235 N.C. App.—No. 4 Pages 541-658

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*MAY 30, 2016*

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

**THE COURT OF APPEALS**

**OF**

**NORTH CAROLINA**

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SANFORD L. STEELMAN, JR.[1]

[1] Retired 30 June 2015.

*Clerk*
DANIEL M. HORNE, JR.

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[2] 1 January 2016.

## COURT OF APPEALS

## CASES REPORTED

### FILED 19 AUGUST 2014



## CASES REPORTED WITHOUT PUBLISHED OPINIONS

dismissed two claims for foreclosure by power of sale. Plaintiff's claims for foreclosure by power of sale could not, as a form of special proceeding, have been brought in the same action as a claim for money judgment on a promissory note. A different trial court did err in a prior proceeding by dismissing plaintiff's claim for judicial foreclosure as plaintiff could not have brought this claim in the same action as its claims for foreclosure by power of sale. **Lifestore Bank v. Mingo Tribal Pres. Tr., 573.**

**CONTRACTS**

**Non-compete agreement—terms of the agreement—applicable law—**The trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants. The language of the terms of the parties' agreement manifested this intent. **N. Star Mgmt. of Am., LLC v. Sedlacek, 588.**

**CONVERSION**

**Taxes—not a specific amount—category—**Mecklenburg County's claim for conversion. The claim was not one for a specific amount of taxes alleged due, much less particular bills and coins, but instead was for a category of monies allegedly owed which was taxes. **Wake Cnty. v. Hotels.com, LP, 633.**

**DEEDS**

**Deed of trust—promissory note—holder of note—**The trial court erred in an action involving an unpaid promissory note by granting summary judgment in favor of plaintiff. There was a material issue of genuine fact as to whether plaintiff was the holder of the note. **Lifestore Bank v. Mingo Tribal Pres. Tr., 573.**

**DRUGS**

**Trafficking in cocaine—failure to consider lesser-included offense—manufacturing cocaine—no plain error—**The trial court did not commit plain error in a prosecution for trafficking in cocaine by manufacturing by failing to allow the jury to consider the issue of defendant's guilt of the lesser-included offense of manufacturing cocaine. There was no record support for the proposition that defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense. **State v. Miranda, 601.**

**Trafficking in cocaine—manufacturing—motion to dismiss—sufficiency of evidence—**The trial court did not err by denying defendant's motion to dismiss a charge of trafficking between 28 and 200 grams of cocaine by manufacturing. The State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from defendant's bedroom; and that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in defendant's bedroom were packaged in plastic bags. **State v. Miranda, 601.**

**Trafficking in cocaine—requested jury instruction—intent to deliver—no plain error—**The trial court did not commit plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that defendant manufactured cocaine

information was actually required by law to be submitted. The schedule in N.C.G.S. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates. **State v. Pressley, 613.**

**Failure to register—motion to dismiss—submission of each form a distinct violation—**The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on his contention that he was charged twice for the same offense. The submission of each form constituted a distinct violation of N.C.G.S. § 14-208.11(a)(4). **State v. Pressley, 613.**

**Failure to register—requested jury instruction—statutory intervals to submit forms—**The trial court did not commit plain error in a failure to register as a sex offender case by failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted. Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted at any time, there was no reason for the trial court to instruct the jury in the manner asserted by defendant. **State v. Pressley, 613.**

**TAXATION**

**Failure to remit—failure to show legal duty—**The trial court did not err by dismissing plaintiff counties' claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes. **Wake Cnty. v. Hotels.com, LP, 633.**

**Occupancy tax—gross receipts from rentals—online travel companies not operators of hotels—**The trial court did not err by determining that defendant online travel companies had no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants imposed on consumers. Defendants were not operators of hotels, motels, tourist homes, or tourist camps within the meaning of N.C.G.S. § 105-164.4(a)(3). Thus, the gross receipts defendants derived from the rentals were not subject to plaintiff counties' room occupancy tax. **Wake Cnty. v. Hotels.com, LP, 633.**

**Property—exemption—charitable association—ownership requirements—**The issue of whether the Property Tax Commission erred by holding that the Grandfather Mountain Stewardship Foundation (GMSF) satisfied the statutory ownership requirements for a property tax exemption for a charitable association was not reached because the property was not wholly and exclusively used for educational and scientific endeavors. It was not clear that GMSF would satisfy the ownership requirements even if the issue was addressed. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

**Property—exemption—scientific and educational use—**The North Carolina Property Tax Commission erred by granting the Grandfather Mountain Stewardship Foundation an exemption from property taxes based on scientific and educational activities.. The property was not wholly and exclusively used for educational and scientific endeavors. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

**Property—exemption—scientific and educational use—use of income from property—**The issue of whether the Property Tax Commission erred by basing

## 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.

**FORT v. CNTY. OF CUMBERLAND**

[235 N.C. App. 541 (2014)]

SAMUEL AND DORIS FORT, JULIA KATHERINE FAIRCLOTH, RAEFORD B. LOCKAMY, II, OK FARMS OF CEDAR CREEK, LLC, AND ARNOLD DREW SMITH, PETITIONERS
v.
COUNTY OF CUMBERLAND, NORTH CAROLINA, AND TIGERSWAN, INC., RESPONDENTS

No. COA14-93

Filed 19 August 2014

**1. Zoning—de novo review—vocational school—outdoor firing range—use by right**

The trial court erred as a matter of law in a zoning case by concluding that respondent's facility was a vocational school pursuant to the zoning ordinance. Furthermore, the trial court erred by failing to affirm the determination of the Cumberland County's Board of Adjustment that the facility was an outdoor firing range, allowed as a use by right.

**2. Zoning—whole record review—land use impacts—recreation/amusement classification**

The trial court erred in a zoning case by concluding that there was "no competent evidence" that could support the Cumberland County Board of Adjustment's determination that respondent's facility's land use impacts were most similar to the recreation/amusement classification.

Appeal by respondents from order entered 23 October 2013 by Judge C. Winston Gilchrist in Cumberland County Superior Court. Heard in the Court of Appeals 4 June 2014.

*Currin & Currin, by Robin T. Currin and George B. Currin, for petitioners.*

*Cumberland County Attorney's Office, by Robert A. Hasty, Jr., for respondent-appellant County of Cumberland.*

*Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for respondent-appellant TigerSwan, Inc.*

McCULLOUGH, Judge.

Respondents TigerSwan, Inc., and Cumberland County appeal an order of the trial court, reversing a decision made by Cumberland County's Board of Adjustment that the TigerSwan facility is permitted in the A1 Zoning District and remanding with instructions to revoke the site plan approval and zoning permit for the TigerSwan facility. Based on the reasons stated herein, we reverse the order of the trial court.

## I. Background

The Cumberland County zoning ordinance at issue in this appeal was originally adopted on 3 July 1972, revised 20 June 2005, and amended on 18 April 2011 ("the zoning ordinance"). Article IV, Section 402, entitled "Uses by Right" provides as follows:

> All uses of property are allowed as a use by right except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use. In the event, a use of property is proposed that is not addressed by the terms of this ordinance, the minimum ordinance standards for the use addressed by this ordinance that is most closely related to the land use impacts of the proposed use shall apply.

Article IV, Section 403 of the zoning ordinance includes a "Use Matrix" which enumerates permitted and special land uses, as well as some land uses allowed only in a conditional zoning district. The following land uses are enumerated in the "Use Matrix" and are pertinent to the case before us: "RECREATION/AMUS[E]MENT OUTDOOR (with mechanized vehicle operations) conducted outside building for profit, not otherwise listed & not regulated by Sec. 924" ("recreation/amusement") which is a permitted use in the A1 zoning district; "SCHOOLS, public, private, elementary or secondary" ("public or private school") which is a permitted use in the A1 zoning district; and a "SCHOOL, business and commercial for nurses or other medically oriented professions, trade, vocational & fine arts" ("vocational school") which is not a permitted use in the A1 zoning district.

TigerSwan, Inc. ("TigerSwan") submitted a site plan application to the County of Cumberland ("County") requesting approval for a "Training Collaboration Center" ("the TigerSwan facility"). The TigerSwan facility leases a 978 acre site which sits on a 1,521 acre parcel. The entire site is located in the A1 Agricultural District of the County. Evidence in the record established that the TigerSwan facility would be designed to provide weapons training and firearm safety primarily to the government, military, law enforcement, and corporate organizations. One day a week,

the TigerSwan facility would be open to the public. Ninety-five (95%) percent of the activity at the TigerSwan facility would occur on the outdoor gun ranges. TigerSwan intends to have a pro-shop, buildings for instruction, administrative offices, and restrooms.

On 9 April 2012, the County's Planning and Inspections Department ("the Planning Department") issued a site plan approval for the TigerSwan facility. The Planning Department held that the TigerSwan facility was permitted as a recreation/amusement land use. The Planning Department also issued a zoning permit to TigerSwan on 17 April 2012.

Petitioners Samuel and Doris Fort, Julia Katherine Faircloth, Raeford B. Lockamy, II, OK Farms of Cedar Creek, LLC, and Arnold Drew Smith appealed the issuance of the permit to the Cumberland County Board of Adjustment ("the Board"). Specifically, petitioners challenged the approval of the TigerSwan facility by arguing that the County's zoning administrator's classification of the TigerSwan facility as a recreation/amusement land use was erroneous. Petitioners argued that the County had never taken the position that the TigerSwan facility be permitted as recreation/amusement and that the Planning Department's determination was in direct conflict with the County's previous position, as set forth in *Fort v. County of Cumberland*, __ N.C. App. __, 721 S.E.2d 350 (2012) ("*Fort*"), that the TigerSwan facility be classified as a "private school."

Petitioners relied on our Court's holding in *Fort.* In *Fort*, TigerSwan sought approval of a "firearms training facility." *Id.* at __, 721 S.E.2d at 352. Our Court found that TigerSwan

> [i]ntends to provide instruction to military, law enforcement, and security personnel in topics such as weapons training, urban warfare, convoy security operations, and "[w]arrior [c]ombatives" in order to "teach, coach, and mentor tomorrow's soldiers." TigerSwan also intends to provide courses on topics such as first aid, firearm and hunting safety, and foreign languages for adults and children.

*Id.* The site plan included multiple firing ranges in addition to classroom facilities. *Id.* The Cumberland County zoning administrator approved TigerSwan's site plan by classifying the business as a "private school." *Id.* Petitioners Samuel and Doris Fort, Julia Katherine Faircloth, and Raeford B. Lockamy, II, appealed the approval of the site plan and the Board affirmed the decision of the zoning administrator. *Id.* at __, 721 S.E.2d at 352-53. After the *Fort* petitioners appealed to the superior

court, the trial court held that the training facility was a permitted use in the A1 zoning district. *Id.* at __, 721 S.E.2d at 353. The *Fort* petitioners appealed to our Court. Under section 402 of the then-existing zoning ordinance[1], our Court held that the TigerSwan facility was not a "private school" and that the TigerSwan facility was not a permitted use in the A1 zoning district. *Id.* at __, 721 S.E.2d 354. Using rules of statutory construction, our Court reasoned that the "schools, public, private, elementary or secondary" category in the zoning ordinance limited permissible schools, private and public, to elementary and secondary education. "[T]he inclusion of 'elementary or secondary' in the description of permissible schools was intended to exclude other types of 'SCHOOLS,' whether they be private or public." *Id.* at __, 721 S.E.2d at 355. Our Court stated that "[w]ithout deciding whether the Training Facility qualifies as either a trade or vocational school, we conclude that the Training Facility is not a permitted use as it is not a public or private, elementary or secondary school." *Id.*

On 10 July 2012, the Board held a hearing on the issue of whether "the staff of the Cumberland County Planning Department erred by failing to classify the use of the site for the [TigerSwan facility] as a vocational school within one of the School land uses." The Board entered an order that made the following pertinent findings:

> 3. The training offered at the TigerSwan facility is in the nature of skill level improvement.
>
> 4. Approximately 80-90% of the activities conducted at the TigerSwan facility occur outside on the firing ranges, and the training conducted in the meeting rooms is incidental to the firing of pistols and rifles. Twenty percent (20%) of the activity at the TigerSwan facility is recreational in nature and involves sportsmen and families.
>
> . . . .
>
> 7. There is no classification of firing ranges in the Cumberland County Zoning Ordinance.

1. This case was decided under the version of the ordinance prior to the 18 April 2011 amendment: Section 402 entitled, "Uses by Right" provided that "[a]ll uses of property are prohibited except those that are permitted or otherwise allowed under the terms of this ordinance."

. . . .

10. Before the submission of the request for a permit for the TigerSwan facility, Planning Director Tom Lloyd issued a directive to staff that any outdoor firing range would be considered as the classified use [recreation/amusement] for the reason that he believed this was the classified use under the ordinance which created the most similar land use impacts.

11. The Planning Department classified the TigerSwan facility in accordance with the Planning Director's directive and issued the subject permit. . . .

The Board concluded that the TigerSwan facility did not fall within the classification of a vocational school. The Board also concluded that the decision of the Planning Department "to consider the TigerSwan facility to be an outdoor firing range most similar to the classified use for outdoor recreation[/amusement] was reasonable and was made in conformance with the provision" of the zoning ordinance. The Board dismissed petitioners' appeal and affirmed the issuance of the permit for the TigerSwan facility.

Petitioners then appealed the order of the Board to the Cumberland County Superior Court by filing a petition for writ of certiorari on 25 September 2012.

Following a hearing held at the 26 August 2013 session of Cumberland County Superior Court on petitioners' writ of certiorari, the trial court entered an order on 23 October 2013. The trial court found that the Board's decision "must be reversed and the case remanded to the Board . . . with instructions to revoke the Site Plan and Zoning Permit for the TigerSwan Facility issued on April 9, 2012 and April 17, 2012." The trial court's decision was based on the following, in pertinent part:

4. In its Table of Permitted Uses, the Zoning Ordinance sets forth the uses that are allowed in the A1 District and those which are not. [Vocational schools] are not permitted in the A1 District. The term vocational school is not defined in the Zoning Ordinance.

5. [Recreation/Amusement] is a permitted use in the A1 District. . . .

6. The Zoning Ordinance in effect at the time of the approvals by the Zoning Administrator (the "Zoning

Ordinance") does not reference a use called a "firing range" or "shooting range," and neither of those terms are defined in the Zoning Ordinance.

. . . .

8. The decisions to approve the Site Plan and Zoning Permit were based upon the Zoning Administrator's determination that the TigerSwan Facility was an outdoor firing range, which is not addressed by the Zoning Ordinance. The Zoning Administrator then determined, pursuant to Zoning Ordinance Section 402, that the TigerSwan Facility should be regulated as [recreation/amusement] because the land use impacts of the TigerSwan Facility were most closely related to that use.

. . . .

13. Based on the Court's de novo review of the whole record . . . this Court concludes that the TigerSwan Facility is a [vocational school], as set out in the Zoning Ordinance and is, therefore, prohibited in the A1 District. The evidence in the Record established that the TigerSwan Facility fits within the definition of a vocational school and its purposes and activities are consistent with those of a vocational school as set out in the Zoning Ordinance. The Board of Adjustment, thus, erred in affirming the decision of the Zoning Administrator which determined the TigerSwan Facility was an outdoor firing range, because it is not. The TigerSwan Facility is a vocational school under the Zoning Ordinance. The fact that TigerSwan operates a recreational firing range one day a week and uses a firing range for its courses does not change the nature of the use, which the Record establishes is to provide instruction to military, law enforcement and security personnel for use in their occupations. See Fort v. County of Cumberland, __ N.C. App. __, __, 721 S.E.2d 350, 356 (2012) (while some uses offered by TigerSwan may be permitted, "the inclusion of permitted uses cannot offset the uses prohibited by the [Zoning] Ordinance.").

> 14. Because the TigerSwan Facility is a vocational school, which is a use that is specifically prohibited in the A1 District, the Zoning Administrator had no authority under the Zoning Ordinance Section 402 to determine that the TigerSwan Facility should be regulated according to the minimum standards for the use with the most closely related land use impacts. Regardless, however, and in the alternative, there was no competent evidence in the Record that could support the determination that the TigerSwan Facility's impacts were most similar to [Recreation/Amusement].

Respondents County of Cumberland and TigerSwan filed notice of appeal on 15 November 2013 from the 23 October 2013 order of the trial court.

## II. Standard of Review

It is well established that "[j]udicial review of the decisions of a municipal board of adjustment is authorized by N.C. Gen. Stat. § 160A-388(e2), which provides, in pertinent part, that '[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari*.' " *Four Seasons Mgmt. Servs. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010). Upon review of a decision from a Board of Adjustment, the trial court should:

> (1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record, and (5) ensure that the decision is not arbitrary and capricious.

*CRLP Durham, LP v. Durham City/County Bd. of Adjustment*, 210 N.C. App. 203, 207, 706 S.E.2d 317, 319-320 (2011) (citations and quotation marks omitted).

"If a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper." *Four Seasons*, 205 N.C. App. at 75, 695 S.E.2d at 462 (citations and quotation marks omitted). "Under de novo review a reviewing court considers the case anew and may

freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Communs. Corp v. City of Bessemer*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted). "However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *Four Seasons*, 205 N.C. App. at 75, 695 S.E.2d at 462 (citations omitted). "When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Templeton Properties v. Town of Boone*, __ N.C. App. __, __, __ S.E.2d __, __ (June 3, 2014) (No. COA13-1274).

"When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: (1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *CRLP Durham*, 210 N.C. App. at 207, 706 S.E.2d at 320 (citation omitted).

## III. Discussion

On appeal, respondents argue that the trial court erred by (A) concluding, in paragraphs 13 and 14 of the 23 October 2013 order, that TigerSwan's facility is a vocational school as set out in the zoning ordinance and by (B) concluding in paragraph 14 that there was no competent evidence in the record that could support the determination that the TigerSwan facility's impacts were most similar to the category of recreation/amusement.

### A. Classification of the TigerSwan Facility as a Vocational School

**[1]** First, respondents argue that the trial court erred as a matter of law by concluding that the TigerSwan facility was a vocational school pursuant to the zoning ordinance. Respondents also contend that the trial court erred by failing to affirm the determination of the Board that the TigerSwan facility was an outdoor firing range, allowed as a use by right.

"The superior court reviews a board of adjustment's interpretation of a municipal ordinance *de novo*." *MNC Holdings, LLC v. Town of Matthews*, __ N.C. App. __, __, 735 S.E.2d 364, 367 (2012). Reviewing the trial court's 23 October 2013 order, we initially note that the trial court, while reviewing issues involving the interpretation of the zoning ordinance, employed the appropriate *de novo* standard of review. The issue in this appeal is whether the trial court's legal interpretation of the zoning ordinance was correct. Accordingly, we also employ

*de novo* review and "consider [the] question[s] anew." *JWL Invs., Inc. v. Guilford County Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 718 (1999). *See MNC Holdings*, __ N.C. App. at __, 735 S.E.2d at 367 (stating that because the issue on appeal is whether the trial court's legal interpretation of a municipal ordinance is correct, our Court also employs a *de novo* review).

In determining the meaning of a zoning ordinance, we apply the same principles of construction used to interpret statutes. *See Morris*, 365 N.C. at 157, 712 S.E.2d at 872. In addition,

> we attempt to ascertain and effectuate the intent of the legislative body. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, we avoid interpretations that create absurd or illogical results.

