a number of years, beginning when she was either ten or eleven years old. By stipulation of the parties, the State entered into evidence a redacted interview report by Janet Hadler

("Hadler"), a clinical social worker who interviewed A.R. The report contained numerous accusations of abuse by A.R., specifically that: (1) defendant sexually abused A.R. and her sister beginning when A.R. was eleven years old; (2) defendant had sexual intercourse with A.R. and took her virginity; and (3) defendant continued to have sex with A.R. "every time he can get away from [A.R.'s] mother." The report also contained Hadler's professional opinion as to these accusations, which appeared as follows:

> [A.R.]'s TSCC[1] is considered to be valid. . . . [A.R.]'s scores were in the clinically significant range for the following TSCC Clinical Scales/Subscales: Anxiety (T-score 67), . . . Fantasy (T-score 68), Sexual Concerns (T-score 120), Sexual Preoccupation (T-score 105), and Sexual Distress (T-score 133.) According to the manual, T-scores at or above 65 are considered clinically significant. For the SC (sexual concerns) scale and it's [sic] subscales SC-P and SC-D, T-scores at or above 70 are considered clinically significant. The manual states, "children with especially elevated scores on the SC scale may have been prematurely sexualized or sexually traumatized. This can occur as a result of childhood sexual abuse exposure to pornography, witnessing sexual acts, or, in the case of adolescents, sexual assault by a peer."

Hadler was unable to testify at trial due to a family illness. According to the stipulation, the parties agreed to let redacted portions of her report come in for the purpose of corroborating A.R.'s testimony. The stipulation read as follows:

> Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness,[A.R.].

While the jury was dismissed, the trial judge indicated to counsel that he would allow the report to be entered into evidence as State's Exhibit 6 pursuant to the agreed-upon stipulation, which would be marked as State's Exhibit 7.

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1. It is unclear from the record what "TSCC" stands for.

Following the bench conference, the jury returned to the courtroom. The State's attorney read the agreed-upon stipulation to the jury and moved, without objection, to enter State's Exhibits 6 and 7 into evidence. The State's attorney then moved to publish copies of Hadler's report to the jury, whereupon the trial judge, before granting the motion to publish, instructed the jury as follows:

> Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.
>
> The agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described.
>
> Since the parties have so agreed, you are to take these facts as true for the purposes of this case.

On 26 February 2013, the jury returned guilty verdicts against defendant for one count of taking indecent liberties with a child and one count of statutory rape; he was sentenced to 336 to 415 months active imprisonment.

Discussion

Defendant argues that the trial judge failed to give a promised limiting instruction and violated statutory mandates of sections 15A-1222 and 15A-1232 prohibiting a trial judge from expressing an opinion (1) as to whether or not a fact has been proved and (2) on any question of fact to be decided by the jury, because the judge inadvertently instructed the jury to consider the facts contained in Hadler's report as true. After carefully reviewing the record and transcript of the trial, I agree. I would hold that the trial court inadvertently erred in its jury instruction on the stipulation, and because this error prejudiced defendant, I would order a new trial.

Typically, in order to preserve an argument for appellate review, a defendant must have "presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2013). Defendant here failed to object to the trial court's instruction. However,

the North Carolina Supreme Court has held that "[w]henever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory provisions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005). Defendant has made such allegations in this case, and thus, these arguments are preserved notwithstanding defendant's failure to object at trial. *See id.* On appeal, the burden is on the defendant to show that he was prejudiced by the allegedly improper remarks. *See State v. McNeil*, 209 N.C. App. 654, 666, 707 S.E.2d 674, 683 (2011). That is, he must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. *Id.*; *see also* N.C. Gen. Stat. § 15A-1443(a) (2013).

N.C. Gen. Stat. § 15A-1222 provides that a trial judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1232 further states in relevant part that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved[.]" Prejudicial error results where "the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility[.]" *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "Whether a trial court's comment constitutes an improper expression of opinion is determined by its probable meaning to the jury, not by the judge's motive. Furthermore, a totality of the circumstances test is utilized under which defendant has the burden of showing prejudice." *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (alteration in original) (citations and internal quotation marks omitted).

Here, while outside the presence of the jury, counsel for defendant and the State conferred with the trial judge regarding the stipulation. The substance of the stipulation was that: (1) Hadler was unavailable to testify at trial; (2) portions of her report were to be admitted into evidence; and (3) these redacted portions may be considered for the purpose of corroborating A.R.'s testimony. The trial court informed counsel that it would instruct the jury as to this stipulation based on N.C.P.I. Civil 101.41, which provides that juries are to accept stipulated facts as true without further proof. Specifically, the trial court informed counsel that it would instruct the jury as follows: "[F]acts have been stated in the record as it relates to stipulation as described in State's Exhibit 7 since

the parties have so agreed. You will take these facts as true for the purpose of this case." However, when the jury returned to the courtroom, the following colloquy took place:

> THE COURT: All right. The jurors are now present with us in the courtroom. Mr. Thompson [counsel for the State], ready to proceed?
>
> MR. THOMPSON: We are, Your Honor.
>
> Your Honor, at this time the State would make this following tender of stipulation.
>
> Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.]. That stipulation, Your Honor, is State's Exhibit 7.
>
> The actual portion of the evidence we're introducing is State's Exhibit 6. We move to enter 6 and 7 at this time.
>
> THE COURT: What says the defendant?
>
> MR. MARTIN [defense counsel]: No objection.
>
> THE COURT: All right. Without objection what is marked as State's Exhibit 6 and State's Exhibit 7 each is admitted and received.
>
> MR. THOMPSON: At this time, Your Honor, we ask to publish the copies to the jury.
>
> THE COURT: Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.
>
> *The agreed facts in this case relate to* what is marked as State's Exhibit 7 and now received as a stipulation *and State's Exhibit 6, portions of an interview conducted by the relevant parties as described.*

> *Since the parties have so agreed, you are to take these facts as true for the purposes of this case. The motion to publish is allowed.*
>
> It's my impression, ladies and gentlemen, you all each have a copy of *State's Exhibit 6. If you will read that to yourselves, again, without comment.* And once you've completed your review of the document, pass that back down to the bailiff so that we know that you've completed your examination of that report.
>
> *(Whereas State's Exhibit No. 6 was published to the jury.)*

(Emphasis added.)

The State argues, and the majority agrees, that the trial court did not violate sections 15A-1222 or 15A-1232 because it did not instruct the jury to read Hadler's report as true. Rather, the statement that "the agreed facts in this case relate to . . . State's Exhibit 6" merely indicated that the actual stipulation in State's Exhibit 7 related to the admissibility of State's Exhibit 6.

However, on appeal, this Court is to consider the instruction's "probable meaning to the jury" under the totality of the circumstances. *Mucci*, 163 N.C. App. at 620, 594 S.E.2d at 415. The attendant circumstances and wording of the instruction leads me to conclude that the jury could have reasonably interpreted the trial court's statement as requiring the jury members to accept Hadler's report as true, in clear, but inadvertent, violation of sections 15A-1222 and 15A-1232.

First, the trial court told the jury that "[t]he agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation *and* State's Exhibit 6, portions of an interview conducted by the relevant parties as described." (Emphasis added.) The use of the conjunctive "and" in this instruction unavoidably combined both exhibits under the umbrella of what the "agreed facts . . . relate to," even though the trial judge told counsel during the bench conference that he would only instruct the jury that "facts have been stated in the record as it relates to stipulation as described in State's Exhibit 7 since the parties have so agreed. You will take these facts as true for the purpose of this case." Thus, the trial court's instruction to the jury differed materially from the instruction it promised counsel it was going to make while the jury was outside the courtroom, indicating that the reference to State's Exhibit 6 was unplanned and inadvertent.