*Ayers v. Bd. of Adjustment*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citations omitted). "[R]eviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations. This proposition emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards." *Morris*, 365 N.C. at 156, 712 S.E.2d at 871 (citations and quotation marks omitted).

We first examine the intent of the zoning ordinance. Prior to the 18 April 2011 amendment, the zoning ordinance provided that "[a]ll uses of property are prohibited except those that are permitted or otherwise allowed under the terms of this ordinance." Notably, following the 18 April 2011 amendment, the zoning ordinance provided in Section 402 that "[a]ll uses of property are allowed as a use by right except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use." In determining the intent of the 18 April 2011 amendment, it is evident that the legislative body intended to broaden the spectrum of permissible uses and thereby, freely allowed the use of property except where it was specifically prohibited.

We now consider the term "vocational school" and the Board's interpretation of that term. The term "vocational school" is not defined in the zoning ordinance. "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a[n ordinance.]" *Perkins v. Arkansas Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citation omitted). "Vocational" is defined as "of, relating to, or concerned with a vocation" or "of, relating

to, or undergoing training in a skill or trade to be pursued as a career." *Merriam-Webster Online Dictionary*.[2]

Despite the lack of a definition within the zoning ordinance, the Board interpreted the term "vocational school" to mean the following:

> The commonly accepted concept or definition of a vocational school is an institution like Fayetteville Technical Community College where students gain career training through extended courses in classrooms. Vocational schools can have hundreds or thousands of students coming by car to the school each day. The TigerSwan facility has just a limited number of cars each day.

The Board also found that the training offered at the TigerSwan facility was in the nature of "skill level improvement" – eighty to ninety (80 – 90%) percent of the activities conducted at the TigerSwan facility occurred outside on the firing ranges and that the training conducted inside the meeting rooms was incidental to the firing of pistols and rifles. Based on the foregoing, the Board concluded that the TigerSwan facility did not fall within the "vocational school" classification of the zoning ordinance.

Considering the plain and ordinary meaning of the term "vocational" school within the zoning ordinance, in light of the intent of the ordinance, we hold that the Board's determination that the TigerSwan facility did not constitute a vocational school was proper. Uncontested evidence presented before the Board on 10 July 2012 included testimony from Brian Searcy, the Chief Operating Officer for TigerSwan, that ninety-five percent (95%) of "everything that occurs on this facility is range fire, outdoors." Searcy testified that eighty percent (80%) of training is provided to military personnel, law enforcement, and private security contractors "[t]o improve their current skills that they have[.]" One day a week, the firing range is opened to the public for recreational shooters. Significantly, Searcy explained that "[TigerSwan] do[es] not qualify people to do jobs, [does not] give diplomas and [does not] give any degrees. We give a certificate of training to people who attend two or three day courses. All we're doing is helping improve skills that they already have." Searcy agreed that at the TigerSwan facility, people are "just practicing a skill which is firing a weapon[.]" Steve Swierkowski, who coordinates the training events that take place at TigerSwan,

2. http://www.merriam-webster.com/dictionary/

testified that "the majority of the activities takes place on the range" and that "we can execute this range without the use of any classrooms."

Because the TigerSwan facility does not teach a skill or trade to be pursued as a career, but rather, provides training to existing members of a profession in order to practice and refine their already-existing skills, we agree with the Board's conclusion that the training offered at the TigerSwan facility is in the nature of skill level improvement. The TigerSwan facility operates as a firing range, and not as a vocational school, where students gain career training through extended courses in classrooms and receive diplomas or degrees so that they are able to pursue a career. Furthermore, because the zoning ordinance fails to specifically prohibit the use of land as a firing range, it is allowed as a use by right pursuant to Section 402. Based on the foregoing reasons, we hold that the trial court improperly applied *de novo* review of the Board's decision and thus, erred by reversing the Board's conclusion that the TigerSwan facility does not fall within the classification of a vocational school.

B. Evidence of the TigerSwan Facility as a Recreation/Amusement Land Use

**[2]** Next, respondents challenge the trial court's conclusion that "in the alternative, there was no competent evidence in the Record that could support the determination that the TigerSwan Facility's impacts were most similar to [recreation/amusement]." Respondents argue that there was competent evidence in the record to refute this conclusion.

Because the trial court was reviewing whether the Board's decision that the TigerSwan facility's impacts were most similar to recreation/amusement, it should have applied the whole record test. It is well established that "[w]hile the county board operates as the finder of fact, a reviewing superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board." *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 12-13, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted). "[I]f in applying the whole record test, reasonable but conflicted views emerge from the evidence, this court cannot substitute its judgment for the administrative body's decision. Ultimately, we must decide whether the decision has a rational basis in the evidence." *Appalachian Outdoor Adver. Co. v. Town of Boone Bd. of Adjustment*, 128 N.C. App. 137, 141, 493 S.E.2d 789, 792 (1997) (citations and quotation marks omitted).

After thoughtful review, we hold that although the trial court's 23 October 2013 order indicates that it conducted review under the whole record test, it failed to do so properly.

A recreation/amusement land use is defined within the zoning ordinance as follows:

> An area or establishment, which requires the use of motors or engines for the operation of equipment or participation in the activity. This definition includes but is not limited to go-cart tracks, bicycle motorcross (BMX) courses and the like. This definition does not include golf courses (golf carts) or other low impact motorized activities or vehicles.

At the 10 July 2012 hearing before the Board, testimony was offered by Thomas J. Lloyd, director of the Planning Department. Mr. Lloyd testified that he had issued a memorandum dated 21 February 2012 wherein he had made a determination that the TigerSwan facility was a firing range, with the most similar land use impacts of recreation/amusement. Mr. Lloyd, explaining the analysis behind his determination, testified to the following:

> MR. LLOYD: We looked at the affects [sic] of a firing range and noted what would be the biggest objection or the biggest problem with respect to health, safety and welfare to neighboring properties and of course that would be any projectile leaving the firing range site. Of course there are other aspects too including noise, lighting and traffic volume. But most of all we had to look at the safety of the surrounding property. When you look at outdoor recreation it addresses safety specifically Section 920F which talks about fencing, netting and other control measures and many times with firing ranges, the use permit, shall be provided around the perimeter of any areas used for hitting, flying, or throwing of objects to prevent the object from leaving the designated area. The only thing we had in the ordinance that addressed objects of any kind leaving the site or leaving the area was outdoor recreation. With respect to that and that measure of any projectile on a firing range leaving the area as well as the less impact of lighting and noise, they were also similarly addressed in outdoor recreation.
>
> MR. FLOWERS: Just so we are clear on this, when you issued that memo on February 21, 2012, you were not

saying that a firing range is outdoor recreation but that the impact is similar to outdoor recreation, is that right?

MR. LLOYD: Yes sir, which is exactly the way the ordinance amendment in Section 402 read.

Based on the foregoing evidence presented to the Board, we hold that the trial court erred by concluding that there was "no competent evidence" that could support the determination that the TigerSwan facility's land use impacts were most similar to the recreation/amusement classification. "It is neither the superior court's nor this Court's duty to second guess the decision of [the Board] where there is a rational basis in the evidence." *Myers Park Homeowners Ass'n., Inc. v. City of Charlotte*, __ N.C. App __, __, 747 S.E.2d 338, 344 (2013).

## IV. Conclusion

We hold that the Board properly approved the TigerSwan facility as a firing range with the land use impacts most similar to the recreation/amusement classification. Accordingly, because the trial court improperly reversed the decision of the Board, we reverse the order of the trial court.

Reversed.

Judges STEPHENS and STROUD concur.

**GRAY v. PEELE**

[235 N.C. App. 554 (2014)]

TAMI L. GRAY, PLAINTIFF
v.
DARRELL KEITH PEELE, DEFENDANT

No. COA13-1333

Filed 19 August 2014

**Appeal and Error—interlocutory orders and appeals—temporary child support order**

Defendant's appeal from the trial court's order denying his motion to modify child support was dismissed as interlocutory. The temporary order provided for payment of child support until a pending motion to modify custody could be determined and child support set based upon the actual custodial schedule.

Appeal by defendant from order entered 9 August 2013 by Judge Daniel J. Nagle in Wake County District Court. Heard in the Court of Appeals 22 May 2014.

*No brief filed on behalf of plaintiff-appellee.*

*Elisabeth P. Clary for intervenor plaintiff-appellee Wake County Child Support Enforcement.*

*Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Darrell Keith Peele ("Defendant") appeals from an order denying his motion to modify child support. Defendant contends that the prior child support order entered in 2010 was temporary in nature and that the trial court erred in requiring him to demonstrate that a substantial change in circumstances had taken place since the entry of the existing order. Defendant also challenges the trial court's conclusions and findings of fact. For the following reasons, we dismiss the appeal as interlocutory.

## I. Factual & Procedural History

Tami L. Gray ("Plaintiff") and Defendant were married on 30 April 1994. During the marriage, Plaintiff and Defendant had one child, L.K.P., who was born in March 1999. Plaintiff and Defendant subsequently divorced.

On 24 October 2000, the Granville County District Court entered a temporary child support order that, pursuant to the North Carolina Child Support Guidelines, required Defendant to pay the presumptive sum of $685.57 per month for the minor child. On 17 April 2001, when the child was 2 years old, the court entered a permanent custody order giving Plaintiff primary physical custody of L.K.P. and Defendant Wednesday evening, alternating weekend, and holiday visitation rights. The custody order also provided that "[t]he parties may exercise such other and further residency periods with the minor child as may be mutually agreed upon by the parties."

On 21 February 2003, the court modified the temporary child support order, requiring Defendant to pay $685.57 per month in accordance with the previous child support order, plus an additional $100 per month towards arrearages. Nearly five years later, in February 2008, the action was transferred to Wake County and an order was entered permitting the local Child Support Enforcement Agency to intervene on behalf of Plaintiff.

Thereafter, on 4 May 2010, Defendant filed a motion to modify his child support obligation, citing loss of work and unemployment, as well as the fact that L.K.P. had been staying with him an additional night during the week. Following a hearing on the motion, the trial court entered an order on 6 August 2010 based on a consent agreement between the parties reducing Defendant's monthly child support obligation to $500 per month.

On 10 October 2010, the parties mutually agreed to implement a week-on/week-off custody arrangement, although the custody order was not formally modified. After the parties implemented this agreement, Defendant stopped paying child support without seeking a modification from the trial court and without Plaintiff's consent. On 31 August 2011, Plaintiff withdrew from the agreement and demanded that Defendant revert to the custody schedule contained in the 17 April 2001 custody order. Despite Plaintiff's objections, however, the record evidence shows that the parties continued the week-on/week-off custody arrangement until the hearing in this matter in May of 2013 -- a period of over 2 years and seven months. On 27 September 2011, Defendant filed a motion to modify custody alleging the existence of many changes in the parties' circumstances and the child's needs, requesting an award of primary custody or in the alternative, that the "Court modify the 2001 Custody Order such that the parties immediately resume and maintain the week-on week-off custodial schedule that they have been operating under for the past year." This motion remains pending in the trial court.

Thereafter, Defendant filed a separate motion to modify child support on 10 April 2012 and again on 31 January 2013, alleging that circumstances had changed in that he had experienced a period of unemployment, his home had been foreclosed upon, his car had been repossessed, and his financial condition had deteriorated. Defendant also cited the week-on/week-off custody schedule in the motion. Defendant's motion to modify child support was heard at the 24 May 2013 "term of Wake County Civil IV-D District Court." Following a hearing concerning the motion to modify child support only, the trial court entered an order dated 9 August 2013 concluding, *inter alia*, that:

> 2. Defendant earns income on a monthly basis and is capable of contributing to the support of the minor child, [L.K.P.].
>
> 3. Defendant should be required to pay child support for the minor child, [L.K.P.].
>
> 4. A change in the physical custody of a child constitutes a substantial change in circumstances warranting modification of an existing child support order.
>
> 5. While a change in the physical custody of the minor child existed from to [sic] 10 October 2010 to 31 August 2011, the defendant failed to file a motion to modify child support and was not precluded from filing by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason, and the change in physical custody no longer exists and payment has vested.
>
> 6. The existing ordered support amount is sufficient to meet the reasonable needs of the minor child.

(Internal citation omitted). Accordingly, the trial court denied Defendant's motion to modify child support and ordered Defendant to continue to make child support payments of $500 per month as previously ordered. Defendant filed timely notice of appeal from the trial court's order.

## II. Jurisdiction

Defendant argues that we have jurisdiction to consider this order because it is not interlocutory. We disagree.

> Generally, there is no right of immediate appeal from interlocutory orders and judgments. An interlocutory order is one made during the pendency of an action, which does

> not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. On the other hand, a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.

*Hausle v. Hausle*, ___ N.C. App. ___, ___, 739 S.E.2d 203, 205-06 (2013) (citations, quotation marks, and brackets omitted). "The reason for this rule is to prevent fragmentary, premature, and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014) (citation, quotation marks, and brackets omitted). "In the child support context, an order setting child support is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered." *Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 250 (1996).

In the literal sense of the word, no child support order entered in this state is "permanent" because it "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances[.]" N.C. Gen. Stat. § 50-13.7(a) (2013). Nevertheless, our case law provides that a child support order may be characterized as "permanent" when the order is based on the merits of the case and intended to be final. *See Miller v. Miller*, 153 N.C. App. 40, 47-48, 568 S.E.2d 914, 919 (2002).

With respect to child custody orders, we have said that "[a] temporary order is not designed to remain in effect for extensive periods of time or indefinitely." *Gary v. Bright*, ___ N.C. App. ___, ___, 750 S.E.2d 912, 915 (2013) (internal quotation marks and citation omitted).

> [A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief[;] or (3) the order does not determine all the issues. If the order does not meet any of these criteria, it is permanent.

*Woodring v. Woodring*, ___ N.C. App. ___, ___, 745 S.E.2d 13, 18 (2013) (alterations in original) (internal quotation marks and citation omitted).

With respect to child support orders, our case law is less developed, but not totally devoid of guiding precedent. *See, e.g.*, *Miller*, 153 N.C. App. 40, 568 S.E.2d 914; *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11

(2002); *Banner*, 124 N.C. App. 439, 477 S.E.2d 249. In these cases, we have looked to the intent behind the trial court's order to determine if a support order is temporary. In doing so, we have considered whether the order explicitly identifies itself as a temporary order and whether the language of the order contemplates that another "permanent" order will be entered at a future point in time. *Miller*, 153 N.C. App. at 47-48, 568 S.E.2d at 919; *Cole*, 149 N.C. App. at 433-44, 562 S.E.2d at 14-15.

A claim for either child support or custody can be brought and heard by the trial court independently, so in one sense, a final determination of one claim would be entirely separate of the other. But in many cases, and this is one of them, the amount of child support depends in large part upon the custodial schedule and the custodial schedule is in dispute. In fact, N.C. Gen. Stat. § 50-13.4 establishes child support guidelines which are based upon the applicable custodial schedule and a presumption that child support shall be set in accordance with the guidelines unless the parties' incomes place their case outside of the guidelines or there is a request for deviation from the guidelines and the trial court makes findings that a deviation is justified in the particular case. *See generally Pataky v. Pataky*, 160 N.C. App. 289, 295-96, 585 S.E.2d 404, 408-09 (2003) (discussing in detail the origins of and procedures applicable to the child support guidelines), *aff'd in part and disc. rev. dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); N.C. Gen. Stat. § 50-13.4(c), (c1).

This statutory scheme and the presumption of application of the guidelines makes the claims of child custody and child support legally interdependent. Here, there is a pending motion to modify custody which, if allowed, would fundamentally alter the facts upon which the trial court based its child support decision. After entry of the 6 August 2010 child support order, the parties agreed that the minor child would live with each party during alternate weeks, and the evidence indicated that this living arrangement continued up to the time of the hearing in May of 2013. Although plaintiff "withdrew her consent" from that arrangement on 31 August 2011, they continued to alternate custody weekly. On 27 September 2011, defendant moved to modify the parties' custody order to reflect the new arrangement. On 10 April 2012, defendant also moved to modify child support, alleging as part of the justification for this request the actual custodial arrangement the parties had been following. On 18 April 2013, defendant also filed notice that he would

> request a deviation from the North Carolina Child Support Guidelines and requests the Court to consider the Defendant's deviation when applying the guidelines

> and to take into consideration the custodial schedule of the parties. The Defendant asserts that the Child Support Guidelines are unreasonable because the parties maintained a fifty/fifty (50/50) custodial schedule for the minor child since October 2010. Based upon information and belief, the Defendant believed the Order was in effect for a 50/50 schedule and has since discovered that the Custody Order may not have been signed and the Plaintiff and Defendant have exercised a 50/50 custody since October 2010.

The order on appeal only addressed the child support issues, while leaving the custody issues unresolved—nearly two years after defendant had moved to modify the custody order to reflect the actual custody schedule. We understand that the order failed to address child custody because this case was heard in Wake County Civil IV-D District Court and prosecuted by the Wake County Child Support Enforcement Agency on behalf of Plaintiff. The "Civil IV-D" session of District Court is commonly referred to as "child support court." Chapter 110 of the North Carolina General Statutes sets out a comprehensive statutory scheme for establishment of child support orders and enforcement of those orders in cases which fall under that Chapter, defined as "a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV–D of the Social Security Act as amended and this Article." N.C. Gen. Stat. § 110-129(7) (2011). N.C. Gen. Stat. § 110-129.1(a)(3) grants to the Department of Health and Human Services the "power and duty" to

> Establish and implement procedures under which in IV-D cases either parent or, in the case of an assignment of support, the State may request that a child support order enforced under this Chapter be reviewed and, if appropriate, adjusted in accordance with the most recently adopted uniform statewide child support guidelines prescribed by the Conference of Chief District Court Judges.

Because of the specialized nature of the IV-D session of court, motions for modification of custody are not heard, nor do Child Support Enforcement agencies represent parents in regard to any custody issues. While we appreciate this procedural situation and the reason that one motion was heard while the other remained pending, despite its apparent relevance to the issues raised in the motion to modify child support, we have to determine the interlocutory nature of the order based upon the law. The present order failed to resolve the pending custody issue or even to address the parties' custodial arrangement during the entire

relevant period, even though the custodial schedule was in dispute.[1] The trial court simply ordered the parties to continue following the prior order, awarding plaintiff $500 per month despite the fact that the actual custody arrangement had changed.

A change in the custodial arrangement is a substantial change in circumstances affecting child support, as the trial court itself noted, citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998). Without knowing the custody arrangement, the trial court cannot determine which child support worksheet to use, or whether to deviate from the guidelines. *See* N.C. Gen. Stat. § 50-13.4(c1) (2011) ("The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein."); N.C. Child Support Guidelines, AOC-A-162 (2011). So, in effect, this order simply temporarily continues the existing support order until the trial court can hear the custody issues.

This would also explain why the trial court made findings of fact about the parties' incomes and all information needed to set guideline child support, but failed to make any findings addressing the justification for deviation from the guidelines or any determination of the amount of child support which would be required by the guidelines, and then simply continued in effect the $500.00 child support amount which the parties had agreed upon in 2010. If the trial court had intended this to be a permanent child support order, the findings and conclusions of law would not support this child support amount, which ignores the findings of fact about the parties' incomes and other relevant numbers and fails to make any findings as to a need to deviate from the guidelines. But as a temporary order entered by the child support enforcement court to provide for payment of child support until the pending motion to modify custody can be determined and child support set based upon the actual custodial schedule, the order makes sense both legally and practically.

Where our record demonstrates that there was at the time of the hearing a motion to modify custody pending, with the actual custodial schedule uncertain and in dispute, and the child support obligation is presumptively directly dependent upon the custodial schedule, allowing

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1. All the trial court could do in this situation, since the pending custody motion was not under consideration, was to make findings regarding the past practice of the parties and whether any retroactive modification of the child support obligation might be justified, and the trial court did make findings concerning this issue. Indeed, defendant did not dispute that the effective date of any retroactive child support modification would be the date of filing of his motion to modify child support.

the present child support order to be immediately appealed would lead to "fragmentary, premature[,] and unnecessary appeals[.]" *Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439 (first alteration in original). Therefore, we hold that the present order is interlocutory and dismiss the appeal.[2]

## III. Conclusion

For the foregoing reasons, defendant's appeal from the child support order is dismissed.

DISMISSED.

Judges ERVIN and DAVIS concur.

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IN THE MATTER OF THE APPEAL OF GRANDFATHER MOUNTAIN STEWARDSHIP FOUNDATION, INC., FROM THE DECISION OF THE AVERY COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF REAL PROPERTY FOR TAX YEAR 2011

No. COA13-1447

Filed 19 August 2014

**1. Taxation—property—exemption—scientific and educational use**

The North Carolina Property Tax Commission erred by granting the Grandfather Mountain Stewardship Foundation an exemption from property taxes based on scientific and educational activities. The property was not wholly and exclusively used for educational and scientific endeavors.

**2. Taxation—property—exemption—scientific and educational use—use of income from property**

The issue of whether the Property Tax Commission erred by basing its decision on whether to grant a property tax exemption on the use of income from the property was not reached. The property was not used wholly and exclusively for educational and scientific purposes.

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2. We note that the Legislature recently enacted Session Law 2013-411, codified at N.C. Gen. Stat. § 50-19.1 (2013), which governs appeals from certain family law orders while other claims remain pending. However, this statute only became effective 23 August 2013, after the order on appeal was entered. 2013 N.C. Sess. Laws ch. 411, § 2. Indeed, defendant has not argued that this statute applies here. Therefore, we do not address how this statute might affect our analysis.

**3. Taxation—property—exemption—charitable association—ownership requirements**

The issue of whether the Property Tax Commission erred by holding that the Grandfather Mountain Stewardship Foundation (GMSF) satisfied the statutory ownership requirements for a property tax exemption for a charitable association was not reached because the property was not wholly and exclusively used for educational and scientific endeavors. It was not clear that GMSF would satisfy the ownership requirements even if the issue was addressed.

**4. Taxation—property—exemption—vacant lot used as buffer—status—dependent on main parcel**

A vacant lot owned by the Grandfather Mountain Stewardship Foundation did not qualify for a property tax exemption where it was found to be a buffer for Grandfather Mountain tourist park. The real property encompassing Grandfather Mountain tourist park was not eligible for the exemption because it was not wholly and exclusively used for educational and scientific endeavors and the status of the buffer lot was dependent on the status of the main parcel. The Property Tax Commission erred by concluding otherwise.

Appeal by Avery County from orders entered 21 February and 24 June 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 22 April 2014.

*Poyner Spruill LLP, by Chad W. Essick and Andrew H. Erteschik, and Harrison & Poore, PA, by Michaelle Poore, for appellant Avery County.*

*Tuggle Duggins, P.A., by Martha R. Sacrinty and Michael S. Fox, for appellee Grandfather Mountain Stewardship Foundation.*

BRYANT, Judge.

Where the property was not wholly and exclusively used for educational or scientific purposes pursuant to North Carolina General Statutes, sections 105-275(12) and 105-278.7(a), we reverse the order of the North Carolina Property Tax Commission granting Grandfather Mountain Stewardship Foundation exemption from property taxes.

Grandfather Mountain Stewardship Foundation, Inc. (GMSF), filed an application for exemption from property taxes in Avery County listing three parcels of real property (the subject property). In its 24 December

2010 application, GMSF indicated that the tax exemption was sought due to GMSF's status as a charitable or educational foundation pursuant to N.C. Gen. Stat. § 105-278.7. The Avery County Tax Assessor's Office denied GMSF's application due to the belief "that Grandfather Mountain is not 'Wholly and exclusively used by its owner for nonprofit educational, scientific, literary purposes' as defined by NCGS § 105-278.7(a)(1)." GMSF appealed to the Avery County 2011 Board of Equalization and Review, stating "[t]he property qualifies as tax exempt under N.C. Gen. Stat. § 105-278.7 and N.C. Gen. Stat. § 105-275(12) . . . ." The Equalization and Review Board also denied the request for tax exempt status. GMSF filed a notice of appeal and application for hearing with the North Carolina Property Tax Commission (the Commission).

On 24 June 2013, following a 10 April 2013 hearing, the Commission entered an order in which it concluded that GMSF was a charitable association; that the revenue GMSF collected from the operation of the real property funded the educational and scientific uses of the property; any structures on the real property that were not used directly for scientific or educational purposes were incidental to the scientific and educational uses of the property; and the subject property[1] was "wholly and exclusively used for scientific and educational purposes." The Commission concluded that "[e]ach of the tracts [was] eligible as exempt under both [General Statutes, sections 105-275(12) and 105-278.7] . . . ." Avery County appeals to this Court.

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On appeal, Avery County raises the following issues: the Commission erred by (I) exempting the property from taxation; (II) holding that the property satisfied the ownership requirements for an exemption; and (III) holding that the vacant lot is exempt from taxation.

*I*

Avery County argues that the Commission erred by exempting the property from taxation because the property is a self-described tourist attraction that is not "wholly and exclusively used for educational or scientific purposes." Specifically, Avery County contends the Commission

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1. GMSF notified the Commission that it abandoned its appeal from the denial of tax exempt status with regard to one of the three parcels of real property listed on its original application for tax exemption. Therefore, only the remaining two land parcels comprised the subject property on review before the Commission. On Parcel Two, GMSF operated the Grandfather Mountain tourist attraction and Parcel Three served "as a buffer tract to preserve the natural area and prevent encroaching development."

erred in concluding GMSF was eligible for a tax exemption under both N.C. Gen. Stat. §§ 105-275(12) and 105-278.7 because (A) the property was not "wholly and exclusively" used for educational and scientific purposes; (B) the conclusion should have been predicated on how the property was used rather than how the income generated from the property was spent; and (C) the income generated from the property is more than incidental income. For the most part, we agree.

"Statutes exempting property from taxation due to the purposes for which such property is held and used must, of course, be strictly construed against exemption and in favor of taxation." *In re Forestry Found.*, 35 N.C. App. 414, 428—29, 242 S.E.2d 492, 501 (1978) (citations omitted), *aff'd*, 296 N.C. 330, 250 S.E.2d 236 (1979); *see also In re Appeal of Totsland Preschool, Inc.*, 180 N.C. App. 160, 164, 636 S.E.2d 292, 295 (2006) ("[A]ll ambiguities are to be resolved in favor of taxation." (citations omitted)). "[T]he taxpayer bears the burden of proving that its property is entitled to an exemption under the law." *In re Appeal of Eagle's Nest Found.*, 194 N.C. App. 770, 773, 671 S.E.2d 366, 368 (2009) (citation omitted).

Appeal from an order or decision of the Property Tax Commission shall lie to the Court of Appeals. *See* N.C. Gen. Stat. § 105-345(d) (2013). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing N.C.G.S. § 105-345.2(b)). This Court "may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings[.]" N.C.G.S. § 105-345.2(b) (2013).

*A.*

**[1]** Avery County contends the Commission erred by concluding GMSF's use of the property was "wholly and exclusively . . . educational and scientific." We agree.

GMSF acknowledges that it seeks tax exemption on the grounds that it is a charitable association or institution and the subject property is "exclusively held and used by its owners for educational and scientific purposes as a protected natural area . . . ." GMSF submitted its application for property tax exemption in December 2010. In its application, GMSF stated that it sought tax exempt status pursuant to General Statutes, section 105-278.7. Following the Avery County Tax Assessor's denial of GMSF's application due to the tax assessor's belief "that Grandfather Mountain is not 'Wholly and exclusively used

by its owner for nonprofit educational, scientific, literary purposes' as defined by NCGS § 105-278.7(a)(1)," GMSF filed an application for hearing before the Board of Equalization and Review. In its application for hearing, GMSF maintained that the tax assessor's appraisal should be adjusted because "[t]he property qualifies as tax exempt under N.C. Gen. Stat. § 105-278.7 and N.C. Gen. Stat. § 105-275(12) . . . ." However, as noted herein, Avery County appeals the decision of the Property Tax Commission which concluded, *inter alia*, that the subject property was wholly and exclusively used for scientific and educational purposes.

We review this dispositive issue on appeal de novo as there does not appear to be a conflict in the evidence as to the *use* of the property; rather, Avery County challenges whether the legal conclusion is correct as a matter of law. *See In re Appeal of Totsland Preschool, Inc.*, 180 N.C. App. at 162-63, 636 S.E.2d at 295 (This Court reviews questions of law de novo, and "considers the matter anew and freely substitutes its own judgment for that of the Commission.").

Pursuant to General Statutes, section 105-275, as effective at the time GMSF filed its initial application for exemption in 2011, property meeting the following description may be excluded from taxation:

> Real property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area. (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.)

N.C. Gen. Stat. § 105-275(12) (2011)[2].

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2. N.C.G.S. § 105-275(12) was amended by 2011 N.C. Sess. Laws 274 (effective for taxes imposed for taxable years beginning after 1 July 2011). In pertinent part, the amended subdivision reads as follows:

> Real property that (i) is owned by a nonprofit corporation or association organized to receive and administer lands for conservation purposes, (ii) is exclusively held and used for one or more of the purposes listed in this subdivision, and (iii) produces no income or produces income that is incidental to and not inconsistent with the purpose or purposes for which the land is held and used. . . . A disqualifying event occurs when the property (i) is no longer exclusively held and used for one or more of the purposes listed in this subdivision, [or] (ii) produces income that is not incidental to and consistent with the purpose or purposes for which the land is held and used . . . . The purposes allowed under this subdivision are any of the following:

Pursuant to North Carolina General Statutes, section 105-278.7,

> [b]uildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by [a charitable association or institution], and if:
>
> (1) Wholly and exclusively used by its owner for nonprofit educational [or] scientific, . . . purposes as defined in subsection (f) . . . .

*Id.* § 105-278.7(a) (2013).

In *In re Forestry Found.*, 296 N.C. 330, 250 S.E.2d 236, the petitioner sought a tax exemption for 49,455 acres of forest in Onslow County. The petitioner was a nonprofit organization whose objective was "to promote the development and practice of improved forestry methods and to promote the production and preservation of growing timber for experimental, demonstration, educational, park and protection purposes." *Id.* at 331, 250 S.E.2d at 237-38. In 1934, the Attorney General of North Carolina expressed his opinion that the forest property was exempt from ad valorem taxes "because of the public nature of the ([petitioner]) and the purpose for which these lands [were] held." *Id.* at 331-32, 250 S.E.2d at 238. In 1945, the petitioner signed a ninety-nine year lease with the Halifax Paper Company, Inc. *Id.* at 332, 250 S.E.2d at 238. Halifax Paper Company's successor in interest was Hoerner-Waldorf Corporation, which held the lease at the time of the tax exemption hearing. The lease, as amended in 1951, afforded the Hoerner-Waldorf Corporation the right to construct roads, maintain drainage ditches and fire lanes, and cut timber and pulpwood. *Id.* "Students and study groups interested in the operation of the Forest [were] allowed to tour or conduct research in the Forest . . . subject to the contract provision that 'such study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by Paper Company in or on [the] Forest.' " *Id.* at 333, 250 S.E.2d at 238-39. In 1975, the petitioner filed an application for tax exemption with the Onslow County Tax Supervisors. The

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> a. Used for an educational or scientific purpose as a nature reserve or park in which wild nature, flora and fauna, and biotic communities are preserved for observation and study. For purposes of this sub-subdivision, the terms "educational purpose" and "scientific purpose" are defined in G.S. 105-278.7(f).

N.C.G.S. § 105-275(12)(a) (2011) (Effective for taxes imposed for taxable years beginning on or after July 1, 2011).

application was denied. Arguing before our Supreme Court, the petitioner contended that the forest property was exempt from ad valorem taxes pursuant to four statutes, including N.C.G.S. § 105-275(12), exempting "[r]eal property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area." *Id.* at 335, 250 S.E.2d at 240 (emphasis omitted). The Court noted that according to Webster's Third New International Dictionary, the word "exclusive" was synonymous with the words "sole" and "single" and the Century Dictionary defined the word as "appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction." *Id.* at 337, 250 S.E.2d at 241. The Court held that because the petitioner's lease agreement, as amended in 1951, gave Hoerner-Waldorf Corporation virtually complete operational control of the forest property and Hoerner-Waldorf Corporation's use of the forest property was primarily commercial, the property was not exclusively used for scientific and educational purposes. *Id.* at 338-39, 250 S.E.2d 241-42.[3]

In the instant case, in concluding that the subject property was wholly and exclusively used for scientific and educational purposes, the Commission made several findings of fact detailing the purposes for which the property was used. GMSF engages in a number of educational activities such as teaching visitors about the animals housed on the property, the native flora and fauna, and leading guided hikes, hosting a nature museum, and educating visitors about stewardship. The Commission also found that GMSF provided both formal and informal programs to educate visitors from a range of age groups about the property. It found that GMSF engages in scientific research on the property, such as taking weather measurements and researching air quality, birds, rare plants, well cores, bats, and salamanders. The Commission also found that the property has been designated a United Nations Biosphere Reserve.

Avery County does not dispute that there are educational and scientific activities that occur on the property but contends there are

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3. Prior to petitioner's appeal to our Supreme Court, this Court reasoned that the actual use of property, rather than a goal or objective for its use, determines whether it is to be excluded from the tax base. "Use, rather than ownership or objective, is the primary exempting characteristic of the Machinery Act, G.S. 105-271 through G.S. 105-395, which includes the statute[] under consideration. H. Lewis, *Annotated Machinery Act of 1971*, (Supp.1973, Comment, p. 55)." *In re Forestry Found.*, 35 N.C. App. at 426, 242 S.E.2d at 499-500.

substantial retail, commercial, recreational, lodging, and office uses that also occur on the property. Several of the Commission's findings support Avery County's contention of substantial retail and commercial activity on the property, including profit from retail sales in excess of one million dollars. Avery County also contends that the vast majority of retail sales on the property are classified by GMSF as "non-mission." We note with interest the Commission's finding that GMSF collects revenue from admission tickets, food sales, souvenir sales, and special programs. The deposition testimony of Emerson Penn Dameron, Jr., President of GMSF, is illuminating as to the activities and uses on the subject property.

President Dameron testified that prior to 1950, Grandfather Mountain was not a travel attraction; individuals visited Grandfather Mountain to hike and explore. Subsequently, the owner of Grandfather Mountain "set about converting it into a more formalized, accessible attraction . . . and began the process of expanding access to the general public rather than just to explorers and naturalists and scientists." "[E]ssentially all of the improvements that are on the property subject to this appeal are located on one parcel." Of the improvements constructed, President Dameron noted a swinging bridge, a small woodcarving shop, two guest cottages, a visitor's center, an animal habitats center, a museum, a fudge shop, and an administrative offices building. In 2010, 244,215 guests visited Grandfather Mountain. Gift shops located in the museum and the visitor's center sold retail items, such as hiking equipment, souvenirs, and snacks. Honey, jelly, fruit, woodcarvings, and books on woodcarving were also sold on the property. Within the nature museum, visitors could purchase food and beverages from an on-site restaurant; nearby, treats could be purchased from a free-standing fudge shop. President Dameron also noted that in 2010, GMSF recognized $1,108,971.00 in profit from retail sales.

Though not always a source of revenue, the property is also used for annual events such as the Grandfather Mountain Highland Games (which celebrates Scottish heritage as its relates to Western North Carolina), Singing on the Mountain, a Klondike Derby for the boy scouts, a Girl Scout Roundup, a family camping weekend, and corporate picnics. The facility is also made available to local groups such as the Audubon Society, the animal shelter, and Habitat for Humanity.

The land parcels comprising Grandfather Mountain are also subject to a conservation easement with the Nature Conservatory, and have been honored with conservation awards and designated a United Nations Biosphere Reserve. The record supports that the attraction of Grandfather Mountain offers educational and scientific presentations

about birds, reptiles, animals, and native flora and fauna; and that revenue from the operations on the property is used to further educational and scientific uses on the property.

However, notwithstanding that such educational and scientific endeavors might be the primary uses of GMSF's subject property, we cannot hold that the property is *wholly* and *exclusively* used for educational and scientific endeavors as defined by our Supreme Court in *In re Forestry Found.*, 296 N.C. 330, 250 S.E.2d 236. The observations of the president of the GMSF confirm this.

> Q. . . . [O]n June 4, 2009, Grandfather Mountain, Inc., conveyed a conservation easement to the State of North Carolina limiting property owner to using the property for conservation and education activities.
>
> It is true that there are commercial and retail activities that take place on the site. Is that correct?
>
> A. That's correct.
>
> Q. So it not entirely accurate to say that it's limited for conservation and education activities. Is that correct?
>
> A. . . . It does – as we've already noted, it would permit us to continue activities that were already taking place on the mountain above and beyond conservation and education.

There is support in the record that GMSF charges market-rate admission fees and operates to some extent as a for-profit tourist attraction. Located on the property are administrative offices from which GMSF manages Grandfather Mountain's retail and commercial services. Based on the President's comments and the events described in the record, it is clear GMSF operated under the proposition that a change to its Internal Revenue Service 501(c)(3) nonprofit status along with the conveyance of a conservation easement would also exempt the subject property from Avery County property taxes. The record owner of the property commonly known as Grandfather Mountain is Grandfather Mountain, Inc. (GMI), a for-profit corporation. GMSF is a 501(c)(3) nonprofit corporation which is the sole shareholder of GMI and holds the property subject to a triple net lease. The Commission found that this lease places the burdens and obligations of ownership of the subject property on GMSF, including responsibility for paying all real property taxes. Prior to leasing the property to GMSF in 2009, GMI engaged in transactions and granted conservation easements to the Nature Conservatory and the

State of North Carolina for the purpose of preserving the property for educational and scientific purposes. It appears, based on the observation of GMSF's President, that GMSF was under the impression the conservation easement, by limiting the use of the property for conservation and educational activities, would also allow for the continuance of commercial activities. While that assumption may be valid for purposes of the easement and maintaining the 501(c)(3) status, it is not sufficient to withstand the requirements of N.C.G.S. §§ 105-275(12) and 105-278.7(a). Despite GMSF's status as a 501(c)(3) nonprofit corporation and the conveyance of a conservation easement, the *use* of the property must still come within the scope and meaning of "wholly and exclusively used for educational and scientific purposes." *See In re Forestry Found.*, 296 N.C. at 337-38, 250 S.E.2d at 241 (where the Court considered and rejected petitioner's argument that "the term 'exclusively' is not to be construed literally and that . . . the word refers to the primary and inherent activity and does not preclude incidental activities . . . ."). Here, the subject property does not meet the statutory requirements necessary to receive tax exempt status.