Furthermore, the trial court failed to clarify that the redacted portions of Hadler's report were not to be considered for substantive purposes at all. Despite the agreement made between counsel outside the presence of the jury that the report would only be admitted for corroborative purposes, the trial court never specifically instructed, either before or after publishing the document to the jury, that there were limits on the admissibility of Hadler's report. The stipulation itself provided only that Hadler's report "*may* be considered for the purpose of corroboration of the witness, [A.R.]." (Emphasis added.) The jury was never instructed at any point of the trial that it *may not* consider the report as substantive evidence of defendant's guilt. During the jury charge, the trial court instructed the jury that:

> Evidence has been received tending to show that at an earlier time *a witness* made a statement which may be consistent or may conflict with the testimony of the witness at this trial.
>
> You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you believe that the earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this and all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the testimony of the witness.

(Emphasis added.) Thus, the trial court failed to specify that Hadler's report, which included not only statements from A.R. but also Hadler's professional opinion on the clinical significance of those statements, was only admitted to corroborate A.R.'s testimony and was not to be considered for any other purpose. *See State v. McMillan*, 55 N.C. App. 25, 30, 284 S.E.2d 526, 530 (1981) (finding error where the trial court instructed on prior statements of "a witness" but failed to specify the limit on admissibility related solely to the specific witness's statements). Accordingly, the trial court's instruction to "take these facts as true," with the facts "relating to" both the stipulation and Hadler's report, was more amenable to being interpreted as invitation to read Hadler's report as true given the lack of specific limiting instructions on that exhibit.

Second, only Hadler's report, and not the stipulation itself, was published to the jury immediately following the trial court's ambiguous

instruction. I believe that the jury could have reasonably inferred that what was being published to them was the subject of the instruction; or in other words, that Hadler's report was the document that the jury members were to read as true. This conclusion is especially availing given that the trial court said "you are to take these facts as true for the purposes of this case" immediately after saying "[t]he agreed facts in this case relate to . . . State's Exhibit 6, portions of an interview conducted by the relevant parties as described," just before publishing State's Exhibit 6 to the jury, and without any clarification regarding the stipulation that Hadler's report "*may* be considered for the purpose of corroboration[.]" (Emphasis added.)

Based on the totality of the circumstances, *Mucci*, 163 N.C. App. at 620, 594 S.E.2d at 415, I would hold that the challenged instruction could have been reasonably interpreted by the jury as requiring them to read Hadler's report as true. In giving this instruction, the trial court both bolstered the credibility of the prosecuting witness, A.R., and afforded undue evidentiary weight to Hadler's conclusions in the report regarding the clinical significance of A.R.'s "T-scores." Each of which constitutes prejudicial error. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248 ("[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results.").

Therefore, while it is clear that this error was inadvertent, the jury may have reasonably believed that they were instructed to read the statements in Hadler's redacted report as true, in which case the trial court inherently intimated an opinion as to the weight of this evidence, and prejudicial error resulted. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248.

Conclusion

Based on the foregoing, I would hold that the trial judge inadvertently erred by giving an instruction constituting an impermissible expression of judicial opinion in violation of sections 15A-1222 and 15A-1232. Because this error bolstered the credibility of the prosecuting witness and afforded undue weight to a report admitted solely for corroborative purposes, I would conclude that defendant was prejudiced by this error, requiring a new trial.

STATE OF NORTH CAROLINA
v.
GREGGORY GEORGE MOSHER, JR., DEFENDANT

No. COA13-1101

Filed 5 August 2014

Sentencing—felony child abuse resulting in serious bodily injury—two separate offenses—charges not mutually exclusive

The trial court did not err by entering judgment on defendant's convictions for both felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a3) and felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a4). There was substantial evidence presented at trial permitting the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive.

Appeal by defendant from judgment entered 23 April 2013 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 6 February 2014.

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

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

DAVIS, Judge.

Greggory George Mosher, Jr. ("Defendant") appeals from his convictions for one count of felony child abuse resulting in serious bodily injury in violation of N.C. Gen. Stat. § 14-318.4(a3) and one count of felony child abuse resulting in serious bodily injury in violation of N.C. Gen. Stat. § 14-318.4(a4). Defendant's sole argument on appeal is that the trial court erred in entering judgment on both of his convictions because the two offenses are mutually exclusive. After careful review, we affirm the trial court's judgment.

Factual Background

The evidence presented at trial tended to establish the following facts: In September of 2009, Defendant married Rebecca Mosher ("Ms. Mosher") and became a stepfather to her two young children, "Amy"

and "Noah."[1] Defendant was deployed to Iraq in December of 2009, and when he returned from his deployment, he lived with Ms. Mosher and the children at a home in Richlands, North Carolina. Their next-door neighbors, Jack Underwood ("Mr. Underwood") and Justus Underwood ("Mrs. Underwood"), had observed bruising on the children before the subject incidents.

On 14 May 2010, Ms. Mosher, accompanied by Defendant, visited the Underwoods' home and requested that Mr. Underwood examine Noah's arm, which was swollen. Mr. Underwood recommended that Noah be taken to the hospital because he might have a broken arm or wrist. Mrs. Underwood testified that during this encounter, Ms. Mosher was standing behind Defendant and trying to catch her attention in a way that Mrs. Underwood interpreted as meaning: "This is suspicious; you need to pay attention." Later that day, Ms. Mosher showed Mrs. Underwood marks on the children's bodies, including bruising on Noah's arm, legs, and side and bruising on Amy's back. Mrs. Underwood further explained that "[t]he children did not have marks on them prior to [Defendant] coming home. They would mysteriously appear when [Ms. Mosher] would be out."

On the evening of 23 May 2010, Defendant was at home alone with Amy and Noah. At the time, Amy was two years old and Noah was three years old. Neither Amy nor Noah testified at trial; therefore, the evidence regarding the specific events giving rise to Defendant's convictions consisted entirely of Defendant's own testimony and testimony concerning the accounts he had provided to physicians and a social worker.

At approximately 7:00 p.m., Defendant began preparing a bath for Amy and Noah. Defendant turned on the water and placed the children into the bathtub. As the water was running and filling up the tub, Defendant heard his dog fighting outside and making a sound that Defendant described as "a vicious growl." Defendant testified that he left the children in the tub with the water running and went to check on the dog. He kicked another dog off of his dog, placed his dog's collar and chain back on, and returned to the bathroom. Defendant estimated that he had left the children in the tub for what "felt like a minute." Immediately upon returning to the bathroom, Defendant saw Noah standing outside the tub. Amy was still in the tub, screaming and "splashing to get out." Defendant grabbed Amy out of the tub and saw that her legs were peeling. He reached to turn off the water and noticed

1. Pseudonyms are used throughout this opinion to protect the privacy of the minor children.

that the cold water faucet was off. When he pulled out the drain plug, he discovered the bath water was "hot."

Amy was taken to the hospital and remained hospitalized until 12 July 2010. She sustained burns to approximately 44 percent of her body and underwent two surgeries to remove the burned skin and replace it with healthy tissue. Dr. Kenya McNeal-Trice ("Dr. McNeal-Trice"), a board-certified pediatrician and a member of Amy's treatment team at the North Carolina Children's Hospital, was tendered and accepted as an expert witness in the field of pediatrics and child abuse and neglect. She testified to a reasonable degree of medical certainty that Amy's injuries were consistent with an intentional — rather than accidental — burn and explained that the pattern of Amy's burn injuries was not consistent with the information Defendant had conveyed to her about how the injuries had occurred. Specifically, Dr. McNeal-Trice testified that Amy's burns were "more consistent with being exposed for a period of time in a still position in hot water and not splashing to get out." She explained that if Amy had been standing and splashing to get out, the backs of her legs would not have remained unburned and instead Amy would have sustained a circumferential burn "all the way around her leg."