Accordingly, we must reverse the Commission's conclusion that the real property subject to GMSF's stewardship is "used wholly and exclusively for scientific and educational purposes."

*B* and *C*

**[2]** Avery County further contends the Commission erred in basing its decision to grant GMSF's request for tax exemption on how the income from the property was spent, instead of how the property was used.

GMSF applied for an exemption from property taxes pursuant to General Statutes, sections 105-275(12) and 105-278.7(a). As discussed in subpart A, both statutes require that the property be used wholly and exclusively for educational and scientific purposes. *See* N.C.G.S. §§ 105-275(12), 105-278.7(a). As we have determined that the subject property is not wholly and exclusively used for educational and scientific purposes, we need not further address this issue.

For the aforementioned reasons, we reverse the Commission's order granting GMSF an exemption from property taxes pursuant to General Statutes, sections 105-275(12) and 105-278.7(a).

*II*

**[3]** Next, Avery County argues that the Commission erred by holding GMSF satisfied the ownership requirements imposed by General Statutes, sections 105-275(12) and 105-287.7, to be eligible for property

tax exemption. We note that because the relevant statutes require ownership to rest in a charitable association or institution *and* be wholly and exclusively used for scientific or educational purposes, and because of our holding in Issue I, we need not reach this argument. However, were we to address it, it is not clear that GMSF would satisfy the statutory ownership requirements. *See In re Appeal of Eagle's Nest Found.*, 194 N.C. App. at 778, 671 S.E.2d at 371 (considering the daily $150.00 "market rate" charged summer campers and the $15,000.00 rate charged each student participating in a semester-long high school course load in comparison to the two percent of revenue used for financial aid in concluding the nonprofit 501(c)(3) corporation running the camp did not satisfy the meaning of "charitable association or institution" as considered in N.C. Gen. Stat. § 105-278.7); *see also Rockingham Cnty. v. Elon Coll.*, 219 N.C. 342, 346-47, 13 S.E.2d 618, 621 (1941) (Holding the buildings owned by Elon college and rented for business purposes were taxable despite the college's use of all the profits for educational purposes. "The fact that a commercial enterprise devotes its entire profits to a charitable or other laudable purpose does not change the character of its business nor the purpose for which it is held. It is still a commercial enterprise, and is held as such.").

*III*

**[4]** Lastly, Avery County argues that the Commission erred by holding that the vacant lot (Parcel Three) is exempt from taxation. Specifically, Avery County contends the Commission failed to find the lot was "necessary for the convenient use of any buildings" as required for exemption pursuant to General Statutes, section 105-278.7. We briefly address the Commission's ruling as to this separate parcel.

General Statutes, section 105-278.7, allows property tax exemption for "[b]uildings, the land they actually occupy, and *additional adjacent land necessary for the convenient use of any such building* . . . if: (1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes . . . ." N.C.G.S. § 105-278.7(a).

In an unchallenged finding of fact, the Commission stated "[t]he Foundation operates the Grandfather Mountain tourist attraction on Parcel Two and uses Parcel Three as a buffer track to preserve the natural area and prevent encroaching development."

In *In re Appeal of the Master's Mission*, this Court reviewed the Graham County Board of Equalization's denial of an application to extend the tax exemption granted to 100 acres by more than 1,200 acres as property used for educational purposes. 152 N.C. App. 640, 647, 568

S.E.2d 208, 213 (2002). The original 100 acres had been granted tax-exempt status "in order to provide a 'buffer zone' around the buildings and areas used 'wholly and exclusively' for educational purposes." *Id.* at 648, 568 S.E.2d at 213. Though it affirmed the Board's denial of an application to extend the buffer, the *Master's Mission* Court noted "[a] 'buffer zone' is additional land around an exempt building or portion of land that is reasonably necessary for the convenient use of any such land or building. We have held that buffering is an appropriate consideration in determining whether an [] exemption applies to a particular parcel." *Id.* at 648-49, 568 S.E.2d at 213 (citations and quotations omitted).

Here, Parcel Three was found to be "a buffer track to preserve the natural area and prevent encroaching development" upon Parcel Two which accommodates Grandfather Mountain tourist park, and as such, Parcel Three's status as a tax-exempt property is dependent upon the status of the main tract, Parcel Two. *See generally id.* As we have determined that the real property encompassing Grandfather Mountain tourist park is not eligible for exemption pursuant to N.C.G.S. § 105-278.7, due to its dependent status, Parcel Three must also be ineligible for such exemption. For these reasons, we hold the Commission erred in concluding that the property was eligible for tax exemption pursuant to N.C.G.S.§ 105-278.7, as it applies to Parcel Three, the buffer tract.

For the foregoing reasons, we reverse the order of the Commission.

Reversed.

Judges HUNTER, Robert C., and STEELMAN concur.

LIFESTORE BANK, F/K/A AF BANK, PLAINTIFF
v.
MINGO TRIBAL PRESERVATION TRUST DATED JANUARY 4, 1993; PITCHFORK BASIN, LLC, F/K/A EAC REV NO.6, LLC; TUSCARORA RANCH, LLC AND ALLEN C. MOSELEY, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA14-46

Filed 19 August 2014

**1. Civil Procedure—two dismissal rule—Rule 41—inapplicable—judicial foreclosure—foreclosure by power of sale**

The trial court did not err in an action involving an unpaid promissory note by denying defendants' motion to dismiss and for summary judgment. The "two dismissal rule" of Rule 41 of the Rules of Civil Procedure was not applicable to plaintiff's claim for judicial foreclosure where plaintiff had previously dismissed two claims for foreclosure by power of sale. Plaintiff's claims for foreclosure by power of sale could not, as a form of special proceeding, have been brought in the same action as a claim for money judgment on a promissory note. A different trial court did err in a prior proceeding by dismissing plaintiff's claim for judicial foreclosure as plaintiff could not have brought this claim in the same action as its claims for foreclosure by power of sale.

**2. Estoppel—two voluntary dismissals—foreclosure by power of sale—claim for money judgment—no final judgment**

The trial court did not err in a case involving an unpaid promissory note by granting plaintiff's motion for summary judgment. Plaintiff's two voluntary dismissals of its actions for foreclosure by power of sale did not act as collateral estoppel upon plaintiff's claims for money judgment because no final judgment had been reached. Further, the nature of these actions — foreclosure by power of sale, judicial foreclosure, and money judgment — are such that these actions, and the issues raised in each, differ.

**3. Deeds—deed of trust—promissory note—holder of note**

The trial court erred in an action involving an unpaid promissory note by granting summary judgment in favor of plaintiff. There was a material issue of genuine fact as to whether plaintiff was the holder of the note.

Appeal by plaintiff from order entered 28 September 2012 by Judge Stuart Albright and by defendants from order entered 29 August 2013

by Judge George B. Collins, Jr., both in Wilkes County Superior Court. Heard in the Court of Appeals 7 May 2014.

*Di Santi Watson Capua Wilson & Garrett, by Chelsea Bell Garrett, for plaintiff-appellant.*

*Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt, for defendant-appellants.*

BRYANT, Judge.

A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied. The "two dismissal rule" of Rule 41 does not bar a creditor from bringing an action for *judicial foreclosure* or for money judgment where the creditor has filed and then taken voluntary dismissals from two prior actions for foreclosure by power of sale. Collateral estoppel is not applicable where a final judgment in an action has not been reached. Where there exists genuine issues of material fact as to whether a creditor is the holder of an enforceable instrument, summary judgment is not appropriate.

A. The Tuscarora Note

On 12 February 2007, defendant Mingo Tribal Preservation Trust ("Mingo") entered into a promissory note with plaintiff Lifestore Bank ("Lifestore") for $2,450,000.00 (the "Tuscarora Note"). The Tuscarora Note was secured by a deed of trust on property in Wilkes County owned by defendant Tuscarora Ranch, LLC ("Tuscarora").

On 1 December 2010, Lifestore initiated a foreclosure by power of sale proceeding against Mingo and Tuscarora, alleging that Mingo was in default on the Tuscarora Note. The Wilkes County Clerk of Court entered an order finding that Mingo was in default and Lifestore could conduct a foreclosure by power of sale of the Tuscarora property. Mingo appealed to the Superior Court, and on 8 March 2011, the Wilkes County Superior Court affirmed the Clerk's order allowing Lifestore to foreclose on the Tuscarora property. On 6 April 2011, Mingo appealed the Superior Court's order to this Court and filed a motion to stay enforcement of the Superior Court's order. Mingo's motion to stay was granted on 15 April. After filing its appeal with this Court on 26 August, Mingo and Lifestore agreed to file a joint motion to dismiss the appeal which was granted by

this Court. On 10 October 2011, Lifestore entered a voluntary dismissal without prejudice as to the foreclosure by power of sale action.

On 7 December 2011, Lifestore filed a second foreclosure by power of sale action against Mingo and Tuscarora alleging that Mingo had defaulted on the Tuscarora Note. On 8 March 2012, the Clerk of Court entered an order allowing the foreclosure. Mingo appealed the order to the Wilkes County Superior Court. Lifestore entered a voluntary dismissal as to the foreclosure by power of sale on 13 July 2012.

B. The EAC Note

On 8 February 2008, Mingo entered into a new promissory note for $1,800,000.00 with Lifestore. To secure this loan, Lifestore took a security interest in a promissory note held between Mingo and Pitchfork Basin, f/k/a EAC ("EAC"). The promissory note between Mingo and EAC (the "EAC Note") was entered into on 21 November 2006 and was secured by a deed of trust between EAC and Mingo.

On 1 December 2010, Lifestore filed a foreclosure by power of sale action against Mingo and EAC alleging that Mingo had defaulted on the EAC Note and Lifestore could, therefore, foreclose on the EAC deed of trust. The Wilkes County Clerk of Court entered an order that same day finding that Lifestore could foreclose; this order was appealed to the Wilkes County Superior Court. On 8 March 2011, the Superior Court affirmed the Clerk of Court's order allowing the foreclosure. Mingo and EAC appealed to this Court on 6 April 2011; on 7 October 2011, Lifestore took a voluntary dismissal without prejudice.

On 7 December 2011, Lifestore filed a second foreclosure by power of sale action against Mingo and EAC alleging that Mingo had defaulted on the EAC Note. The Clerk of Wilkes County Superior Court entered an order on 8 March 2012 allowing the foreclosure; Mingo and EAC appealed this order to the Superior Court. Lifestore entered an oral notice of voluntary dismissal as to the foreclosure by power of sale on 7 May during the foreclosure hearing; a written notice of voluntary dismissal was entered 13 July 2012.

C. The Current Complaint

On 6 June 2012, Lifestore filed a complaint against Mingo, Tuscarora, and EAC which asserted three claims for: judgment against Mingo and EAC as to the EAC Note; judgment against Mingo as to the Tuscarora Note; and judicial foreclosure of the Tuscarora and EAC deeds of trust. Mingo, Tuscarora, and EAC ("defendants") filed a motion to dismiss Lifestore's complaint pursuant to Rule 41 of the Rules of Civil Procedure

on 17 August 2012. On 28 September 2012, the trial court entered an order denying defendants' motion to dismiss Lifestore's first and second claims for relief, and granting defendants' motion to dismiss as to Lifestore's third claim for judicial foreclosure.

On 8 April 2013, Lifestore filed a motion for judgment on the pleadings pursuant to Rule 12(c) or, in the alternative, for summary judgment pursuant to Rule 56 as to its first and second claims for relief in its complaint. Defendants filed a motion for summary judgment on 23 April. On 29 August 2013, the trial court entered an order allowing Lifestore's motion for summary judgment and denying defendants' motion for summary judgment. Both Lifestore and defendants appeal.

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Defendants raise two issues as to whether the trial court erred in (I) denying defendants' motion to dismiss and for summary judgment and (II) in granting judgment in favor of Lifestore on the EAC Note. Plaintiff Lifestore raises the sole issue of whether the trial court erred in (III) dismissing Lifestore's claim for judicial foreclosure.

*I. & III.*

**[1]** As defendants' first issue on appeal concerns the same matter as that of Lifestore's sole issue on appeal, i.e., whether the trial court erred in its application of the "two dismissal rule" of Rule 41, we address both issues together.

Defendants first argue that the trial court erred in denying their motion to dismiss and for summary judgment. In contrast, Lifestore contends the trial court erred in dismissing its claim for judicial foreclosure. We disagree as to defendants, and agree as to Lifestore.

"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 (2003). When a motion for summary judgment is brought, the trial court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). The movant "has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted).

> When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. In addition, [i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.

*Rankin v. Food Lion*, 210 N.C. App. 213, 215, 706 S.E.2d 310, 312-13 (2011) (citations and quotations omitted).

Defendants contend the trial court erred in denying their motion to dismiss and for summary judgment as to Lifestore's first and second claims for relief. Specifically, defendants argue that pursuant to the "two dismissal rule" of Rule 41, Lifestore's claims for judgment on the Tuscarora and EAC promissory notes were barred. Lifestore, in contrast, argues that its claim for judicial foreclosure is not barred pursuant to the "two dismissal rule" of Rule 41.

*Foreclosure and Rule 41*

A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply. *See Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 320-21, 325 S.E.2d 1, 2-3 (1985). North Carolina Rules of Civil Procedure, Rule 41, states that:

> an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.*

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2013) (emphasis added).

> [I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would

> operate as an adjudication on the merits and bar a third action based upon the same set of facts.

*Richardson v. McCracken Enters.*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997). "The 'two dismissal' rule has two elements: (1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action." *Dunton v. Ayscue*, 203 N.C. App. 356, 358, 690 S.E.2d 752, 753 (2010) (citing *City of Raleigh v. Coll. Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989)).

Defendant contends the "two dismissal rule" of Rule 41 bars Lifestore from bringing claims for money judgment on the two promissory notes because the claims for money judgment are based on the same set of facts as Lifestore's motions for foreclosure by power of sale and, therefore, because Lifestore took two voluntary dismissals as to the actions for foreclosure by power of sale, it is now barred under Rule 41 from pursuing its claims for money judgments.

This Court has held that "a creditor-mortgagee such as [Lifestore] has an election of remedies. Upon default, it may sue to collect on the unpaid note or foreclose on the land used to secure the debt, or both, until it collects the amount of debt outstanding." *G.E. Capital Mort. Servs., Inc. v. Neely*, 135 N.C. App. 187, 192, 519 S.E.2d 553, 557 (1999) (citation omitted). If a creditor seeks to foreclose on property, they may proceed under N.C. Gen. Stat. § 45-21.1 *et seq.* (foreclosure by power of sale), or under N.C. Gen. Stat. § 1-339.1 *et seq.* (judicial foreclosure). *See In re Young*, ___ N.C. App. ___, ___, 744 S.E.2d 476, 480 (2013).

> At a foreclosure [by power of sale] hearing pursuant to N.C. Gen.[]Stat. § 45-21.16, the clerk of superior court is limited to making the six findings of fact specified under subsection (d) of that statute: (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee's right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice . . .; and (6) the sale is not barred by section 45-21.12A [pursuant to] N.C. Gen. Stat. § 45-21.16(d)[.] The clerk's findings are appealable to the superior court for a hearing de novo; however, in a section 45-21.16 foreclosure proceeding, the superior court's authority is similarly limited to determining whether the six criteria of N.C. Gen.[]Stat. § 45-21.16(d) have been satisfied.

*Id.* at ___, 744 S.E.2d at 479 (citations omitted).

Lifestore first sought to foreclose on defendants' property by filing, then taking voluntary dismissals from, two actions for foreclosure by power of sale stemming from defendants' default upon the two promissory notes. In Lifestore's instant (and third) complaint, Lifestore now seeks to obtain money judgments against defendants as to the two promissory notes. While a foreclosure by power of sale is a type of special proceeding, limited in scope and jurisdiction, in which the clerk of court determines whether a foreclosure pursuant to a power of sale should be granted, a claim for money judgment arising from a default upon a promissory note must be brought through the filing of a complaint in a civil action. *See id.* at ___, 744 S.E.2d at 479 (noting that in an action for foreclosure by power of sale, "[t]he clerk's findings are appealable to the superior court for a hearing de novo; however, in a section 45-21.16 foreclosure [by power of sale] proceeding, the superior court's authority is similarly limited to determining whether the six criteria of N.C. Gen.[]Stat. § 45-21.16(d) have been satisfied. The superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [N.C. Gen.[]Stat. § ] 45-21.16." (citations and quotation omitted)); *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 98, 392 S.E.2d 410, 411 (1990) ("A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial." (citation omitted)). As such, an action for foreclosure by power of sale differs from a claim for money judgment, as while both actions may concern the same parties, property, and promissory note(s), each action must be brought separately due to a foreclosure by power of sale being of limited jurisdiction and scope.

In its order granting Lifestore's motion for summary judgment, the trial court noted the following:

> Defendants contend that the "two dismissal rule" of Rule 41 of the North Carolina Rules of Civil Procedure gives them an absolute defense, not only to Claim Three of the complaint (upon which Defendants have previously prevailed on their Motion for Summary Judgment and which is therefore not before this Court)[1] but also to Claims One and Two of the Complaint.

1. The trial court is referring to Judge Albright's 28 September 2012 order granting defendants' motion to dismiss Lifestore's third claim for relief for judicial foreclosure, from which Lifestore now appeals (*Issue III*).

> Claims One and Two of the complaint seek a money judgment against the Defendants for failure to pay debts. Claim Three seeks to have the Court order a judicial foreclosure of certain real property that allegedly served as security for said debts. [Lifestore] had previously filed two successive foreclosure actions pursuant to Chapter 45 of the North Carolina General Statutes under the Trustee's power of sale provision. [Lifestore] had voluntarily dismissed both actions under Rule 41.
>
> [Lifestore] argues that the "two dismissal rule" does not apply to foreclosures pursuant to Chapter 45, citing a case from the North Carolina Court of Appeals that predated the enactment of broad amendments to Chapter 45. Defendant argues that the plain language of the Rules of Civil Procedure make them apply to Chapter 45 unless provided otherwise by law. This Court need not address this issue because it finds that the "two dismissal rule" would not apply in this case, even if it does apply to Chapter 45 foreclosures.
>
> In enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts. Richardson v. McCracken Enters., 126 N.C. App. 506, 509; 485 S.E.[]2d 844, 846 (1997)[,] aff'd, 347 N.C. 660, 496 S.E.[]2d 380 (1998). The test is whether the actions are claims based upon the same core of operative facts and whether all of the claims could have been asserted in the same cause of action. Id.
>
> Here, while Claims One and Two of the Complaint are based on the same core of operative facts as the foreclosure actions, they are not claims that could have been asserted in the foreclosure actions and therefore are not barred by Rule 41. A foreclosure action only allows the sale of property. While it is true that the Clerk must find a valid debt, the action itself does not allow for the entry of a judgment on that debt.

Defendants contend the trial court erred in its analysis of *Richardson* as Rule 41 only requires a determination of "whether the actions are claims

based upon the same core of operative facts." Defendants' argument lacks merit, as the trial court was accurate in its analysis of *Richardson*.

In *Richardson*, the plaintiffs filed an action against the defendant oil company alleging trespass, strict liability, negligence, and punitive damages caused by the defendant allowing diesel fuel and oil to leak onto the plaintiffs' property. *Richardson*, 126 N.C. App. at 507, 485 S.E.2d at 845. The plaintiffs voluntarily dismissed their claims without prejudice and then filed a new action against the defendant for nuisance based on the same facts as alleged in the first action. *Id.* The plaintiffs then voluntarily dismissed their second action without prejudice and filed a third action containing all of the claims asserted in their first and second actions. *Id.* The defendant moved for summary judgment, arguing that the plaintiffs' third action was barred under the "two dismissal rule" of Rule 41. *Id.* The trial court granted the defendant's motion and this Court affirmed, noting that where the two previously dismissed actions "asserted claims based upon the same core of operative facts relating to the contamination of plaintiffs' property, and all of the claims could have been asserted in the same cause of action[,]" Rule 41(a)(1) barred the plaintiffs' third action. *Id.* at 509, 485 S.E.2d at 846-47.

*Richardson* is distinguishable from the instant matter, as Lifestore's claims for foreclosure by power of sale could not, as a form of special proceeding, be brought in the same action as a claim for money judgment on a promissory note. As such, we disagree with defendants' contention the trial court erred in holding that Rule 41's "two dismissal rule" is not applicable to Lifestore's claims for money judgment.

Defendants further argue that Lifestore's claims for money judgment are barred under the "two dismissal rule" of Rule 41 because Lifestore's voluntary dismissals of its actions for foreclosure by power of sale are, under Rule 41, an adjudication on the merits. We disagree.

Lifestore pursued two foreclosures by power of sale under N.C.G.S. § 45-21.16(a) each against Mingo and EAC, 10 SP 423 and 11 SP 395, and against Mingo and Tuscarora, 10 SP 424 and 11 SP 394. Lifestore subsequently took voluntary dismissals of each foreclosure by power of sale action. As such, the "two dismissal rule" of Rule 41 applies here for, by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars Lifestore from undertaking a third foreclosure by power of sale action pursuant to N.C.G.S. § 45-21.16(a).

However, in the instant matter Lifestore has now filed a complaint seeking, in addition to money judgments, judicial foreclosure against

defendants. As already noted, a creditor may pursue foreclosure, money judgment, or both in order to collect on a debt. *See G.E. Capital Mort. Servs.*, 135 N.C. App. at 192, 519 S.E.2d at 557. This Court has more recently held that a creditor seeking to foreclose on property can do so under both N.C.G.S. § 45-21 *et seq.*, foreclosure by power of sale, and N.C.G.S. § 1-336 *et seq.*, judicial foreclosure. *In re Young*, ___ N.C. App. at ___, 744 S.E.2d at 480.

In *In re Young*, the respondents defaulted on their loan with the petitioner. *Id.* at ___, 744 S.E.2d at 477-48. The respondents then agreed to a loan modification agreement with the petitioner and began making payments in accordance with the agreement. *Id.* at ___, 744 S.E.2d at 478. The petitioner alleged that the loan modification was never finalized and demanded that the respondents return to making payments under the terms of the original loan, but the respondents refused. *Id.* The petitioner subsequently filed for a foreclosure by power of sale, and during the special proceeding hearing the clerk of court dismissed the petitioner's action on grounds that the petitioner never finalized the loan modification agreement with the respondents. *Id.* On appeal to Superior Court, the petitioner's action for foreclosure was again dismissed on grounds that because the petitioner had begun to undertake a loan modification agreement with the respondents, the petitioner's action for foreclosure was now barred by equitable estoppel. *Id.* This Court vacated and remanded the petitioner's appeal for a determination of subject matter jurisdiction, but noted that if the petitioner was now barred from pursuing a foreclosure by power of sale, the petitioner could still pursue a judicial foreclosure. *Id.* at ___, 744 S.E.2d at 478-80.

Lifestore argues that the trial court erred in dismissing its claim for judicial foreclosure. We agree, and find *In re Young* to be instructive. This Court noted in *Young* that a judicial foreclosure differs from a foreclosure by power of sale in that a judicial foreclosure is not a type of special proceeding and, as such, can be pursued by a creditor after a foreclosure by power of sale has failed. *See id.* at ___, 744 S.E.2d at 480 (holding that if the petitioner's action for foreclosure by power of sale was now barred, "[p]etitioner's remedy would then be limited to judicial foreclosure procedures pursuant to N.C. Gen. Stat. § 1-339.1 *et seq.*, rather than the summary proceedings provided under N.C. Gen. Stat. § 45-21.1 *et seq.*"); *see also Phil Mech. Constr. Co.*, 72 N.C. App. at 321, 325 S.E.2d at 3 ("Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails." (citation omitted)). As a judicial foreclosure

is not a type of special proceeding limited in scope and jurisdiction, the "two dismissal rule" of Rule 41 is not applicable to Lifestore's claim for judicial foreclosure as Lifestore could not have brought a claim for judicial foreclosure in the same action as its claims for foreclosure by power of sale. *See Richardson*, 126 N.C. App. at 508-09, 485 S.E.2d at 846-47 (holding that the "two dismissal rule" of Rule 41 does not apply where all of a party's claims could not be asserted in the same action). Accordingly, the trial court erred in finding that Lifestore's claim for judicial foreclosure was barred under the "two dismissal rule" of Rule 41. We therefore reverse as to Lifestore's argument.

*Collateral Estoppel*

**[2]** Defendants further contend the trial court erred in granting Lifestore's motion for summary judgment because Lifestore's two voluntary dismissals of its actions for foreclosure by power of sale now act as collateral estoppel upon Lifestore's claims for money judgment. We disagree.

> For collateral estoppel to bar plaintiff's action, defendants must show: (1) the earlier action resulted in a final judgment on the merits, (2) the issue in question is identical to an issue actually litigated in the earlier suit, (3) the judgment on the earlier issue was necessary to that case and (4) both parties are either identical to or in privity with a party or the parties from the prior suit.

*Bee Tree Missionary Baptist Church v. McNeil*, 153 N.C. App. 797, 799, 570 S.E.2d 781, 783 (2002) (citations omitted).

Defendants cite three cases in support of their contention that collateral estoppel applies to Lifestore's claims for money judgment: *Petri v. Bank of Am.*, No. COA13-907, 2014 N.C. App. LEXIS 157 (Feb. 4, 2014); *Haughton v. HSBC Banks USA*, No. COA12-420, 2013 N.C. App. LEXIS 92 (Feb. 5, 2013); and *Peak Coastal Ventures, LLC v. Suntrust Bank*, No. 10 CVS 6676, 2011 NCBC LEXIS 13 (N.C. Sup. Ct., Forsyth Cnty., May 5, 2011).[2]

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2. Pursuant to Rule 30(e) of our Rules of Appellate Procedure, "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]" N.C. R. App. Proc. 30(e)(3) (2014). As such, these cases cited by defendants are not controlling authority upon this Court. Moreover, we decline to consider defendants' arguments as to *Peak Coastal Ventures* as this opinion is not from our appellate courts.

*Petri* and *Haughton* are not applicable to the instant case. In *Petri* and *Haughton*, final judgments were reached in foreclosure proceedings against the plaintiffs; none of the plaintiffs appealed. *Petri* at *1-3; *Haughton* at *1-3. When the plaintiffs later filed complaints relating back to the foreclosure proceedings, the trial court held, and this Court affirmed, that the plaintiffs' complaints were barred by collateral estoppel because the issues raised in the complaints had already been decided in final judgments reached in the foreclosure proceedings. *Petri* at *5-10; *Haughton* at *3-11.

Here, Lifestore took two sets of voluntary dismissals from its foreclosure by power of sale actions against defendants. The first voluntary dismissal was taken after defendants had appealed to this Court, and the second was taken during the Superior Court's hearing on defendants' appeal of the Clerk of Court's order granting Lifestore foreclosure by power of sale. In each instance, no final judgment was reached. As such, although Lifestore is barred from bringing a third action for foreclosure by power of sale due to the application of Rule 41, collateral estoppel is not applicable because a final judgment was not reached. *See First Union Nat'l Bank v. Richards*, 90 N.C. App. 650, 653, 369 S.E.2d 620, 621 (1988) (holding that a final judgment has not been reached in a case where a plaintiff has not abandoned, dismissed, or withdrawn its appeal, "but rather took a voluntary dismissal of the action."). Further, as already discussed the nature of these actions — foreclosure by power of sale, judicial foreclosure, and money judgment — are such that these actions, and the issues raised in each, differ. Accordingly, although Lifestore's two claims for foreclosure by power of sale are now barred under Rule 41, Rule 41 does not bar Lifestore from bringing its current claims for money judgment and judicial foreclosure against defendants, nor are Lifestore's current claims barred by collateral estoppel. Therefore, we overrule defendants' argument (*Issue I*) and reverse as to Lifestore's argument (*Issue III*).

*II.*

**[3]** Defendants next contend the trial court erred in granting judgment in favor of Lifestore on the EAC Note. We agree.

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment receives *de novo* review on

> appeal, and evidence is viewed in the light most favorable to the non-moving party.

*TD Bank, N.A. v. Mirabella*, ___ N.C. App. ___, ___, 725 S.E.2d 29, 30 (2012) (citation omitted).

Defendants argue that the trial court erred in finding Lifestore was entitled to a judgment against EAC on the EAC Note because Lifestore failed to prove that it is the holder of the note. In its order, the trial court noted the following:

> Defendants also argue that [Lifestore] cannot obtain a judgment against EAC/Pitchfork Basin, LLC because it cannot prove and has not alleged that it is the holder of the Note made to [Mingo] by EAC/Pitchfork LLC and assigned to [Lifestore]. This argument fails because the record in the case shows that [Lifestore] has met the requirements of North Carolina General Statutes Section 25-9-203(b)(3)(a).

Pursuant to North Carolina General Statutes, Article 9 — Secured Transactions, "[a] security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral[.]" N.C. Gen. Stat. § 25-9-203(a) (2013).

> [A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) Value has been given;
>
> (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) . . . The debtor has authenticated a security agreement that provides a description of the collateral[.]

*Id.* § 25-9-203(b)(1), (2), (3)(a) (2013).

As part of the EAC Note between Mingo and Lifestore, Mingo executed an assignment of note which granted Lifestore a security interest in the deed of trust between EAC and Mingo. We agree with the trial court that Lifestore has met the requirements of N.C.G.S. § 25-9-203(b)(3)(a), as the record indicates that Lifestore gave value to Mingo (via a promissory note for $1,800,000.00) in exchange for a security interest in collateral (the deed of trust between Mingo and EAC), as provided in an authenticated security agreement (the assignment of note between Lifestore and Mingo).

Lifestore, as the holder of an enforceable instrument (the assignment of note) may seek to enforce payment of that instrument. *See TD Bank*, ___ N.C. App. at ___, 725 S.E.2d at 31. However, Lifestore must prove that it is the holder of the instrument, and "[t]he requirement that [Lifestore] prove [its] status as a holder of the note is distinguishable from a requirement that [Lifestore] allege that status in [its] pleadings." *Liles v. Myers*, 38 N.C. App. 525, 527, 248 S.E.2d 385, 387 (1978). "Mere possession of a note payable to order does not suffice to prove ownership or holder status." *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980) (citations omitted).

Here, Lifestore attached photocopies of the assignment of note executed between itself (as AF Bank) and Mingo and the EAC Note to its complaint. Lifestore did not provide the actual documents during the trial court's hearing on the parties' motions for summary judgment however, and defendants filed an affidavit containing an email from Lifestore in which Lifestore admitted it was not in possession of the original EAC Note. Further, Lifestore did not provide evidence establishing it as the holder of the EAC Note during the trial court's hearing. Lifestore contends that although the EAC Note may be lost, it remains the holder of the note and is, thus, entitled to enforce it.

We find that *Liles v. Myers* is applicable to the instant case. In *Liles*, the plaintiff brought an action for money judgment against the defendant alleging the defendant had defaulted upon a promissory note. *Liles*, 38 N.C. App. at 525, 248 S.E.2d at 386. The plaintiff then filed a motion for summary judgment which the trial court granted. This Court reversed, noting that:

> Prior to being entitled to a judgment against the defendant, the plaintiff was required to establish that she was [the] holder of the note at the time of this suit. This element might have been established by a showing that the plaintiff was in possession of the instrument and that it was issued or endorsed to her, to her order, to bearer or in blank. It is essential that this element be established in order to protect the maker from any possibility of multiple judgments against him on the same note through no fault of his own.
>
> . . .
>
> As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the

> defendant was entitled to demand strict proof of this element. By his answer denying the allegations of the complaint, the defendant demanded such strict proof. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. As the record on appeal fails to reveal that the note itself or any other competent evidence was introduced to show that the plaintiff was the holder of the note, she has failed to prove each essential element of her claim sufficiently to establish her entitlement to summary judgment.

*Id.* at 526—28, 248 S.E.2d at 387—88 (citations omitted).

Here, defendants demanded strict proof that Lifestore is the holder of the EAC Note. Lifestore attached a copy of the assignment of note and the EAC Note to its complaint, but admitted at the trial court's hearing that it could not find the original documents. *See id.* Accordingly, as there remain genuine issues of material fact as to whether Lifestore is the holder of the EAC Note and can, therefore, enforce it, we must reverse and remand as to this issue.

Affirmed in part; reversed in part; and remanded.

Judges CALABRIA and GEER concur.

NORTHERN STAR MANAGEMENT OF AMERICA, LLC, PLAINTIFF
v.
MARK SEDLACEK, DEFENDANT

No. COA13-1427

Filed 19 August 2014

**1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—substantial right**

Defendant's appeal from the trial court's interlocutory order enjoining him from violating non-compete provisions contained in an agreement he had entered into with his former employer was heard on the merits. North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions in cases involving an alleged breach of a non-competition agreement.

**2. Contracts—non-compete agreement—terms of the agreement—applicable law**

The trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants. The language of the terms of the parties' agreement manifested this intent.

**3. Appeal and Error—issue not before the court—argument dismissed**

Defendant's argument that the trial court erred in concluding that the covenants included in the 2010 Asset Purchase Agreement applied because they were superseded by the covenants set forth in the 2010 Consulting Agreement was dismissed. The issue was not properly before the Court of Appeals because the trial court only enjoined defendant from continued violations of the covenants contained in the Consulting Agreement.

**4. Injunctions—non-compete agreement—overly broad—reasonableness of geographic scope—reasonableness of scope of restricted activities**

An order enjoining defendant from participating in certain activities based on the terms of a non-competition agreement was vacated and remanded where certain covenants were overly broad. The order was remanded for entry of findings with respect to the reasonableness of the geographic scope of the covenants and to

tailor the geographic scope of the restrictions to that area that was reasonable under the circumstances as supported by the court's findings. The order was also remanded for entry of findings and conclusions with respect to the reasonableness of the scope of the restricted activities.

Appeal by Defendant from order entered 4 September 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 24 April 2014.

*Nelson Levine de Luca & Hamilton, by David G. Harris II, David L. Brown, and John I. Malone, Jr., for Plaintiff.*

*Carruthers & Roth, P.A., by Mark K. York and J. Patrick Haywood, for Defendant.*

DILLON, Judge.

Mark Sedlacek appeals from the trial court's order enjoining him from violating non-compete provisions contained in an agreement he entered into with his former employer, Northern Star Management of America, LLC ("Northern Star"). For the following reasons, we vacate and remand for further proceedings consistent with this opinion.

## I. Factual & Procedural Background

Northern Star is a company which specializes in the design, development and administration of insurance products. Its principal place of business is located in North Carolina, though its parent company, Northern Star Management, Inc., is based in New Jersey. Mr. Sedlacek, a North Carolina resident, has worked in the insurance industry since 1982 and specializes in "creating and managing insurance products for and on behalf of commercial carriers related to collateral recovery (repossession), automobile transporters, and towing."

In early 2010, Mr. Sedlacek was an officer and part-owner of AEON Insurance Group, Inc., when AEON was purchased by Northern Star. Mr. Sedlacek thereafter worked for Northern Star, on and off, until June 2013. During this time, Mr. Sedlacek and Northern Star entered into three agreements, each of which contained non-compete and confidentiality provisions (hereinafter referred to generally as the "covenants"), whereby Mr. Sedlacek agreed to refrain from engaging in certain activities in the insurance business within certain territories for a specified period of time.

The parties entered into the first two agreements (collectively, the "2010 Agreements") around the time of Northern Star's purchase of AEON, and each included a provision designating New Jersey law as governing the agreements. Mr. Sedlacek signed the first agreement (the "Asset Purchase Agreement") as an owner of AEON, agreeing to sell AEON's assets and liabilities to Northern Star and to refrain from using Northern Star's confidential information and from engaging in certain activities in the insurance business with Northern Star "worldwide." In the second agreement (the "Consulting Agreement"), Mr. Sedlacek agreed to work as a consultant for Northern Star and further agreed not to engage in certain activities in the insurance business and not to use Northern Star's confidential information outside his relationship with Northern Star for a certain period in the United States and its territories.

The parties entered into the third agreement (the "Severance Agreement") in February 2013, when Mr. Sedlacek temporarily separated from Northern Star. Pursuant to this agreement, Mr. Sedlacek accepted a severance payment and acknowledged that his obligations under the prior agreements would continue in accordance with their terms. The Severance Agreement contained a provision designating North Carolina law as governing that agreement. Mr. Sedlacek was rehired by Northern Star the day after the parties executed the Severance Agreement and continued his employment with Northern Star for approximately four additional months before resigning on 23 June 2013.

Northern Star commenced the present action in August 2013, within two months of Mr. Sedlacek's resignation, alleging that Mr. Sedlacek had engaged in competitive activities in violation of the covenants contained in the 2010 Agreements. Northern Star requested an injunction proscribing Mr. Sedlacek from further violation of the covenants.

At the preliminary injunction hearing, Northern Star introduced evidence that Mr. Sedlacek had violated the covenants. Mr. Sedlacek asserted that the covenants imposed overly broad restrictions, rendering them unenforceable under North Carolina law. Northern Star countered that New Jersey law governed and that, accordingly, even if the covenants were overly broad as written, the court possessed the authority to modify the covenants to bring them into compliance with New Jersey law.

By order entered 4 September 2013, the trial court concluded that New Jersey law applied with respect to its interpretation of the covenants; granted Northern Star's request for a preliminary injunction;

and directed that Mr. Sedlacek refrain from further violation of the covenants contained in the 2010 Consulting Agreement. The trial court also indicated in its order that Northern Star had presented sufficient evidence to establish that it would likely prevail on the merits of its claims against Mr. Sedlacek and, moreover, that Northern Star would likely sustain irreparable loss absent the injunction. From this order, Mr. Sedlacek appeals.

## II. Jurisdiction

**[1]** The trial court's preliminary injunction order is interlocutory in nature, in that it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). This Court has jurisdiction over an interlocutory appeal where the order " 'affects some substantial right claimed by [the] appellant and will work injury to him if not corrected before an appeal from the final judgment.' " *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted). We have stated that "[i]n cases involving an alleged breach of a non-competition agreement[,] North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions . . . ." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002); *see also Copypro, Inc. v. Musgrove*, __ N.C. App. __, __, 754 S.E.2d 188, 191 (2014) ("[W]hen the entry of an order granting a request for the issuance of a preliminary injunction has the effect of destroying a party's livelihood, the order in question affects a substantial right and is, for that reason, subject to immediate appellate review."). We accordingly proceed to address the merits of Mr. Sedlacek's appeal.