In addition, Dr. McNeal-Trice opined that the fact that Amy did not burn her hands, stomach, or torso was inconsistent with a child splashing to get out of scalding hot water. Dr. McNeal-Trice noted that there were "sharp water demarcation lines" on Amy's thighs, a potential indication that the burn was intentionally inflicted, and that Amy had petechial bruising on her sternum, which was likely caused by "some type of either pressure or force" being applied to her chest.

Defendant's expert witness, Dr. Allen Dimick ("Dr. Dimick"), was tendered and accepted as an expert in the fields of burn trauma care, burn surgery, and pre-hospital emergency care. He examined Amy's medical records, records from the investigation conducted by the Onslow County Sheriff's Office, and photographs of her burns and testified to a reasonable degree of medical certainty that Amy's burns "were completely accidental and not intentional." Dr. Dimick testified that in his opinion, Amy likely suffered the second-degree "scald burns" on her back and buttocks from lying or falling back into the hot water and reacted to those burns by changing position to kneel on her knees, which resulted in the more severe burns to her thighs, legs, and the tops of her feet.

Dr. Dimick conceded, however, that he had "difficulty understanding" how Amy had sustained her particular burn injury pattern and that it

was "hard to envision how that could occur" unless she had fallen backwards on her back into the water and then changed position to kneel on her knees. Dr. Dimick testified that he did not believe that Amy's injuries were consistent with someone "pushing her backward and holding her down," noting that the burns to her back were less severe, indicating a briefer exposure to the hot water. However, he did agree that Amy "certainly" could have sustained the burns to her back if she was pushed down into the water for a brief period of time.

On 18 January 2011, Defendant was indicted on two felony child abuse charges. The first charge alleged that Defendant had intentionally inflicted a serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a3), and the second charge alleged that Defendant, by a willful act or grossly negligent omission, showed a reckless disregard for human life which resulted in serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a4).

A jury trial was held on 15 April 2013, and on 23 April 2013, the jury returned a verdict finding Defendant guilty of both offenses. The trial court consolidated the offenses and entered a judgment sentencing Defendant to a presumptive-range term of 58 to 79 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

Defendant contends that the trial court erred in entering judgment on both counts of felony child abuse — the intentional infliction of a serious bodily injury to a child in violation of N.C. Gen. Stat. § 14-318.4(a3) and the willful act or grossly negligent omission showing a reckless disregard for human life and resulting in a serious bodily injury to a child in violation of N.C. Gen. Stat. § 318.4(a4) — because the two offenses are mutually exclusive. We disagree. As explained below, we conclude that the evidence at trial permitted the jury to find both that (1) Defendant acted in reckless disregard for human life by initially leaving Amy and Noah unattended in a tub of scalding hot water; and (2) after a period of time, Defendant returned to the tub and intentionally held Amy in that water.

Criminal offenses are mutually exclusive if "guilt of one necessarily excludes guilt of the other." *State v. Mumford*, 364 N.C. 394, 400, 699 S.E.2d 911, 915 (2010) (citation and quotation marks omitted). For example, our Supreme Court has held that a defendant may not be convicted of both embezzlement and obtaining property by false pretenses when the charges arise out of the same act or transaction, explaining that

> to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted. On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other.

State v. Speckman, 326 N.C. 576, 578, 391 S.E.2d 165, 166-67 (1990) (internal citations omitted).

Here, Defendant was convicted of two counts of felony child abuse under two separate subsections of N.C. Gen. Stat. § 14-318.4. The first count, child abuse inflicting serious bodily injury in violation of § 14-318.4(a3), required the State to prove that Defendant (1) is a parent or any other person providing care to or supervision of a child less than 16 years of age; and (2) intentionally inflicted any serious bodily injury to the child. *See* N.C. Gen. Stat. § 14-318.4(a3) (2013).[2]

Defendant's second count, child abuse by willful act or negligent omission showing a reckless disregard for human life resulting in serious bodily injury, required the State to establish that (1) Defendant is a parent or any other person providing care to or supervision of a child less than 16 years of age; (2) Defendant's willful act or negligent omission in the care of the child showed a reckless disregard for human life; and (3) the act or omission resulted in serious bodily injury to the child. *See* N.C. Gen. Stat. § 14-318.4(a4).

Defendant argues that the *mens rea* component of each offense makes the two crimes mutually exclusive because "[i]f one's conduct is intentional, as required to establish the offense defined in subsection (a3) of the statute, it is not any sort of negligence" and that "if one's conduct is any sort of negligence showing reckless disregard for human life, as required to establish the offense defined in subsection (a4) of the statute, it is not intentional." We conclude, however, that there was substantial evidence presented at trial permitting the jury to find that

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2. The statute defines serious bodily injury as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1).

two separate offenses occurred in succession such that the two charges were not mutually exclusive.

We are guided by our decision in *State v. Johnson*, 208 N.C. App. 443, 702 S.E.2d 547 (2010), *disc. review denied*, ___ N.C. ___, 706 S.E.2d 247 (2011), which — although arising in a wholly different factual context than the present case — sheds light on the legal issue presented here. In *Johnson*, the defendant argued that the trial court erred by entering judgment on both his conviction for felony entering and his conviction for discharging a firearm into an occupied dwelling inflicting serious bodily injury because the two offenses were mutually exclusive. *Id.* at 448, 702 S.E.2d at 551. Specifically, he argued that the trial court should not have entered judgment against him for discharging a firearm *into* the victim's residence because his entry into the residence had already been accomplished at the time the shots were fired. *Id.*

We rejected this argument, holding that the facts of the case were sufficient to support a conclusion that the two crimes were committed in succession and, as a result, the defendant's guilt of one offense did not exclude his guilt of the other. *Id.* at 449, 702 S.E.2d at 551. We explained that the evidence tended to show that the defendant and his coperpetrator, acting in concert, committed the entry when the coperpetrator inserted his hand into the partially-opened front door. He then removed his hand (and the firearm he was holding) from the interior of the residence and subsequently fired into the home through the door as evidenced by a bullet hole found in the door panel above the lock. *Id.* We concluded that these facts established that the two offenses occurred in succession and, therefore, were not mutually exclusive, finding merit in the State's contention that "[t]he mere fact that the shooter entered [the victim's] house at one point does not mean that the shooter was at all times thereafter inside [the victim's] house." *Id.*

Here, evidence was presented from which a reasonable juror could conclude that Defendant both (1) committed a willful act or negligent omission showing a reckless disregard for human life resulting in a serious bodily injury to Amy by leaving her unattended in a bathtub with the water on; *and* (2) intentionally inflicted a serious bodily injury to Amy thereafter by deliberately immersing her in scalding water.

Defendant, by his own admission, left Amy and Noah, who were two and three years old respectively, unattended in the bathtub while the water was running for what "felt like a minute." Defendant testified that he thought he turned on both the hot and cold water but that he could not be certain. Evidence was presented at trial that when the hot water

is turned on in that bathtub, the water reaches 100 degrees Fahrenheit in 10 seconds, 115 degrees in 20 seconds, 119 degrees in 30 seconds, and 184 degrees in one minute. There was also testimony that an individual would sustain a third-degree burn from one second of exposure to 155-degree water, five seconds of exposure to 140-degree water, and 60 seconds of exposure to 127-degree water. We believe that from this evidence the jury could reasonably conclude that Defendant, by leaving the children alone in the tub, acted in a manner that showed a reckless disregard for human life, thereby constituting a violation of N.C. Gen. Stat. § 14-318.4(a4).