## III. Standard of Review

In order to obtain a preliminary injunction, the movant must demonstrate (1) that it will likely succeed on the merits of its case; and (2) that it will likely sustain irreparable harm absent the injunction. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Mr. Sedlacek does not challenge any of the trial court's factual findings; rather, he takes issue with the trial court's legal conclusions, which this Court reviews *de novo* on appeal. *Copypro, Inc.*, __ N.C. App. at __, 754 S.E.2d at 191 (stating that where "the ultimate question for our consideration is whether the trial court correctly applied the applicable law to the undisputed record evidence, [we] utilize a *de novo* standard of review").

## IV. Analysis

Mr. Sedlacek raises three primary contentions on appeal: (1) the trial court erred in applying New Jersey law instead of North Carolina law; (2) the trial court erred in concluding that the covenants contained in the Asset Purchase Agreement apply; and (3) the trial court erred in concluding that the terms of the covenants were valid and enforceable as written. Upon careful review of the record and the parties' arguments, we conclude that the trial court did not err in applying New Jersey law and in determining that the Asset Purchase Agreement was applicable. We further conclude, however, that in applying New Jersey law the trial court should have determined whether the scope of the covenants was overly broad and, if so, should have appropriately narrowed the restrictions and tailored the preliminary injunction accordingly. Thus, for the reasons set forth below, we vacate the trial court's order and remand to the trial court for entry of findings and conclusions concerning the scope of the preliminary injunction consistent with this opinion.

### A. Choice of Law

**[2]** Mr. Sedlacek argues that the trial court incorrectly applied New Jersey law, in that the choice-of-law provision in the Severance Agreement — which designates North Carolina law as governing that agreement — effectively supersedes the choice-of-law provisions in the Asset Purchase Agreement and the Consulting Agreement, both of which designate New Jersey law as governing.

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). The intent of the parties "is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). Where "a contract is 'in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact,' the intention of the parties is a question of law[.]" *Vue-Charlotte, LLC v. Sherman*, __ N.C. App. __, __, 719 S.E.2d 161, 163 (2011) (citation omitted).

Mr. Sedlacek relies on paragraph 16 of the Severance Agreement which provides as follows:

> 16. Governing Law. This Agreement and any amendments hereof shall be governed and interpreted in accordance with the laws (both substantive and procedural) of the

> State of North Carolina and without regard to any conflict of laws provisions. Each of the parties to this Agreement irrevocably consents to the exclusive jurisdiction and venue of any state or federal court of the State of North Carolina permitted by law to have jurisdiction over any and all actions between or among any of the parties, whether arising hereunder or otherwise, except as otherwise directed by such court. . . .

Mr. Sedlacek asserts in his brief that this provision "clearly states that North Carolina law will apply substantively and procedurally to any and all actions between the parties, whether arising under the Severance Agreement or otherwise." We disagree.

We interpret paragraph 16 as indicative of the parties' intent that "*This* Agreement," i.e., the Severance Agreement, "be governed and interpreted in accordance with" North Carolina law. Further, the language "any and all actions between or among any of the parties, whether arising hereunder or otherwise" – to which Defendant directs this Court's attention – does not support Defendant's position that North Carolina *law* will govern any action between or among the parties. Rather, this provision reveals only that the parties intended North Carolina courts to have "*exclusive jurisdiction and venue*" over any such action. In other words, this provision evidences the parties' intent that any action between or among them be *heard in North Carolina*, not that any such action be governed by North Carolina law.

This interpretation is reinforced when construing paragraph 16 in conjunction with paragraph 8, which provides as follows:

> 8. Non-disparagement, Non-Solicitation, Non-Competition, and Confidentiality. In connection [with Mr. Sedlacek's] termination, [Defendant] . . . understands and acknowledges that all of his duties as a consultant of [Northern Star] ceased on the Separation Date, except that all obligations, including all non-disclosure, non-solicitation and non-competition obligations, that [Mr. Sedlacek] owes to [Northern Star], under law or any agreement [Mr. Sedlacek] has with [Northern Star], will continue after the Separation Date pursuant to the terms of those laws and/or agreements.

We believe the language in paragraph 8 reflects the parties' intent that Mr. Sedlacek remain bound by all previously assumed "non-competition obligations," including, but not limited to, the covenants in the 2010

Agreements. We note that neither this provision nor any other provision in the Severance Agreement seeks to redefine Mr. Sedlacek's "non-competition obligations"; rather, as paragraph 8 states, such obligations "will continue . . . pursuant to the terms of *those . . . agreements*." (Emphasis added). Both 2010 Agreements specify that Mr. Sedlacek's "non-competition obligations" are to be defined with reference to New Jersey law, which includes the approach employed by New Jersey courts of permitting the trial court to rewrite an otherwise unreasonably restrictive covenant. Thus, to accept Mr. Sedlacek's position that the Severance Agreement superseded the prior agreements would also require this Court to accept the unlikely proposition that Northern Star intended to remove the non-compete covenants from the purview of New Jersey's flexible approach in favor of North Carolina's more restrictive approach, which does not permit the trial court to rewrite an overly broad restrictive covenant. *See, e.g.*, *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). Thus, respecting the intent of the parties as manifested in the terms of their agreements, we hold that the trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants.

B. Covenants in Asset Purchase Agreement

**[3]** Mr. Sedlacek argues that the trial court erred in concluding that the covenants included in the 2010 Asset Purchase Agreement applied because they were superseded by the covenants set forth in the 2010 Consulting Agreement. We do not believe that this issue is properly before us, since the trial court only enjoined Mr. Sedlacek from continued violations of the covenants contained in the Consulting Agreement. Specifically, the trial court enjoined Mr. Sedlacek in three ways, ordering that he "refrain from (i) soliciting, servicing, selling, designing, developing, producing, forming, purchasing, administering, or procuring for third-parties Local, Intermediate and Long Haul Commercial Auto, Garage, Towing, Collateral Recovery (Repossession), Auto Dismantlers and Automobile Transporters insurance products . . . within the Restricted Area as defined by the 2010 Consulting Agreement; (ii) furnishing, divulging and/or making accessible to others Confidential Information as defined in the 2010 Consulting Agreement; and (iii) continuing to be a member of a partnership or a stockholder, investor, officer, director, employee, agent, associate or consultant or persons and entities engaging in the foregoing activities [described in the Consulting Agreement]." Accordingly, this argument is dismissed.

C. Enforceability of Non-Compete Covenants

**[4]** Finally, Mr. Sedlacek argues that the covenants are not enforceable, even under New Jersey law. Under New Jersey law, a covenant not to compete is enforceable to the extent that it is "reasonable under the circumstances." *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585, 264 A.2d 53, 61 (1970). To be deemed reasonable under the circumstances, a non-compete covenant (1) must be reasonably necessary to protect the employer's legitimate interests; (2) must not cause undue hardship on the former employee; and (3) must not be contrary to the public interest. *Id.* New Jersey courts have stated that an "employer has no legitimate interest in preventing competition as such," *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33, 274 A.2d 577 (1971), and, therefore, will not enforce "a restrictive agreement merely to aid the employer in extinguishing competition . . . from a former employee." *Campbell Soup*, 58 F.Supp.2d at 489. However, New Jersey courts will enforce a non-compete provision where doing so is necessary to protect legitimate interests of the employer, for instance, the "employer's interest in protecting trade secrets, confidential information, and customer relations." *Ingersoll–Rand Co. v. Ciavatt*a, 110 N.J. 609, 628, 542 A.2d 879 (1988). Further, the New Jersey Supreme Court has recognized that "employers may have legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been exposed and enriched solely due to his employment." *Id.* at 638, 542 A.2d 879 (internal quotation marks omitted).

Here, Mr. Sedlacek argues that the trial court's order enforces a non-compete covenant that is overly broad as a matter of law. Northern Star counters that the non-compete covenant is not overly broad and that, in any event, Mr. Sedlacek's contentions to the contrary are "premature because the Trial Court has not ruled that any of the restrictive covenants at issue are to be enforced in their entirety."

We do not believe that Mr. Sedlacek's challenges with respect to the enforceability of the non-compete covenant set forth in the Consulting Agreement are premature. *See, e.g., Coskey's T.V. & Radio Sales v. Foti*, 253 N.J. Super. 626, 602 A.2d 789 (App. Div. 1992) (further limiting the scope of a non-compete covenant – after trial court had trimmed the covenant's scope – upon review of the trial court's preliminary injunction order). Accordingly, we address each portion of trial court's injunction order.

First, the trial court enjoined Mr. Sedlacek from engaging in certain insurance-related business activities within the areas described in the Consulting Agreement, namely, the fifty states, the District of Columbia and Puerto Rico. While the uncontested findings support the restrictions on the activities described, they do not support the geographic scope of those restrictions. Specifically, the trial court made no findings with respect to the geographic regions where Northern Star competes for business. Accordingly, we vacate and remand this portion of the injunction order for entry of findings with respect to the reasonableness of the geographic scope of the covenants as set forth in the Consulting Agreement, and to tailor the geographic scope of the restrictions to that area that is reasonable under the circumstances as supported by the court's findings.[1]

Second, the trial court's order enjoins Mr. Sedlacek from divulging confidential information of Northern Star. However, Mr. Sedlacek does not make any argument challenging this portion of the injunction as unreasonable, and we accordingly do not address this portion of the order.

Third, the trial court's order enjoins Mr. Sedlacek from participating in essentially any capacity in any entity engaged in the activities described in the first portion of the injunction, *supra*. This portion of the order appears overly broad, in that, for instance, it prohibits Mr. Sedlacek from owning stock as a passive investor in a publicly traded company that engages in any of the insurance businesses described in the Consulting Agreement. We therefore vacate and remand this portion of the injunction order for entry of findings and conclusions with respect to the reasonableness of the scope of these restrictions.

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1. We note that the covenants at issue contain a provision assigning a duration of ten years to the restrictions set forth therein. If North Carolina law were applicable, it would be appropriate to consider the reasonableness of this ten-year duration at the preliminary injunction stage of these proceedings. That is, if the ten-year duration were determined to be unreasonable, then, applying North Carolina law, the covenants would be unenforceable and a preliminary injunction would be inappropriate. Here, however, New Jersey law applies, and the preliminary injunction enforces the covenant only until the propriety of a permanent injunction is presented for consideration by the trial court. It will be necessary at that time for the trial court to inquire into the reasonableness of the ten-year duration of the covenants.

V. Conclusion

In light of the foregoing, we vacate the trial court's preliminary injunction order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judge STROUD and Judge HUNTER, JR. concur.

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MICHELLE D. SARNO, PLAINTIFF
v.
VINCENT J. SARNO, DEFENDANT

No. COA13-1472

Filed 19 August 2014

**Appeal and Error—interlocutory orders and appeals—pending motion to modify child custody—failure to argue substantial right**

Both parties' appeals in a child custody case were from an interlocutory order based on plaintiff's outstanding motion to modify custody. The parties failed to argue a substantial right would be affected absent immediate review, and thus, their appeals were dismissed.

Appeal by Plaintiff and Defendant from Order entered 24 April 2013 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals 4 June 2014.

*The Law Office of Richard B. Johnson, P.A., by Richard B. Johnson, for plaintiff-appellant, cross-appellee.*

*Krusch & Sellers, P.A., by Rebecca K. Watts, for defendant-appellee, cross-appellant.*

STROUD, Judge.

Plaintiff and defendant each appeal from an order for permanent child support and attorney fees. Because the order from which the parties have appealed is interlocutory and they have failed to argue that

they are entitled to an interlocutory appeal based upon impairment of a substantial right, we dismiss both parties' appeals.

## I. Background

Plaintiff and defendant were married in 2000 and one child was born to their marriage, in 2003. They separated in 2006 and later divorced. In 2009, plaintiff filed a complaint including claims for child custody and support, and defendant filed an answer and counterclaims also seeking custody, child support, and attorney's fees. Trial on the issues of child support and custody began on 6 June 2011 and 7 June 2011. On 23 March 2012, the trial court entered an order of permanent child custody, which specifically reserved the issue of child support for later determination. In the custody order, the trial court concluded that "[t]here was insufficient time to hear evidence and rule on claims for child support and attorney fees and the court retains jurisdiction to rule on this issue." On 24 July 2012, plaintiff filed a motion to modify custody based on several alleged changes of circumstances, including claims that the custody order was based upon the fact that plaintiff had planned to move to Vermont at the time of the June 2011 hearing, but she had since decided to remain in North Carolina.

The trial court resumed trial on the issue of permanent child support on 14 September 2012. On 24 April 2013, the trial court entered an order for permanent child support and attorney fees. In this order, the trial court found that plaintiff's motion to modify custody, filed on 24 July 2012, was still pending. The trial court found that at the 2011 trial, plaintiff had maintained "with certainty" that she would relocate to Vermont on 15 July 2011 and sought primary custody of the minor child. The permanent custody order had awarded primary custody of the child to defendant and had set a visitation schedule based upon the fact that plaintiff would be residing in Vermont and the defendant and child in North Carolina, with "extended time in the summers and school holidays" but "not enough overnights" to require that plaintiff's child support be established under Schedule B of the Child Support Guidelines.

The trial court also found that despite the visitation schedule established in the custody order, since plaintiff had remained in North Carolina, she had actually exercised additional weekend visitation during the school year, beyond that dictated by the custody order. The trial court found that "plaintiff's testimony of her overnights did not convince the court of an exact amount of parenting time" and that defendant's theory for calculating the parties' overnights was "confusing." The trial court found that plaintiff had 135 overnight visits per year, sufficient

for child support to be set on Worksheet B, but based upon the uncertainty of the exact amount of visitation as well as additional findings of fact regarding the parties' financial situations and sharing of expenses, established child support accordingly, based upon Schedule A. The trial court also found that "while there is a motion to modify custody outstanding, child support needs to be established based on the current order and practice of the parties."

The trial court also made findings, when addressing the issue of attorney's fees, as to the delay in the progress of the case. The court found that "procedurally, this case has been slowed by the heavy case load of the court system, trial strategy decisions by the Plaintiff's counsel, the health issues of the prior trial counsel, as well as personal decisions by Plaintiff." One of these decisions was that "after receiving an undesirable result in the custody [matter], Plaintiff changed course, and opted to stay in North Carolina, presumably believing that this would negate the effects of the Court's ruling." According to the record before us, plaintiff's motion for modification of custody remains outstanding.

## II. Interlocutory Order

Although neither party has raised the issue, it is apparent from the provisions of the child support order on appeal that we must first consider whether this order is a final, appealable order.

> Generally, there is no right of immediate appeal from interlocutory orders and judgments. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. On the other hand, a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.

*Hausle v. Hausle*, ___ N.C. App. ___, ___, 739 S.E.2d 203, 205-06 (2013) (citations and quotation marks omitted). "The reason for this rule is to prevent fragmentary, premature, and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014) (citation, quotation marks, and brackets omitted). "In the child support context, an order setting child support is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered." *Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 250 (1996).

We have said in the child custody context that

> [a] trial court's label of a custody order as "temporary" is not dispositive. A custody order is, in fact, temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.

*Sood v. Sood*, ___ N.C. App. ___, ___, 732 S.E.2d 603, 606 (2012) (citations and quotation marks omitted), *cert. and disc. rev. denied, and app. dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012). These rules logically apply to the child support context as well. Indeed, support and custody are normally addressed in the same order if the two claims are heard at the same trial, as they were here. The unusual procedural feature here was the bifurcation of the issues by issuing two separate orders based upon the one trial, with plaintiff's motion to modify custody being filed in between the first and second sessions of the trial. This unusual procedural posture was created by a combination of the plaintiff's actions and circumstances beyond the control of the parties or the trial court, but still it resulted in an order which fails to provide a complete resolution of all issues.

Although the child support order was labeled as a "permanent" order and did not set a specific hearing date for a hearing upon plaintiff's pending motion, the provisions of the order address in detail some of the changes in circumstances since the custody order, such as plaintiff's decision to remain in North Carolina, which may necessitate additional change in the child support obligation as well. In fact, one of the primary issues was how much custodial time is being exercised by plaintiff, including consideration of the actual visitation, as practiced by the parties, compared to the visitation dictated by the existing custody order, and the establishment of child support depends heavily upon this determination. This order did not resolve all pending issues, due to plaintiff's outstanding motion to modify custody, which the trial court acknowledged by various findings in the child support order addressing plaintiff's outstanding motion, clearly anticipating that the child support issue would need to be revisited after plaintiff's motion to modify is heard. Addressing the parties' contentions at this time would result in "fragmentary, premature, and unnecessary appeals[.]" *Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439.

For an interlocutory order to be immediately appealable, either the trial court must certify the case for immediate appeal or the appellant must demonstrate that a substantial right will be impaired by delay in the appeal. *Id.* The parties have not acknowledged that the order is interlocutory and have not made any argument as to any substantial interest which would be impaired by delay. *See id.* at ___, 754 S.E.2d at 441 (noting that orders affecting only "the financial repercussion of a separation or divorce" generally do not affect a substantial right). Therefore, both parties' appeals must be dismissed.[1]

III. Conclusion

For the foregoing reasons, we must dismiss plaintiff's appeal as interlocutory.

DISMISSED.

Judges STEPHENS and McCULLOUGH concur.

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STATE OF NORTH CAROLINA
v.
DANIEL MIRANDA

No. COA13-1374

Filed 19 August 2014

**1. Drugs—trafficking in cocaine—sufficiency of indictment—subject matter jurisdiction**

The trial court did not lack subject matter jurisdiction to try defendant and to enter judgment against him for the crime of trafficking in between 28 and 200 grams of cocaine by manufacturing even though defendant contended that the indictment was fatally defective. The relevant count in the indictment returned against defendant alleged all of the elements of the offense of trafficking in between 28 and 200 grams of cocaine by manufacturing.

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1. We note that the Legislature recently enacted Session Law 2013-411, codified at N.C. Gen. Stat. § 50-19.1 (2013), which governs appeals of certain interlocutory family law orders. However, this statute only became effective 23 August 2013, after the order on appeal was entered. 2013 N.C. Sess. Laws ch. 411, § 2. Therefore, it does not apply here and we express no opinion on how it would affect our analysis.

**2. Drugs—trafficking in cocaine—failure to consider lesser-included offense—manufacturing cocaine—no plain error**

The trial court did not commit plain error in a prosecution for trafficking in cocaine by manufacturing by failing to allow the jury to consider the issue of defendant's guilt of the lesser-included offense of manufacturing cocaine. There was no record support for the proposition that defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense.

**3. Drugs—trafficking in cocaine—requested jury instruction—intent to deliver—no plain error**

The trial court did not commit plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that defendant manufactured cocaine with the intent to distribute before convicting him of that offense. Defendant failed to establish that a different outcome would probably have been reached had the instruction been delivered at trial.

**4. Drugs—trafficking in cocaine—manufacturing—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss a charge of trafficking between 28 and 200 grams of cocaine by manufacturing. The State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from defendant's bedroom; and that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in defendant's bedroom were packaged in plastic bags.

Appeal by defendant from judgment entered 2 August 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 19 March 2014.

*Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston, for the State.*

*N.C. Prisoner Legal Services, by Mary E. McNeill, for Defendant.*

ERVIN, Judge.