We also conclude that substantial evidence was presented supporting a finding of a *separate* act of intentional infliction of a serious bodily injury. The State put forth circumstantial evidence that Amy was intentionally immersed in scalding hot water by Defendant. Specifically, the State offered evidence that (1) Amy had bruising on her chest, suggesting the application of pressure or force to that area of her body; and (2) the burns on her legs had sharp demarcation lines, indicating that she was forcibly held still while in the tub. This evidence was sufficient to support a conviction for intentionally inflicting serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a3).

As such, the jury could have reasonably concluded that two separate, successive acts of felonious child abuse occurred — one causing a serious bodily injury through a reckless disregard for human life and one intentionally causing such an injury. A finding by the jury that Defendant acted in reckless disregard for human life by initially leaving Amy and Noah unattended in the tub did not preclude a separate finding that Defendant's conduct upon returning to the tub was intentional. Consequently, Defendant's argument is overruled, and the trial court's judgment is affirmed.

Conclusion

For the reasons stated above, we affirm the trial court's entry of judgment on Defendant's felony child abuse convictions.

AFFIRMED.

Judges CALABRIA and STROUD concur.

TURNER v. THOMAS

[235 N.C. App. 520 (2014)]

KIRK ALAN TURNER, PLAINTIFF
v.
SPECIAL AGENT GERALD R. THOMAS, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; SPECIAL AGENT DUANE DEAVER, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; ROBIN PENDERGRAFT, IN HER INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HER OFFICIAL CAPACITY; AND JOHN AND JANE DOE SBI SUPERVISORS, IN THEIR INDIVIDUAL CAPACITIES AND, IN THE ALTERNATIVE IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA13-1131

Filed 5 August 2014

Malicious Prosecution—intentional infliction of emotional distress—allegations in complaint—sufficient to state claims—not barred by statute of limitations

The trial court erred by dismissing plaintiff's claims for malicious prosecution and intentional infliction of emotional distress against defendants Thomas and Deaver. The allegations of the complaint, when treated as true, were sufficient to state claims for relief, and the complaint did not contain allegations establishing that those claims were barred by the statute of limitations.

Appeal by plaintiff from order entered 11 April 2013 by Judge Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2014.

Morrow, Porter, Vermitsky & Fowler, PLLC, by John C. Vermitsky, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Angel E. Gray, Special Deputy Attorney General Grady Balentine, Jr., and Assistant Attorney General Matthew Boyatt, for defendants-appellees.

GEER, Judge.

Plaintiff Kirk Allan Turner appeals from an order granting the motions of defendants Gerald R. Thomas, Duane Deaver, Robin Pendergraft and John and Jane Doe to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. We agree with plaintiff that the trial court erred in dismissing his state law

claims against defendants Thomas and Deaver for malicious prosecution and intentional infliction of emotional distress ("IIED") because the allegations of the complaint, when treated as true, are sufficient to state a claim for relief, and the complaint does not contain allegations establishing that those claims are barred by the statute of limitations. As to plaintiff's remaining claims, we affirm.

Facts

Plaintiff was tried for the murder of his wife, Jennifer Wittwer Turner, and found not guilty by reason of self defense. Following his acquittal, plaintiff commenced this lawsuit against various officers of the North Carolina State Bureau of Investigation ("SBI") who were involved in the investigation of his wife's death. Plaintiff's complaint alleges the following facts.

On 12 September 2007, plaintiff and his friend Gregory Adam Smithson went to the Turner's marital residence, where Mrs. Turner was living, to retrieve some of Mr. Smithson's personal property being stored there. While Mr. Smithson was loading his belongings, plaintiff and Mrs. Turner began talking about personal matters. During the conversation, Mrs. Turner picked up a spear and began attacking plaintiff, stabbing him multiple times in his thigh and groin area. In response, defendant grabbed a pocketknife from his right front pocket and cut Mrs. Turner twice in the neck, causing her death.

Mr. Smithson called 911 and performed CPR on Mrs. Turner until emergency personnel arrived. The Davie County Sheriff's Office responded to the 911 emergency call and Special Agent E.R. Wall responded on behalf of SBI. Agent Wall notified the SBI Assistant Special Agent in Charge, K.A. Cline, that a blood splatter expert would be needed to analyze the scene. However, after further examination of Mrs. Turner's body, Agent Wall concluded that the blood splatter patterns at the scene were likely the result of arterial spurting from the large wound in Mrs. Turner's neck.

Later that evening, Agent Cline arranged for defendant Thomas, a special agent at the SBI, to conduct a blood splatter interpretation of the scene and of several articles of clothing that had been collected during the course of the investigation. On 14 September 2007, defendant Thomas documented the bloodstains and bloodstain patterns at the crime scene and then went to the Davie County Sheriff's Office to examine clothing and other evidence collected from the scene. Prior to defendant Thomas' examining any evidence, SBI Special Agent D.J. Smith

informed him that Mrs. Turner had apparently stabbed plaintiff with a spear and, in response, plaintiff reached into his right front pocket of his pants to retrieve a knife that he used to cut her throat.

Fifteen days later, defendant Thomas wrote a report documenting the bloodstain patterns at the scene and his notes regarding the clothing seized. The report stated that the t-shirt worn by plaintiff on the night of Mrs. Turner's death had a large bloodstain on it consistent with a transfer bloodstain pattern resulting from a bloody hand being wiped on the surface of the shirt.

On 13 December 2007, plaintiff was indicted for first degree murder of Mrs. Turner. Plaintiff was detained for one month before being granted a $1,000,000.00 bond. When plaintiff posted bail, he was released on house arrest.

On 15 January 2008, defendant Thomas met with defendant Deaver, an SBI special agent; an attorney with the District Attorney's office; Captain Jerry Hartman, the lead investigator for the Davie County Sherriff's Office; and "Mr. Marks" to discuss the feasibility of plaintiff's version of events leading to Mrs. Turner's death. At that meeting, the men theorized that plaintiff killed Mrs. Turner as part of an elaborate scheme in which plaintiff stabbed himself with the spear and staged the scene to make it look like self defense. To prove this theory, defendants needed to show that the transfer blood stain on plaintiff's shirt was not a mirror image stain from plaintiff's hand, but rather a transfer pattern consistent with plaintiff wiping his knife off on his shirt.

Defendants Thomas and Deaver, with the approval of their supervisor (defendant Pendergraft), then "wantonly and maliciously conducted unscientific tests to 'shore up' the new theory." In conducting the new tests, defendant Thomas retook samples of evidence but failed to properly label his work, and he failed to make a record of his new theory. Defendants Thomas and Deaver videotaped themselves conducting unscientific experiments to try to obtain a blood smear from a knife similar to the smear on plaintiff's shirt. After several attempts, defendants obtained a smear with a knife that looked similar to the smear on plaintiff's shirt. At that point in the video, defendant Deaver can be heard saying, " 'Oh, even better! Holy cow, that was a good one!' and 'Beautiful! That's a wrap, baby!' "

After conducting the new tests and reviewing the evidence a second time, defendant Thomas created a second report purportedly discussing the "examination of clothing for bloodstain patterns on Friday, September 14, 2007," even though the actual date of the examination was

15 January 2008. The second report altered the first report by replacing " 'consistent with a bloody hand wiped on the shirt' with 'consistent with a pointed object being wiped on the shirt.' "

Stuart James of Fort Lauderdale, Florida, disagreed with Thomas and Deaver's blood stain analysis and believed that the blood stain was most likely a " 'mirror stain' " created when the shirt was folded after the shirt was cut off or when it was tossed on the floor.[1] Thomas, however, wrote in his report that Captain Hartman " 'was present when emergency services cut the gray T-shirt from Mr. Turner's body and that the question [sic] blood stain was observed present in its current condition on the shirt. Hartman said that he took the shirt from Emergency Medical Services and placed it in a secure area [an adjacent room], laying flat on the floor to dry.' "[2]

Plaintiff's trial began on 27 July 2009. Defendant Thomas testified at trial consistent with what he had written in his report. Captain Hartman testified, however, that he did not arrive at the crime scene until two hours after EMTs took plaintiff to the hospital and that he was not present when EMTs removed the shirt. Additionally, initial crime scene photos showed that the t-shirt was crumpled on the floor, inside out.