Defendant Daniel Miranda appeals from a judgment entered based upon his convictions for trafficking in between 28 and 200 grams of

cocaine by manufacturing and felonious possession of cocaine. On appeal, Defendant argues that the trafficking in cocaine by manufacturing indictment that had been returned against him was fatally defective, that the trial court committed plain error by failing to instruct the jury concerning the issue of his guilt of the lesser included offense of manufacturing cocaine, that the trial court committed plain error by failing to instruct the jury that a conviction for trafficking in cocaine by manufacturing based upon compounding required a finding that Defendant intended to distribute the substance in question, and that the record did not contain sufficient evidence to support his conviction for trafficking in cocaine by manufacturing. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

## I. Factual Background

### A. Substantive Facts

On 19 July 2012, Detectives Randall Ackley and Brad Gillis of the Johnston County Sheriff's Office went to Defendant's mobile home in Benson. Upon arriving at that location, the investigating officers met Defendant and his sister, informed Defendant that they had come to his residence for the purpose of serving outstanding warrants, and asked Defendant to identify the room that he occupied. In response to this inquiry, Defendant indicated that he occupied a room located at the far end of the mobile home.

After Defendant's father arrived at the residence, he consented to allow the investigating officers to conduct a search of the mobile home. As a result, Defendant led Detective Ackley into the interior of the mobile home and down the hallway to his room. As he entered Defendant's bedroom, Detective Ackley observed the presence of several items that caused him to ask Defendant to leave the room and wait in the mobile home's living room with Detective Gillis while he conducted his search.

At the time that he initially inspected the bedroom, Detective Ackley noted a mirror that had been placed against the wall and observed an end table on which were situated cellular phones, two digital scales, and a bag containing a green leafy substance that Detective Ackley believed to be marijuana, based upon his training and experience. In addition, Detective Ackley found a box of plastic bags on the coffee table in the bedroom. After looking behind the mirror, Detective Ackley found an orange pill bottle that contained a white substance. After making this

discovery, Detective Ackley repositioned the mirror and went to the living room to get Detective Gillis.

When the investigating officers reached Defendant's bedroom, Detective Ackley showed Detective Gillis what he had discovered on the table and behind the mirror and asked Defendant to enter the room. At that point, Detective Gillis asked Defendant if there were any other illegal items in his room and received a negative response. After the investigating officers seized the pill bottle, in which two plastic bags containing a white substance were situated, Detective Gillis told Defendant that he believed that the bottle contained a controlled substance and asked Defendant several times if he knew what the substance was. Although he initially claimed to be ignorant of the substance's identity, Defendant eventually said, "[i]t is what you said it is." A laboratory analysis of the contents of the pill bottle revealed the presence of two plastic bags, one of which contained approximately 21.5 grams of cocaine base and the other of which contained a mixture of rice and cocaine base weighing approximately 28.26 grams.

On 20 July 2012, the investigating officers conducted a videotaped interview of Defendant. During the interview, Detective Ackley informed Defendant that the investigating officers had seized a sufficiently large amount of controlled substances from his residence to suggest that he was selling cocaine. Although Defendant denied having sold a controlled substance, he did admit to having mixed rice with the cocaine base to eliminate the moisture contained in the cocaine base and placed the bag containing the combined substance in the pill bottle.

B. Procedural History

On 19 July 2012, a warrant for arrest was issued charging Defendant with trafficking in between 28 and 200 grams of cocaine by manufacturing; trafficking in between 28 and 200 grams of cocaine by possession; and maintaining a dwelling house for the purpose of keeping and selling a controlled substance. On 4 September 2012, the Johnston County grand jury returned a bill of indictment charging Defendant with trafficking in between 28 and 200 grams of cocaine by manufacturing; trafficking in between 28 and 200 grams of cocaine by possession; and maintaining a dwelling house for the purpose of keeping or selling a controlled substance. The charges against Defendant came on for trial before the trial court and a jury at the 31 July 2013 criminal session of Johnston County Superior Court. At the conclusion of the State's evidence, the trial court dismissed the charge of maintaining a dwelling house for the purpose of keeping or selling a controlled substance for

insufficiency of the evidence. On 2 August 2013, the jury returned verdicts convicting Defendant of trafficking in between 28 and 200 grams of cocaine by manufacturing and felonious possession of cocaine. At the conclusion of the ensuing sentencing hearing, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a term of 35 to 51 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

## II. Legal Analysis

### A. Jurisdiction and Indictment

**[1]** In his first challenge to the trial court's judgment, Defendant contends that the trial court lacked subject matter jurisdiction to try him and to enter judgment against him for the crime of trafficking in between 28 and 200 grams of cocaine by manufacturing on the grounds that the indictment that purported to charge him with committing that offense was fatally defective. More specifically, Defendant contends that the trafficking in between 28 and 200 grams of cocaine by manufacturing indictment returned against him was fatally defective on the grounds that the indictment did not adequately describe the manner in which Defendant allegedly manufactured cocaine. Defendant's argument lacks merit.

#### 1. Standard of Review

As the Supreme Court has previously stated, "[i]t is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). "It is well established that '[a]n indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Land*, __ N.C. App. __, __, 733 S.E.2d 588, 591 (2012) (quoting *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003)), *disc. review denied in part*, __ N.C. __, 758 S.E.2d 851, *affirmed in part*, 366 N.C. 550, 742 S.E.2d 803 (2013). "As a general rule[,] a [charging instrument] following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner" unless "the statutory language fails to set forth the essentials of the offense," in which case "the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged." *State v. Barneycastle*, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983) (citing *State v. Palmer*, 293 N.C. 633, 638-39, 239 S.E.2d

406, 410 (1977), and *State v. Loesch*, 237 N.C. 611, 612, 75 S.E.2d 654, 655 (1953)). A convicted criminal defendant is entitled to challenge the sufficiency of the indictment upon which the trial court's judgment is based even if the challenge that the defendant wishes to assert on appeal was never raised in the trial court. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000) (stating that, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court"). We "review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

2. Validity of Manufacturing Indictment

The indictment returned against Defendant in this case alleged that Defendant had "manufacture[ed] twenty-eight (28) grams or more, but less than two hundred (200) grams of a mixture containing cocaine[.]" A person is guilty of trafficking in cocaine by manufacturing if he or she manufactures 28 grams or more of cocaine or any mixture containing cocaine. N.C. Gen. Stat. § 90-95(h)(3). As a result, in order to establish a defendant's guilt of trafficking in between 28 and 200 grams of cocaine by manufacturing, the State must establish beyond a reasonable doubt that the defendant manufactured an amount of cocaine or a mixture containing cocaine that weighed between 28 and 200 grams. N.C. Gen. Stat. §90-95(h)(3). A defendant involved in the "production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means," including "any packaging or repackaging of the substance," has engaged in "manufacturing" for purposes of the cocaine trafficking statutes. N.C. Gen. Stat. § 90-87(15).

Although Defendant contends in his brief that the indictment purporting to charge him with trafficking in cocaine by manufacturing was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly manufactured cocaine or a cocaine-related mixture, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have not identified any such authority in the course of our own research. On the contrary, the relevant count of the indictment that had been returned against Defendant in this case is clearly couched in the statutory language and alleges that Defendant's conduct encompassed each of the elements of the offense in question. Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a

cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged. As a result, since the relevant count in the indictment returned against Defendant in this case alleges all of the elements of the offense of trafficking in between 28 and 200 grams of cocaine by manufacturing, we conclude that the indictment returned against Defendant was not fatally defective and sufficed to give the trial court jurisdiction to hear this case and enter judgment against Defendant based upon his conviction for trafficking in between 28 and 200 grams of cocaine by manufacturing.

B. Submission of Manufacturing Cocaine

**[2]** In his second challenge to the trial court's judgment, Defendant contends that the trial court committed plain error by failing to allow the jury to consider the issue of his guilt of the lesser included offense of manufacturing cocaine. More specifically, Defendant contends that, just as the trial court allowed the jury to consider the issue of Defendant's guilt of the lesser included offense of felonious possession of cocaine, it should have allowed the jury to consider the issue of his guilt of manufacturing cocaine given that the jury might have failed to find beyond a reasonable doubt that Defendant manufactured a mixture containing between 28 and 200 grams of cocaine. We do not find Defendant's argument persuasive.

1. Standard of Review

As he candidly acknowledges, Defendant did not object at trial to the trial court's failure to submit the issue of his guilt of manufacturing cocaine to the jury as a lesser included offense. For that reason, we are limited to determining whether the trial court's inaction constituted plain error. N.C.R. App. P. 10(a)(4); *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (stating that, "[b]ecause defendant failed to object to the jury instructions at trial, the standard of review therefore is plain error"), *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005). "A reversal for plain error is only appropriate in the most exceptional cases." *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007) (citation and quotation marks omitted), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2857, 174 L. Ed. 2d 601 (2009). "To show plain error, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (citation and quotation marks omitted), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009).

2. Relevant Legal Principles

A lesser included offense is one that "requires no proof beyond that which is required for conviction of the greater [offense]." *Brown v. Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 2226, 53 L. Ed. 2d 187, 196 (1977). A trial court must instruct the jury concerning the issue of the defendant's guilt of a lesser included offense in the event that "(1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. White*, 142 N.C. App. 201, 205, 542 S.E.2d 265, 268 (2001) (citations omitted). As a result, a trial court should instruct the jury concerning the issue of a defendant's guilt of a lesser included offense where "the evidence 'would permit a jury rationally to find [the] [defendant] guilty of the lesser offense and acquit him of the greater,' " *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds in State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986)), with "[t]he determinative factor [being] what the State's evidence tends to prove." *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658.

It is well-established that the total "quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation under N.C. Gen. Stat. § 90-95(h)(3)." *State v. Broome*, 136 N.C. App. 82, 86, 523 S.E.2d 448, 452 (1999) (holding that the defendant was properly convicted of trafficking in between 200 and 400 grams of cocaine by possession based upon the seizure of a package containing a cocaine mixture that, while weighing 273 grams, contained only 27 grams of pure cocaine), *disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000); *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E.2d 575, 577 (1981). As a result, in a case in which the defendant has been charged with trafficking in between 28 and 200 grams of a cocaine mixture, the State need not prove that the mixture contained between 28 and 200 grams of cocaine; instead, the State need only prove that the mixture, considered as a whole, met the relevant weight standard.

3. Evidentiary Analysis

The undisputed record evidence indicates that Defendant admitted having added rice to some portion of the cocaine base that was in his possession for the purpose of removing moisture from that substance and having placed the bag containing the mixture of rice and cocaine base into the pill bottle discovered by investigating officers. Although

Defendant argues that a combination of cocaine base and rice does not constitute a "mixture" as that term is used in our trafficking statutes, he cites no authority in support of that assertion, we have found no support for that assertion in the course of our own research, and the statutory reference to a "mixture" appears to us to encompass the mixture of a controlled substance with any other substance regardless of the reason for which that mixture was prepared. In addition, various items used to weigh and package controlled substances were found by investigating officers in Defendant's bedroom. As a result, the undisputed record evidence clearly establishes that Defendant engaged in "manufacturing" as that term is used in N.C. Gen. Stat. § 95-87(15) with respect to more than 28 grams of cocaine or a mixture containing cocaine. In addition, there is no record support for the proposition that Defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense. For that reason, Defendant's argument rests upon a contention that the jury could have chosen to refrain from believing some portion of the State's evidence while believing the rest of it, an approach that we have consistently held to be insufficient to support the submission of a lesser included offense. As a result, despite its decision to submit the issue of Defendant's guilt of the lesser included offense of felonious possession of cocaine for the jury's consideration on the basis of similar logic, the trial court did not err, much less commit plain error, by failing to allow the jury to consider the issue of Defendant's guilt of the lesser included offense of manufacturing cocaine.

C. Trafficking by Manufacturing Instruction

**[3]** In his third challenge to the trial court's judgment, Defendant contends that the trial court committed plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that Defendant manufactured cocaine with the intent to distribute before convicting him of that offense. More specifically, Defendant contends that, in order to find him guilty of trafficking in between 28 and 200 grams of cocaine by manufacturing on the basis of compounding, the jury was required to find that Defendant acted with the intent to distribute. Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

1. Standard of Review

As he once again candidly admits, Defendant did not object to the trial court's failure to instruct the jury that it had to find beyond a reasonable doubt that he had an intent to distribute in order to convict him

of trafficking in between 28 and 200 grams of cocaine by manufacturing based upon compounding. For that reason, we are, once again, required to utilize a plain error standard of review in evaluating the validity of Defendant's contention. N.C.R. App. P. 10(a)(4); *Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315.

2. Plain Error Analysis

As Defendant notes, we have held that, "where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding," the State must prove the existence of any intent to distribute the controlled substance. *State v. Childers*, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656, *cert. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979). Although the State has responded by arguing that the holding in *Childers* does not apply in this case given that Defendant had been charged with trafficking in cocaine by manufacturing in violation of N.C. Gen. Stat. § 90-95(h)(3) rather than felonious manufacturing of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) and that the requirement that the State prove beyond a reasonable doubt that Defendant's activities involved between 28 and 200 grams of cocaine and a cocaine-related mixture obviates the necessity to prove an intent to distribute given that "[o]ur legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale," *Tyndall*, 55 N.C. App. at 60-61, 284 S.E.2d at 577, we need not reach this issue in light of our recognition that the trial court allowed the jury to find that Defendant engaged in manufacturing-related activities based on packaging and repackaging as well as compounding and the fact that the undisputed record evidence shows that Defendant placed the cocaine-related mixture in the pill bottle and possessed items used to weigh and package controlled substances in the vicinity of a substantial amount of cocaine base and a cocaine-related mixture. As a result, since we do not believe that Defendant has established that a different outcome would probably have been reached had the instruction at issue here been delivered at trial, we conclude that Defendant is not entitled to relief on the basis of this argument.

D. Sufficiency of the Evidence

**[4]** In his final challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his motion to dismiss the trafficking in between 28 and 200 grams of cocaine by manufacturing charge for insufficiency of the evidence. More specifically, Defendant contends

that the trial court should have dismissed the trafficking in between 28 and 200 grams of cocaine by manufacturing charge on the grounds that the evidence did not suffice to support a determination that Defendant had packaged or repackaged cocaine or a cocaine-related mixture or that Defendant had compounded a sufficient quantity of cocaine or a cocaine-related mixture with the intent to distribute. Once again, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Wallace*, 197 N.C. App. 339, 343, 676 S.E.2d 922, 925 (2009) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006) (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). In making the required sufficiency determination, the record evidence presented must be viewed "in the light most favorable to the State." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000).

2. Relevant Legal Principles

As we have already noted, the statutory definition of "manufacturing" "includes any packaging or repackaging of the [controlled] substance[.]" N.C. Gen. Stat. § 90-87(15). "[T]his Court has held that there was sufficient evidence of manufacturing where the instruments of manufacture are found together with cocaine which was apparently manufactured." *State v. Outlaw*, 96 N.C. App. 192, 198, 385 S.E.2d 165, 169 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990). As a result, in the event that investigating officers find cocaine or a cocaine-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction. *See Brown*, 64 N.C. App. at 640-41, 308 S.E.2d at 348-49 (holding that evidence, such as plastic bags and tinfoil, found on the defendant's table in connection with his constructive possession of cocaine was sufficient to support a manufacturing conviction).

3. Sufficiency Analysis

According to the undisputed record evidence, investigating officers found a pill bottle that housed a bag containing 21 grams of cocaine base and a second bag containing a mixture of rice and cocaine base that weighed 28.26 grams behind a mirror in Defendant's bedroom. In addition, investigating officers seized two digital scales and boxes of plastic bags from the same room. As Detective Ackley testified, plastic bags, in conjunction with digital scales, are used for the separation of controlled substances and as a "method of distribution." Defendant acknowledged having placed the bag containing the mixture of cocaine base and rice in the pill bottle. As a result, given that the State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from Defendant's bedroom; that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in Defendant's bedroom were packaged in plastic bags; and that our prior decisions in *Outlaw* and *Brown* indicate that such evidence is sufficient to support a manufacturing conviction on the basis of packaging and repackaging,[1] we conclude that the trial court did not err by denying Defendant's dismissal motion.

In seeking to persuade us to reach a different result, Defendant contends that there was no indication that the plastic bags and digital scales found in his bedroom were used in packaging the cocaine found behind the mirror. Instead, Defendant asserts that digital scales and plastic bags are not "unique to the manufacture of cocaine" and might have been used solely for the purpose of weighing and packaging the marijuana that was discovered in his bedroom. Although Defendant's argument rests upon an accurate description of the record evidence, the inference that he wishes us to draw is not the only interpretation that a reasonable juror could have adopted after hearing and analyzing the State's case. Instead, the argument upon which Defendant relies amounts to a challenge to the weight that the jury should have given to the evidence rather than to its sufficiency. As a result, the trial court appropriately denied Defendant's dismissal motion.

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1. In view of our determination that the record supports a finding that Defendant packaged or repackaged the cocaine and cocaine-related mixture found in his bedroom, we need not analyze the sufficiency of the evidence to show that Defendant engaged in compounding-related activities as well.

III. Conclusion

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

AFFIRMED.

Judges GEER and STEPHENS concur.

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STATE OF NORTH CAROLINA
v.
ANTHONY PRESSLEY

No. COA13-1248

Filed 19 August 2014

**1. Sexual Offenders—failure to register—false information on verification forms**

The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on the State's failure to show that one of the forms containing false information was actually required by law to be submitted. The schedule in N.C.G.S. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates.

**2. Sexual Offenders—failure to register—requested jury instruction—statutory intervals to submit forms**

The trial court did not commit plain error in a failure to register as a sex offender case by failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted. Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted at any time, there was no reason for the trial court to instruct the jury in the manner asserted by defendant.

**3. Sexual Offenders—failure to register—motion to dismiss—submission of each form a distinct violation**

The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on his contention that he was charged twice for the same offense. The submission of each form constituted a distinct violation of N.C.G.S. § 14-208.11(a)(4).

Appeal by defendant from judgments entered 11 June 2013 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 6 March 2014.

*Roy Cooper, Attorney General, by Hal F. Askins, Special Deputy Attorney General, for the State.*

*Gilda C. Rodriguez for defendant-appellant.*

DAVIS, Judge.

Anthony Pressley ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11, based on his listing of a false address on forms submitted to law enforcement officers following his release from prison. Defendant argues on appeal that the trial court (1) erred in denying his motion to dismiss based on the State's failure to show that one of the forms containing false information was actually required by law to be submitted; (2) committed plain error in failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted; and (3) erred in denying his motion to dismiss based on his contention that he was charged twice for the same offense. After careful review, we conclude that Defendant received a fair trial free from error.

**Factual Background**

The State's evidence at trial tended to establish the following facts: Defendant was previously found guilty in Rowan County Superior Court of taking indecent liberties with a child. He was sentenced to a term of 19-23 months imprisonment and was released from prison on 23 April 2012. Pursuant to N.C. Gen. Stat. § 14-208.7, Defendant – as a convicted sex offender – was required to provide, upon his release from prison, a signed form to the sheriff of his county of residence containing, *inter alia*, the following information:

> The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, *and home address*.

N.C. Gen. Stat. § 14-208.7(b)(1) (2013) (emphasis added).

Upon his release from prison on 23 April 2012, Defendant registered with the Rowan County Sheriff's Office, listing his residence on the form as 364 Culbertson Estate's Drive, Woodleaf, North Carolina, which was the address of his mother's home. On 4 June 2012, at the written direction of the State Bureau of Investigation, Defendant signed an additional verification of information form, continuing to list this same address.