The jury returned a verdict of not guilty of murder by reason of self defense on 21 August 2009. On 14 November 2011, plaintiff filed a complaint against defendants Thomas, Deaver, Pendergraft, and John and Jane Doe in a case docketed as 11 CVS 7812. Defendant Pendergraft is the Director of the SBI, and defendants John and Jane Doe are supervisors for the SBI. On 4 April 2012, plaintiff voluntarily dismissed his complaint in 11 CVS 7812, and filed the complaint which is the subject of this appeal.

Plaintiff's complaint alleges several causes of action against defendants. As to defendants Thomas and Deaver in their individual capacities, the complaint alleges claims for (1) IIED, (2) Abuse of Process, (3) Malicious Prosecution, and (4) False Imprisonment. As for defendants Pendergraft and Jane and John Doe, plaintiff brought a claim of negligence for their failure to properly train, supervise, and direct defendants

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1. It is unclear from the complaint when and in what form Stuart James offered this opinion, whether he testified at plaintiff's criminal trial, what his credentials were, or how he came to be involved in the case.

2. The complaint does not specify when Thomas added this information to the report, but it could be read to imply that Thomas wrote this in his second report in response to Stuart James' opinion in an effort to discredit it, but the complaint is vague in this regard.

Thomas and Deaver. Finally, the complaint asserts claims under 42 U.S.C. § 1983 against all defendants in both their individual and official capacities, and a claim against all defendants in their official capacities for violation of Article I § 19 of the North Carolina Constitution.

Defendants filed motions to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7). After a hearing on 8 April 2013, the trial court entered an order granting defendants' motions. In the order, the trial court found that plaintiff conceded to the dismissal of all claims against John and Jane Doe and to the dismissal of the 42 U.S.C. § 1983 claim against all defendants in their official capacities. The order concluded that "Plaintiff's complaint should be dismissed as to all Defendants for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted." In light of this conclusion, the trial court found it "unnecessary to consider the Defendant's Motion to Dismiss for failure to join necessary parties pursuant to 12(b)(7)." Plaintiff timely appealed the order to this Court.

Discussion

On appeal, plaintiff argues that the trial court should not have dismissed the claims of malicious prosecution, abuse of process, IIED, and false imprisonment against defendants Thomas and Deaver, or the 42 U.S.C. § 1983 claims against defendants Thomas, Deaver, and Pendergraft in their individual capacities.

Plaintiff does not challenge the dismissal of the remaining claims including all the claims against defendants John and Jane Doe, and the negligence claim against Pendergraft. Accordingly, we affirm the dismissal of those claims. *See* N.C.R. App. P. 28(a).

Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (internal citation omitted), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Generally, " 'a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Id.* (quoting 2A *Moore's Federal Practice*, § 12.08 (2d ed. 1975)). "This Court must conduct a *de novo* review of the pleadings to determine

their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I. Plaintiff's State Law Claims

Plaintiff sued defendants Thomas and Deaver for malicious prosecution, abuse of process, IIED, and false imprisonment. Defendants moved to dismiss these claims on the basis of the statute of limitations, failure to state a claim, and public official immunity.[3]

With respect to the statute of limitations, the parties agree that the statute of limitations for each of the state law claims is three years, N.C. Gen. Stat. § 1-52 (2013), and that plaintiff initiated this action on 14 November 2011. Therefore, any cause of action that accrued prior to 14 November 2008 is barred by the statute of limitations.

A. Malicious Prosecution

"In order to recover in an action for malicious prosecution, plaintiff must establish that defendant: (1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff." *Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992). In this case, defendant does not dispute that the prior proceeding terminated in favor of plaintiff in August 2009 when plaintiff was acquitted of first degree murder.

Because the prior proceeding terminated within three years of the initiation of this lawsuit, plaintiff's malicious prosecution claim is not barred by the statute of limitations. Defendants argue, however, that the trial court correctly dismissed this claim because plaintiff's complaint does not sufficiently allege facts to support the first three elements of malicious prosecution.

1. Institution, Procurement, or Participation in the Criminal Proceeding

Defendants Thomas and Deaver argue that plaintiff's complaint fails to adequately allege the element of initiation, procurement, or

3. In his complaint, plaintiff sought to impose liability on defendant Pendergraft for defendants Thomas and Deaver's actions based on a claim of negligent supervision and training. Plaintiff does not, however, on appeal challenge the trial court's dismissal of that negligence claim. Plaintiff has, therefore, chosen not to proceed with any state law claim against defendant Pendergraft.

participation in the criminal proceeding because "there are no allegations that any of the named defendants personally played any role in presenting the case to the grand jury or in initiating criminal process against the plaintiff. In addition, defendants did not engage in the actions of which plaintiff specifically complains . . . until several months after plaintiff's arrest and release on bond."

However, regarding this first element of a malicious prosecution cause of action, this Court has recognized:

> [W]hen discussing the tort of malicious prosecution generally, our cases indicate a liberal reading of the requirement that the defendant have "initiated" the earlier proceeding. For example, while some of our decisions involving a claim based upon a prior criminal action have stated a plaintiff must prove the defendant *initiated* the prior criminal proceeding, *see*, *e.g.*, *Alt v. Parker*, 112 N.C. App. 307, 312, 435 S.E.2d 773, 776 (1993), *disc. review denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), and others have said a plaintiff must show defendant *instituted* the prior proceeding, *see*, *e.g.*, *Juarez-Martinez v. Deans*, 108 N.C. App. 486, 491, 424 S.E.2d 154, 157, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993), still others have held a plaintiff must establish that the defendant "instituted, procured *or participated in* the criminal proceeding against plaintiff." *Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899 (citation omitted) (emphasis added).

Moore v. City of Creedmoor, 120 N.C. App. 27, 38, 460 S.E.2d 899, 906 (1995), *aff'd in part, rev'd in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997).

Thus, *Moore* recognized that a showing that a defendant " 'participated in the criminal proceeding' " is sufficient to establish the first element of a malicious prosecution claim for relief. *Id.* (emphasis omitted) (quoting *Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899). Although defendants refer to the inadequacy of plaintiff's allegations regarding "defendants' participation *in the procurement of the indictment*" (emphasis added), *Moore*'s holding allowing for a showing of participation in a criminal proceeding generally necessarily contemplates participation after the proceeding has been initiated or instituted. Defendants' interpretation improperly merges participation into procurement and eliminates one of the three alternative ways that this Court has stated that this element may be established.

Allowing this element to be established by a showing of participation in the criminal proceeding is consistent with the *Restatement (Second) of Torts*, which indicates that "[a] private person who takes an active part in *continuing or procuring the continuation* of criminal proceedings initiated by himself *or by another* is subject to the same liability for malicious prosecution as if he had then initiated the proceedings." *Restatement (Second) Torts* § 655 (1977) (emphasis added). This rule "applies . . . when the proceedings are initiated by a third person, and the defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation." *Id.*, cmt. b.

Although we have not found any North Carolina cases specifically addressing what facts are necessary to show that a defendant sufficiently participated in a criminal proceeding to support a claim for malicious prosecution, we believe that *Williams* is instructive. In *Williams*, this Court explained that "[t]he act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution." 105 N.C. App. at 201, 412 S.E.2d at 900.

There, this Court held that the plaintiff presented sufficient evidence of the first element of malicious prosecution when

> the jury could find defendant's actions went further than merely providing assistance and information. Defendant brought all the documents used in the prosecution to the police. As discussed earlier, these documents included the eleven suspicious void sales, the three suspicious alteration tickets, and the names and addresses of witnesses to be contacted. From the record it appears the only additional investigation undertaken by the authorities was to contact the three individuals who had suspicious alterations performed. Law enforcement officials never interviewed other customers, store employees or plaintiff prior to the time of his arrest. Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff.

Id. It follows from this reasoning that once criminal proceedings have been initiated, the first element of malicious prosecution can be established by a showing that defendant participated in the criminal proceedings if "[e]xcept for the efforts of defendant, it is unlikely" that the criminal prosecution would have *continued* against defendant. *Id.*

In this case, the complaint alleges that defendants Thomas and Deaver met with a member of the District Attorney's office in January

2008 to help formulate a theory in support of the first degree murder charge. Defendants theorized that Mrs. Turner did not attack plaintiff, but rather that plaintiff stabbed himself with the spear and staged the scene to look like self defense as part of an elaborate scheme.

The complaint further alleges that defendants then devised and executed unscientific tests designed specifically to support the theory, and defendant Thomas altered his initial report to reflect their new findings arising out of those tests. Significantly, the complaint alleges that "[t]his evidence was crucial to maintain probable cause for a first-degree murder charge." Thus, plaintiff has sufficiently alleged that defendants participated in the criminal proceedings by alleging facts that tend to show that "[e]xcept for the efforts of defendant[s], it is unlikely" that the proceedings would have continued against plaintiff. *Id.*

Accordingly, we hold that plaintiff's complaint sufficiently alleges the first element of malicious prosecution. *See also Pierce v. Gilchrist*, 359 F.3d 1279, 1291 (10th Cir. 2004) (applying common law elements of malicious prosecution to § 1983 claim and holding allegations sufficient to survive motion to dismiss when complaint alleged that, after plaintiff's arrest, defendant forensic analyst " 'contrived evidence to secure a fraudulent conviction' " by creating forensic report that was false, without any scientific basis, and in disregard of exculpatory evidence).

2. Probable Cause

Defendants further argue that dismissal was proper because plaintiff's allegation that there was no probable cause to initiate or pursue criminal charges against plaintiff is impermissibly conclusory and need not be taken as true in considering the motion to dismiss. However, this Court has recognized that "[w]ith the adoption of 'notice pleading,' mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss." *Gatlin v. Bray*, 81 N.C. App. 639, 644, 344 S.E.2d 814, 817 (1986) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). Rather, " '[p]leadings comply with our present concept of notice pleading if the allegations in the complaint give defendant sufficient notice of the nature and basis of plaintiffs' claim to file an answer, and the face of the complaint shows no insurmountable bar to recovery.' " *Id.* (quoting *Rose v. Guilford Cnty.*, 60 N.C. App. 170, 173, 298 S.E.2d 200, 202 (1982)).

Under the North Carolina standard for motions to dismiss, plaintiff's allegation that there was no probable cause is sufficient unless the facts alleged in the complaint conclusively establish that there was probable cause or that there does not exist " 'any state of facts which

could be proved in support of' " the allegation of lack of probable cause. *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (emphasis omitted) (quoting 2A *Moore's Federal Practice*, § 12.08). " 'The test for determining probable cause is whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.' " *Strickland v. Hedrick*, 194 N.C. App. 1, 17, 669 S.E.2d 61, 71 (2008) (quoting *Becker v. Pierce*, 168 N.C. App. 671, 677, 608 S.E.2d 825, 829-30 (2005)).

Defendants argue that the complaint's allegations that (1) plaintiff "grabbed a pocketknife from his right front pocket and made two cuts in rapid succession to Jennifer Turner's neck area which resulted in her death[,]" and (2) plaintiff was arrested pursuant to a grand jury indictment conclusively establish the existence of probable cause in this case. We disagree.

First degree murder is the intentional and unlawful killing of a human being with premeditation and deliberation. N.C. Gen. Stat. § 14-17 (2013). The allegation that plaintiff killed Mrs. Turner with a pocket knife, standing alone, is insufficient to establish probable cause that plaintiff acted with malice, premeditation, and deliberation as a matter of law. In determining probable cause, the totality of the circumstances must be considered. Here, the complaint, when viewed in the light most favorable to plaintiff, shows that plaintiff accompanied his friend to Mrs. Turner's residence in order to help his friend retrieve personal property being stored there. While plaintiff talked to Mrs. Turner, she picked up a large spear and attacked plaintiff, stabbing him several times. In response, plaintiff retrieved a pocketknife from his front pocket and cut Mrs. Turner twice in the neck.

These allegations are consistent with plaintiff's claim that he only acted in self defense and did not stab Mrs. Turner with malice, premeditation, and deliberation. When viewed in the light most favorable to plaintiff, the facts alleged in the complaint do not establish as a matter of law that there was probable cause to arrest plaintiff for first degree murder.

In support of their argument that the indictment conclusively establishes probable cause, defendants cite *Stanford v. Grocery Co.*, 143 N.C. 419, 426, 55 S.E. 815, 817 (1906), which holds that that a true bill of indictment against a criminal defendant returned by a grand jury is prima facie evidence of probable cause. However, "[w]hile our Supreme Court has said that both a grand jury indictment and a waiver of a preliminary hearing in a criminal action establish a *prima facie* showing of probable cause, nevertheless, such a finding or waiver is not conclusive

in a subsequent malicious prosecution action, and the question of probable cause is still an issue for the jury." *Williams*, 105 N.C. App. at 201, 412 S.E.2d at 900. The indictment, therefore, only creates an issue of fact for the jury to determine with respect to the issue of probable cause. Accordingly, we conclude that plaintiff's complaint sufficiently alleges a lack of probable cause.

3. Malice

Defendants similarly argue that plaintiff's allegation that defendants acted maliciously is impermissibly conclusory and not supported by the facts alleged. However, in a malicious prosecution claim, "malice may be inferred from want of probable cause." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). Additionally, " '[e]vidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest . . . is admissible both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause.' " *Id.* (quoting *Dickerson v. Atl. Ref. Co.*, 201 N.C. 90, 95, 159 S.E. 446, 449 (1931)).

Plaintiff alleged that defendants acted with malice, without probable cause, and for the ulterior purposes of political gain and advancing their careers. These allegations are sufficient under *Cook* to establish the element of malice. Although defendants suggest that acting for political gain does not constitute a "collateral purpose" that may raise an inference of malice and a lack of probable cause, they have cited no authority to support such a limitation. As explained by our Supreme Court in *Dickerson*, "[t]he reason for holding that proof of a collateral purpose is sufficient to make out a prima facie want of probable cause is based upon the hypothesis that a person, bent on accomplishing some ulterior motive, will act upon much less convincing evidence than one whose only desire is to promote the public good." 201 N.C. at 95, 159 S.E. at 450. We see no reason why this rationale does not apply when the ulterior motive is to obtain political gain.

In sum, we conclude that the complaint sufficiently alleges the essential elements of malicious prosecution. Therefore, the trial court erred in dismissing the claim of malicious prosecution as to defendants Thomas and Deaver.

B. Abuse of Process

" '[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that

process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended (sic) to be secured.' " *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624 (quoting *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965)).

More recently, this Court has explained:

> "[A]buse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding, and that [b]oth requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter."

Chidnese v. Chidnese, 210 N.C. App. 299, 310-11, 708 S.E.2d 725, 734-35 (2011) (quoting *Stanback*, 297 N.C. at 201, 254 S.E.2d at 624). "There is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." *Mfrs. & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 196-97, 19 S.E.2d 849, 853 (1942).

Here, plaintiff alleged that defendants Thomas and Deaver "intentionally and maliciously used their positions as Special Agents with the SBI, tasked with the official duty of investigating the death of Jennifer Wittwer Turner, to obstruct justice and 'frame' Dr. Kirk Turner for the first-degree murder of his wife Jennifer Turner after Dr. Kirk Turner was indicted. This was done for the improper purpose of political benefit, and to ensure a conviction in a high profile case where it would be unpopular for the district attorney to enter a dismissal of charges." The complaint additionally alleged that defendants' "actions were undertaken for an ulterior motive, that is to secure a conviction of a high publicity murder case regardless of guilt to further the careers of the Defendants and to assist the District Attorney in winning a very public case for political purposes with no regard to the defendant's guilt or innocence."

These allegations are insufficient to support an abuse of process claim because the improper purpose alleged -- securing plaintiff's conviction -- is within the intended scope of criminal proceedings. It, therefore, fails to meet the requirement that a defendant use the process to achieve a result "not warranted or commanded by the writ" and "not lawfully or properly obtainable" by the process. *Fowle*, 263 N.C. at 728, 140 S.E.2d at 401. Accordingly, we affirm the trial court's dismissal of plaintiff's abuse of process claim under Rule 12(b)(6). *See also Scott v. District of Columbia*, 101 F.3d 748, 756 (D.C. Cir. 1996) (holding that when "officers instituted the criminal charge for precisely the purpose for which it was intended [--] establishing that [plaintiff] was guilty of a criminal offense" -- "fact that the officers expected to realize some benefit by covering up their own alleged wrongdoing simply points to an ulterior motive, not the kind of perversion of the judicial process that gives rise to a cause of action for abuse of process").[4]

C. Intentional Infliction of Emotional Distress

The essential elements of a claim for IIED are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens*, 302 N.C. at 452, 276 S.E.2d at 335. "The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Id.*

1. Statute of Limitations

This Court has stated that a cause of action for IIED "does not come into existence until the continued conduct of the defendant causes extreme emotional distress." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993). In *Bryant*, the plaintiff sued her former employer for IIED based upon allegations of sexual harassment that began more than three years prior to her initiation of the lawsuit. *Id.* at 3, 437 S.E.2d at 521. The defendant raised the defense of the three-year statute of limitations and argued that the statute barred recovery for events occurring more than three years prior to the filing of the lawsuit. *Id.* at 4, 437 S.E.2d at 521. The trial court denied the defendant's motion for summary judgment and motion in limine to bar evidence of events occurring outside of the period of the statute of limitations. *Id.* A jury returned a verdict in favor of the plaintiff on the IIED claim, and the defendant appealed. *Id.*

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4. Because of this holding, we need not address whether the claim is barred by the statute of limitations.

On appeal, this Court rejected the defendant's contention that "the acts of [the defendant] that occurred prior to December 1986 are barred by the three-year statute" because "[i]f all of the elements of the tort [are] not present, then no cause of action for intentional infliction of emotional distress exist[s] at that time." *Id.* at 13, 437 S.E.2d at 526. The Court explained:

> The statutes of limitations serve to bar *claims*, not *evidence* of contributing factors to an ultimate claim that has not yet come into existence. "As our courts have frequently noted, in no event can a statute of limitations begin to run until the plaintiff is entitled to institute action. . . . Ordinarily, the period of the statute of limitations begins to run when *the plaintiff's right* to maintain an action for *the wrong alleged* accrues. The cause of action accrues *when the wrong is complete*. . . ." Obviously, outrageous conduct by the defendant alone would confer no cause of action on the plaintiff in the case until she suffered extreme emotional distress caused by his actions.

Id. (quoting *Bolick v. Am. Barmag Corp.*, 54 N.C. App. 589, 594, 284 S.E.2d 188, 191, *decision modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1981)). This Court held that because the plaintiff's cause of action did not accrue until "the actions of the defendant did in fact cause emotional distress of the calibre set out in *Waddle* [*v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992),]" the trial court did not err in denying the defendant's motion in limine. *Id.*

In *Waddle*, the Supreme Court adopted the same standard for the element of "severe emotional distress" in an IIED claim as required for a claim of negligent infliction of emotional distress:

> "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."

331 N.C. at 83, 414 S.E.2d at 27 (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)).

Here, plaintiff's complaint alleges that plaintiff "did in fact suffer severe emotional distress as a direct and proximate result of the actions of the defendants which first manifested themselves in diagnosable form

following his acquittal for first degree murder . . . ." Defendant was acquitted in August 2009, within the three-year statute of limitations before plaintiff filed the complaint in November 2011. Because plaintiff's cause of action could not accrue until he suffered severe emotional distress, and the complaint alleges that did not happen until after August 2009, this cause of action as to both defendants Thomas and Deaver is not barred by the statute of limitations. *See also Ruff v. Reeves Bros., Inc.*, 122 N.C. App. 221, 227, 468 S.E.2d 592, 597 (1996) (applying *Bryant* and holding that "plaintiff's cause of action did not accrue until the actions of the defendant did, in fact, cause severe emotional distress").

2. Failure to State a Claim for Relief

Defendants argue that plaintiff's complaint fails to allege sufficient facts to show that defendants engaged in extreme and outrageous conduct, the first element of IIED. "[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: '*If the court determines that it may reasonably be so regarded*, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)).

" 'Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)). "[T]his Court has set a high threshold for a finding that conduct meets the standard." *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). " 'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *Briggs*, 73 N.C. App. at 677, 327 S.E.2d at 311 (quoting *Restatement (Second) of Torts* § 46 cmt. d.).

We believe that the allegations in the complaint in this case are similar to the facts of *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). In *West*, a store manager falsely accused the plaintiffs of stealing from his store, despite the plaintiffs producing a receipt of their purchase and verification from the cashier of the sale. *Id.* at 700-01, 365 S.E.2d at 622-23. In concluding that the evidence of the store manager's conduct was sufficient to go to the jury on the claim of IIED, the

Supreme Court cited favorably Judge Phillips' dissent from the majority opinion of this Court that

> "[f]ew things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it."

Id. at 705, 365 S.E.2d at 625 (quoting *West v. King's*, 86 N.C. App. 485, 358 S.E.2d 386 (1987) (Phillips, J., dissenting) (unpublished)).

Similarly, here, when viewed in the light most favorable to plaintiff, the complaint alleges facts showing that plaintiff's prosecution was highly publicized and he was accused of a crime he did not commit. While in *West*, the defendant refused to even look at evidence that would have established that the plaintiffs had not stolen anything, here, the allegations of the complaint, viewed in the light most favorable to plaintiff, allege that defendants Thomas and Deaver -- public officers -- essentially manufactured evidence to negate plaintiff's self defense claim by (1) performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self defense; (2) creating a second report supporting that theory that was inconsistent with his first report; (3) writing the second report in a manner that hid the existence of the first report by falsely suggested the second report was the result of examination of the evidence of four months earlier (when the first report was done) and by not indicating that the second report was an amendment or supplement to the first report; and (4) bolstering the theory by making false statements in the second report and in testimony regarding what the Sheriff's Office lead investigator had said. We believe that allegations that defendants falsely created evidence to establish guilt equates with the *West* defendant's refusal to look at evidence that would have exonerated the plaintiffs.

The Court in *West* also noted that the foreseeability of injury is a factor that goes to the outrageousness of a defendant's conduct. *Id.* It stands to reason that the more serious the crime of which someone is falsely accused and the more credible the accusers, the more foreseeable the mental anguish resulting therefrom. Here, the crime of which plaintiff was accused, first degree murder, is a much more serious offense than the crime of which the plaintiff in *West* was accused and

the accusers -- experienced special agents of the SBI -- more credible to the public than the store manager in *West*. Therefore, the nature of the crime and the identity of the defendants in this case are factors that may be considered in assessing the outrageousness of defendants' conduct.

Defendants, however, argue that plaintiff's allegations do not differ substantially from the conduct in *Dobson*. In *Dobson*, a department store employee reported a customer to the Department of Social Services ("DSS") for child abuse after the customer "yelled at the [15-month-old] child, picked her off the counter where she had been sitting, and set her back down hard." 134 N.C. App. at 575, 521 S.E.2d at 713. The investigation against the customer was terminated when DSS was unable to substantiate the employee's claims, and the customer sued the employee for IIED. *Id.* In holding that summary judgment was properly granted in favor of the defendant employee, this Court explained:

> Assuming *arguendo* that defendant [employee] exaggerated or fabricated the events she reported to DSS, the report served only to initiate an investigatory process. Although falsely reporting child abuse wastes the limited resources available to DSS and subjects the reported parent to questioning and investigation, in light of this Court's precedent, we cannot say that such actions constitute "extreme and outrageous conduct" which is "utterly intolerable in a civilized community."

Id. at 578-79, 521 S.E.2d at 715 (quoting *Briggs*, 73 N.C. App. at 677, 327 S.E.2d at 311).

In *Dobson*, the defendant was a private citizen whose false accusations of criminal conduct merely served to initiate an investigatory process. The defendant's conduct in *Dobson* was not considered outrageous in part due to the existence of an independent investigatory process that served to protect the plaintiff from further proceedings based on false accusations. In contrast, here, defendants are agents of the SBI who have an official duty to investigate allegations of criminal conduct and discover the truth. They are the individuals who are supposed to be conducting the independent investigatory process that would protect plaintiff from false accusations. When those individuals generate unsupported accusations, then the accused -- in this case, plaintiff -- is subjected to public condemnation of him as a murderer and is not merely subjected to an investigation. As a result, defendants' misconduct is more likely to result in the initiation or continuation

of publicized criminal proceedings than false accusations by private citizens. Thus, we believe that defendants' status as SBI agents distinguishes this case from *Dobson*.

While not binding authority, we note that other jurisdictions have found that similar conduct by police officers could be found by a reasonable jury to be sufficiently outrageous to support an IIED claim. *See Limone v. United States*, 579 F.3d 79, 99 (1st Cir. 2009) (conclusion that FBI engaged in extreme and outrageous conduct supported by findings that FBI knew that "scapegoats" were not involved in murder "from the moment that [an informant] implicated them" and that "FBI agents nonetheless assisted [the informant] in embellishing his apocryphal tale, helped him to sell that tale to state authorities and the jury, and covered up their perfidy by stonewalling the scapegoats' petitions for post-conviction relief."); *Pitt v. District of Columbia*, 491 F.3d 494, 506 (D.C. Cir. 2007) (evidence that police officer's arrest affidavit omitted exculpatory evidence and contained at least one false statement, and evidence that one officer tampered with evidence in attempt to link plaintiff to crime supported conclusion by reasonable juror that conduct was sufficiently "outrageous" for IIED claim); *Wagenmann v. Adams*, 829 F.2d 196, 214 (1st Cir. 1987) (holding that where evidence could support inference that officers conspired to arrest plaintiff and have him committed and were "determined to accomplish this objective at all costs and by the nearest means, in manifest derogation of the appellee's civil rights," trial court properly denied motion for judgment notwithstanding the verdict on IIED claim).

We find the reasoning in these cases persuasive and consistent with the analysis North Carolina courts have applied. Accordingly, we hold that plaintiff's complaint sufficiently alleges outrageous conduct and reverse the trial court's dismissal of plaintiff's claim of IIED.

D. False Imprisonment

False imprisonment is " 'the illegal restraint of a person against his will.' " *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoting *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995)). "A false arrest is an arrest without legal authority and is one means of committing a false imprisonment." *Marlowe*, 119 N.C. App. at 129, 458 S.E.2d 220 at 223.

Plaintiff contends that his release on house arrest constituted false imprisonment. We disagree. As explained by the Supreme Court of the United States:

> False arrest and false imprisonment overlap; the former is a species of the latter. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets; and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is. We shall thus refer to the two torts together as false imprisonment. That tort provides the proper analogy to the cause of action asserted against the present respondents for the following reason: The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*[.]
>
> . . . .
>
> Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process* – when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.

Wallace v. Kato, 549 U.S. 384, 388-90, 166 L. Ed. 2d 973, 980-81, 127 S. Ct. 1091, 1095-96 (2007) (internal citations and quotation marks omitted).

Plaintiff's complaint alleges that he was arrested only after being indicted by a grand jury. He was then released on house arrest. Plaintiff's complaint fails to allege that he was confined without legal process or other legal authority. While plaintiff's allegation that his detention and house arrest were not supported by probable cause is sufficient to state a claim for malicious prosecution, plaintiff has not, on appeal, cited any authority that would allow him to also proceed with a false imprisonment claim. Accordingly, we affirm the dismissal of this claim.

E. Public Official Immunity

Public officials sued in their individual capacity are entitled to public official immunity from claims in tort unless their "conduct is malicious, corrupt, or outside the scope of official authority." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852 (1996). "[I]f a plaintiff wishes to sue a public official in his personal or individual capacity, the

plaintiff must, at the pleading stage and thereafter, demonstrate that the official's actions (under color of authority) are commensurate with one of the 'piercing' exceptions." *Id.* at 207, 468 S.E.2d at 853. To withstand a defendant's motion to dismiss a claim based on the defense of public official immunity, the facts alleged in the complaint must support a conclusion that one of the piercing exceptions apply. *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997).

Here, plaintiff's complaint alleges that defendants' conduct was willful, intentional, and malicious. As previously discussed, the facts alleged support an inference that defendants acted maliciously. Therefore, to the extent the trial court dismissed the complaint based on public official immunity with respect to the malicious prosecution and IIED claims, the trial court erred.

II. Federal Constitutional Claims

Plaintiff argues that his complaint adequately alleged facts to support a § 1983 claim for malicious prosecution against defendants Thomas, Deaver, and Pendergraft in their individual capacities. Plaintiff apparently bases the § 1983 claim upon a violation of plaintiff's Fourth Amendment right to be free from unreasonable seizure, but otherwise makes no attempt to distinguish the § 1983 malicious prosecution claim from the state law malicious prosecution claim. Defendants argue, however, that they are entitled to qualified immunity for this claim and that the trial court properly dismissed the claim on this basis.

"The defense of qualified immunity shields government officials from personal liability under § 1983 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Toomer v. Garrett*, 155 N.C. App. 462, 473, 574 S.E.2d 76, 86 (2002) (quoting *Andrews v. Crump*, 144 N.C. App. 68, 75-76, 547 S.E.2d 117, 122 (2001)). "The qualified immunity inquiry requires a determination of whether the right at issue was clearly established at the time it was allegedly violated." *Id.* at 474, 574 S.E.2d at 87.

On appeal, plaintiff makes no argument that defendants violated a clearly established constitutional right. Rather, plaintiff, citing only *Epps v. Duke Univ., Inc.*, 116 N.C. App. 305, 447 S.E.2d 444 (1994), confuses the doctrine of qualified immunity with the doctrine of public official immunity, arguing generally that because "[u]nder the facts alleged, the Defendants could not have acted in good faith[,]" neither immunity defense is available to defendants at this stage of the proceeding.

Plaintiff, therefore, does not make any relevant argument or cite any authority in support of his assertion that defendants are not entitled to qualified immunity for the § 1983 malicious prosecution claim. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Accordingly, we affirm the trial court's dismissal of plaintiff's § 1983 claims.

Conclusion

In sum, we reverse the trial court's dismissal of plaintiff's state law malicious prosecution and IIED claims, as neither of those claims are barred by the statute of limitations or public official immunity and the allegations of the complaint are legally sufficient to state a claim for relief. As to the remaining claims, we affirm.

Affirmed in part; reversed in part.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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