On 3 July 2012, David Allen ("Chief Allen"), the Chief of Police for the Town of Cleveland, North Carolina, was investigating an unrelated case and came to the 364 Culbertson Estate's Drive residence to interview Defendant. Chief Allen spoke with Joseph Nathan Rankin ("Rankin"), Defendant's stepfather, who informed him that Defendant did not live there.

On 23 July 2012, Chief Allen again spoke with Rankin, who provided a written statement that Defendant (1) did not live at 364 Culbertson Estate's Drive; (2) had used that address on the forms because he "needed an address to provide"; and (3) "ha[d] only spent the night at [the] house one time since he was released from prison." Rankin later clarified that Defendant had stayed with him and Defendant's mother at the residence for two days between 23 April 2012, the date of his release from prison, and 23 July 2012, the date of Rankin's statement.

Chief Allen also spoke with James Alonzo Lewis, who signed a statement indicating that Defendant had lived with him at 106 Crowder Street in Cleveland, North Carolina "for about three months" after his release from prison but subsequently left the residence after a dispute over bills. In addition, Chief Allen talked with Latisha Vaughan, who provided a written statement attesting to the fact that Defendant "started staying at [her] apartment near the end of May 2012" and moved out in August of 2012.

On 29 October 2012, Defendant was indicted on two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11 with regard to the signed forms he submitted on 23 April 2012 and on 4 June 2012. A jury trial was held on 11 June 2013 in Rowan County Superior Court. The jury convicted Defendant on both counts, and the trial court entered judgments upon the jury verdicts. Defendant was sentenced to two consecutive sentences of 23-37 months imprisonment. Defendant gave notice of appeal in open court.

## Analysis

### I. Denial of Motion to Dismiss Based on State's Failure to Prove That Submission of 4 June 2012 Verification Form Was Required by Statute

**[1]** The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations and quotations omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Defendant initially contends that the trial court erred in denying his motion to dismiss because the State failed to prove that the 4 June 2012 verification form he submitted was "required" by statute. We disagree.

Defendant was charged with violating N.C. Gen. Stat. § 14-208.11, which is a part of North Carolina's Sex Offender Registration Act ("the Act"), codified at N.C. Gen. Stat. § 14-208.5 *et seq.* N.C. Gen. Stat. § 14-208.9A provides that, beginning on the date of his initial registration and every six months thereafter, a person required to register under the Act must submit a verification form to the sheriff of his county of residence within three business days of receiving it. The form must be signed and must indicate, among other things, "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A (2013). The statute Defendant was charged with violating, N.C. Gen. Stat. § 14-208.11, further states, in pertinent part, that:

> A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (4) Forges or submits under false pretenses the information or verification notices required under this Article.

N.C. Gen. Stat. § 14-208.11(a)(4) (2013).

Defendant does not argue that the address he listed on the 23 April 2012 and 4 June 2012 forms was correct. Rather, he contends that the

4 June 2012 form was not required to be submitted under N.C. Gen. Stat. § 14-208.9A because, under that statute, verification forms must only be submitted every six months subsequent to the date of the initial registration form.

Defendant's argument, while novel, lacks merit. The clear and unambiguous purpose of the Act is

> to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013).

As a part of this statutory scheme, N.C. Gen. Stat. § 14-208.9A is intended to ensure that law enforcement officers possess complete and accurate information as to the addresses of convicted sex offenders living in North Carolina. This intent is reinforced by N.C. Gen. Stat. § 14-208.9A(b), which provides, in relevant part, as follows:

> Additional Verification May Be Required.–During the period that an offender is required to be registered under this Article, the sheriff is authorized to attempt to verify that the offender continues to reside at the address last registered by the offender.

N.C. Gen. Stat. § 14-208.9A(b).

The only rational reading of N.C. Gen. Stat. § 14-208.11 is that it criminalizes the provision of false or misleading information on forms submitted pursuant to the Act – regardless of when these forms are submitted. The schedule of deadlines set out in N.C. Gen. Stat. § 14-208.9A is simply designed to provide a reliable timetable for the filing of verification forms. The inclusion of this schedule in N.C. Gen. Stat. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates. Indeed, Defendant's argument, if accepted, would permit the submission of false or misleading information to law enforcement agencies on forms submitted at time intervals different than those explicitly set out in the statute. We decline to adopt a construction of the statute that would both thwart the express intent of

the General Assembly and fly in the face of common sense. *See State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005) (holding that "[i]n construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results" (citation omitted)). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss based on the State's failure to prove that Defendant was required by statute to submit the 4 June 2012 verification form on that date.

## II. Jury Instructions

**[2]** In his second argument, Defendant contends that the trial court committed plain error by failing to instruct the jury that the 4 June 2012 verification form was not required to be submitted on that date based on the timetable set out in N.C. Gen. Stat. § 14-208.9A. Because Defendant did not request a jury instruction on this issue, we review this argument only for plain error. *See State v. McClary*, 198 N.C. App. 169, 175, 679 S.E.2d 414, 419 (2009) ("Plain error review is only available in criminal cases and is limited to errors in jury instructions or rulings on the admissibility of evidence.").

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citations and quotations omitted).

This argument is foreclosed by our ruling on Defendant's first issue on appeal. By arguing that the trial court erred in declining to instruct the jury that N.C. Gen. Stat. § 14-208.9A did not require Defendant to submit a verification form on 4 June 2012, Defendant is essentially rearguing his earlier contention that accurate information is required *only* on verification forms submitted in strict accordance with the timetable

set out in N.C. Gen. Stat. § 14-208.9A. In light of the fact that we have rejected that argument, it logically follows that the trial court did not commit plain error by declining to instruct the jury as to this fact.

Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted *at any time*, there was no reason for the trial court to instruct the jury in the manner asserted by Defendant. Accordingly, we hold that the trial court did not commit plain error in its jury instructions.

## III. Denial of Motion to Dismiss Based on Continuing Offense Theory

**[3]** In his final argument, Defendant contends that the trial court erred in denying his motion to dismiss because he was charged twice for the same offense. This argument is also meritless.

Defendant characterizes the two offenses for which he was convicted as one continuing offense such that he could not lawfully be convicted twice on these facts. However, Defendant's argument ignores the fact that – on two separate occasions – he submitted verification forms that contained false information regarding his address. The submission of each of these forms constituted a distinct violation of N.C. Gen. Stat. § 14-208.11(a)(4). Consequently, we conclude that the trial court did not err in denying Defendant's motion to dismiss based on this theory.

## Conclusion

For the reasons stated above, we hold that Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and STROUD concur.

SURGICAL CARE AFFILIATES, LLC AND BLUE RIDGE DAY SURGERY CENTER, L.P., PETITIONERS
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND WAKEMED, RESPONDENT-INTERVENOR

No. COA13-1322

Filed 19 August 2014

**Hospitals and Other Medical Facilities—certificate of need—relocation of operating rooms—substantial prejudice—not shown**

In a certificate of need case involving the proposed relocation of two specialty ambulatory operating rooms by WakeMed, petitioners failed to show that the respondent's decision to grant WakeMed's application resulted in substantial prejudice, a necessary element of petitioner's attempt to successfully oppose the Agency decision.

Appeal by Petitioners from Final Decision entered 23 July 2013 by Judge Eugene J. Cella in the Office of Administrative Hearings. Heard in the Court of Appeals 23 April 2014.

*Nexsen Pruet, PLLC, by Frank S. Kirschbaum, Robert A. Hamill, and Rachael Lewis Anna, for Petitioners.*

*Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for Respondent.*

*Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Terrill Johnson Harris, and Carrie A. Hanger for Respondent-Intervenor.*

STEPHENS, Judge.

*Background*

This case involves the proposed relocation of two specialty ambulatory operating rooms from Southern Eye Ophthalmic Surgery Center ("Southern Eye")[1] to the WakeMed health care system's Raleigh Campus,

1. A specialty ambulatory operating room is a surgical facility that is used for single-day, outpatient surgical procedures limited to one specialty area. *See* N.C. Gen. Stat. § 131E-176(1b), (24f) (2013). For Southern Eye, that specialty is ophthalmic surgery.

where the operating rooms would be used as "shared operating rooms" for inpatients and outpatients. WakeMed is a nonprofit corporation that owns and operates multiple health care facilities in the Triangle region of North Carolina. WakeMed purchased Southern Eye on 10 May 2012 with the intention of relocating its operating rooms to WakeMed Raleigh. Petitioners Surgical Care Affiliates, LLC ("SCA") and Blue Ridge Day Surgery Center, L.P. ("Blue Ridge")[2] operate a multispecialty ambulatory surgical facility in Raleigh,[3] are direct competitors with WakeMed, and contest the proposed relocation of these rooms.

WakeMed filed a certificate of need ("CON") application with the North Carolina Department of Health and Human Services ("the Agency") on 16 April 2012, officially proposing to move the two operating rooms to its Raleigh Campus. The Agency conditionally granted that application on 27 September 2012. Following the Agency's decision, SCA and Blue Ridge petitioned for a contested case hearing to challenge the decision.[4] An administrative law judge with the Office of Administrative Hearings ("the ALJ") heard the matter beginning 15 April 2013 and affirmed the Agency's decision on 23 July 2013 by final decision. Petitioners appeal from the ALJ's final decision.

*Discussion*

On appeal, Petitioners argue that the ALJ erred in affirming the Agency's decision because (1) the Agency failed to apply certain agency-created regulations, referred to by Petitioners as "the conversion rules," to WakeMed's CON application and (2) this failure "substantially prejudice[d] [Petitioners'] rights." We affirm the decision of the ALJ on the issue of substantial prejudice and, therefore, do not reach the issue of the application of the conversion rules.

*I. Standard of Review*

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test."

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2. SCA is the managing partner of Blue Ridge and has an ownership interest in the partnership.

3. A multispecialty ambulatory surgical facility is a surgical facility that is used for same-day surgical procedures occurring over at least three defined specialty areas, including general surgery. *See* N.C. Gen. Stat. § 131E-176(15a).

4. A "contested case" is an "administrative proceeding [held under Chapter 150B of the North Carolina General Statutes] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C. Gen. Stat. § 150B-2(2) (2013).

*Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citation omitted). Pursuant to section 150B-51 of the North Carolina General Statutes:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [sections] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) . . . , the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) . . . , the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)–(c) (2013) (italics added). "Under *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *McMillan v. Ryan Jackson Props., LLC*, __ N.C. App. __, __, 753 S.E.2d 373, 377 (2014) (citation and internal quotation marks omitted).

> In applying the whole record test, the reviewing court is required to examine all competent evidence . . . in order to determine whether the [final] decision is supported

> by "substantial evidence." Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

*Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010) (citations omitted), *disc. rev. denied*, __ N.C. __, 705 S.E.2d 753 (2011) [hereinafter *Parkway Urology*].

*II. Substantial Prejudice*

After the Agency decides to issue, deny, or withdraw a CON or exemption or to issue a CON pursuant to a settlement agreement, "any affected person [as defined by section 131E-188(c)] shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." *Id.* at 535, 696 S.E.2d at 192 (citation omitted). Subsection (c) defines an "affected person" as, *inter alios*, "any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant." N.C. Gen. Stat. § 131E-188(c) (2013). In addition to meeting this "prerequisite[] to filing a petition for a contested case hearing regarding CONs," the petitioner must also satisfy "the actual framework for *deciding* the contested case [as laid out in section 150B-23(a) of] Article 3 of Chapter 150B of the General Statutes." *Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193 (citation omitted; emphasis in original).

Section 150B-23(a) of the North Carolina General Statutes provides that a petitioner must state facts in its petition which

> tend[] to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise *substantially prejudiced* the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a) (2013) (emphasis added).[5] This Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must "determine whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner's rights." *Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193 (citation and emphasis omitted) (overruling the petitioner's argument that it was not required to show substantial prejudice as long as it could show that it was an affected person). Therefore, under section 150B-23 and our opinion in *Parkway Urology*, a petitioner in a CON case must show (1) either that the agency (a) has deprived the petitioner of property, (b) ordered the petitioner to pay a fine or civil penalty, or (c) substantially prejudiced the petitioner's rights, *and* (2) that the agency erred in one of the ways described above. *See* N.C. Gen. Stat. § 150B-23(a); 205 N.C. App. at 536, 696 S.E.2d at 193; *see also Caromont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, __ N.C. App. __, __, 751 S.E.2d 244, 248 (2013) ("The administrative law judge must, therefore, determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner's* rights, as well as whether the agency *also acted* outside its authority, acted erroneously, acted arbitrarily and capriciously, *used improper procedure*, or failed to act as required by law or rule.") (citation omitted; certain emphasis added).

Here, the ALJ concluded in the final decision that Petitioners were " 'affected persons' because they provide surgical services that are similar to services provided by WakeMed," and the parties do not dispute that conclusion. In addition, Petitioners do not argue that the Agency deprived them of property or ordered them to pay a fine or civil penalty. Rather, Petitioners contend that they were substantially prejudiced by the Agency's decision, which was erroneously and improperly decided. Specifically, Petitioners argue that they were substantially prejudiced either (1) as a matter of law or, in the alternative, (2) because the Agency's decision gives WakeMed an unfair competitive advantage amounting to substantial prejudice. We disagree.

*(1) Substantial Prejudice as a Matter of Law*

Petitioners contend that the Agency's decision substantially prejudiced their rights as a matter of law because (a) the ALJ had already determined that Petitioners were substantially prejudiced and (b) the

5. Section 150B-23 was amended in 2013 to include an additional subsection. This amendment is unrelated to the issues raised by the parties in this appeal. *See* 2013 N.C. Sess. Laws 397, sec. 4.

Agency's alleged failure to follow its own rules necessarily constitutes substantial prejudice as a matter of law. We are unpersuaded.

*(a) The ALJ's Statement*

Petitioners assert that the Agency's decision substantially prejudiced their rights as a matter of law because the ALJ made a finding to that effect during the contested case hearing. This argument takes the ALJ's statement out of context. Responding to WakeMed's motion for summary judgment, the ALJ made the following comment at the hearing:

> The Court: All right. As far as this particular motion is concerned and ruling on the motion for summary judgment, I'm going to find that I think there is enough evidence on the record that there is substantial prejudice by not applying this rule and consequently deny the motion for summary judgment.

Following that ruling, Wakemed presented evidence, and Petitioners presented rebuttal witnesses. Afterward, the parties attempted to clarify the ALJ's initial ruling:

> [Counsel for WakeMed]: . . . [I]t's our understanding, Your Honor, that you deferred — that you denied the motion [for summary judgment] and decided to have a hearing on the issue of whether the multispecialty rules applied. . . .
>
> . . . .
>
> The summary judgment motion that we filed was to say that they were not substantially prejudiced as a matter of law, and that was what was renewed yesterday and that you also denied. . . .
>
> . . . .
>
> The Court: I don't know that I can agree or disagree —
>
> . . . .
>
> — Without sitting down and thinking about it and looking at it.
>
> [Counsel for the Agency]: I think, Judge . . . , that the heart of this is we understood that you did not grant summary judgment in favor of [SCA], but you also didn't grant summary judgment the other way and say that the Agency was

> correct on the rule. You said, "I'd go to trial[,] and I'll hear the evidence."
>
> . . . .
>
> The Court: *I wasn't deciding on the merits, no.*

(Emphasis added). The ALJ's comments make clear that his preliminary ruling constituted a denial of Respondents' motion for summary judgment on grounds that Petitioners had presented enough evidence to proceed with the hearing. It was not a final determination on the merits and does not control or undermine the ALJ's ultimate, written determination, following the presentation of the parties' evidence, that Petitioners failed to show substantial prejudice. Accordingly, Petitioners' argument that the ALJ determined the issue of substantial prejudice in their favor at the contested case hearing is overruled.

*(b) Failure to Follow Rules as Substantial Prejudice*

Petitioners also argue that the Agency's alleged failure to apply its own rules constitutes substantial prejudice as a matter of law, citing *N.C. Dep't of Justice v. Eaker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988), *overruled on other grounds*, *Batten v. N.C. Dep't of Corrs.*, 326 N.C. 338, 389 S.E.2d 35 (1990); *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 647 S.E.2d 651, *disc. review denied*, 361 N.C. 692, 654 S.E.2d 477–78 (2007) [hereinafter *Hospice at Greensboro*]; and *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990) [hereinafter *HCA Crossroads*] for support. This argument is without merit.

Petitioners cite *Eaker* for the rule that a plaintiff need not "show prejudice once he carries his burden of showing that the Department [of Justice] failed to follow the [State Personnel] Commission's policies," 90 N.C. App. at 37, 367 S.E.2d at 397, and seek to apply that rule here. In *Eaker*, the Department of Justice attempted to eliminate a research associate position in the Department's Sheriffs' Standards Division. 90 N.C. App. at 31, 367 S.E.2d at 394. The research associate position belonged to the petitioner, who sought a contested case hearing following his termination. *Id.* The petitioner alleged that the Department's actions were the result of political discrimination and "that the Department failed to comply with its own policies or those of the State Personnel Commission regarding 'reductions in force.'" *Id.* The State Personnel Commission rejected the petitioner's political discrimination claim, but agreed that the Department had failed to follow the Commission's policies for a reduction in force and recommended

that the petitioner be reinstated to his position. *Id.* at 31–32, 367 S.E.2d at 394. The case was appealed to the trial court, which reversed the Commission on grounds that the Department had followed all mandatory policies for reductions in force and, even if it had not followed those policies, that the "petitioner had failed to show [prejudice in the form of] a substantial chance of a different result." *Id.* at 32, 367 S.E.2d at 394.

On appeal, this Court reversed the trial court because it "improperly placed [the] burden on the Department [to prove that appropriate procedures for personnel reduction were utilized]." *Id.* at 36, 367 S.E.2d. at 397. We also elected to address the Department's remaining arguments and concluded that the petitioner "does not have to show prejudice once he carries his burden of showing that the Department failed to follow the Commission's policies." *Id.* at 37–38, 367 S.E.2d at 397–98. We reasoned that the Commission's policies were promulgated pursuant to statutory authority and, thus, had "the force of law." *Id.* Because the substance of those policies required the Department to consider a number of discretionary factors, however, we pointed out that a showing of prejudice would be "nearly impossible" for the petitioner to achieve. *Id.* Specifically, we observed that

> [t]o show prejudice from failure to follow policy, [the] petitioner would have to show, not only how he stood in relation to other employees in the same class as to type of appointment, length of service, and work performance, but he would have to show the weight which the Department would attribute to each of those factors. The Commission and the reviewing court would be relegated to speculating how the Department would weigh each factor.

*Id.* at 38, 367 S.E.2d at 398. Therefore, we held that it was sufficient to show prejudice for the petitioner to establish that the Department failed to follow the mandatory policies of the Commission, which had been promulgated pursuant to statutory authority. *Id.* A separate showing of prejudice was unnecessary in that circumstance. *Id.*

Assuming without deciding that the *Eaker* opinion raises issues that are analogous to those in this case, its interpretation of prejudice is no longer applicable to section 150B-23(a) of Article 3 of the Administrative Procedure Act. The petitioner in *Eaker* submitted his petition to the State Personnel Commission on 24 April 1985. 1585 N.C. App. Records & Briefs No. 8710SC857, 2 (1987). At that time, Article 3 of Chapter 150 contained no requirement that a petitioner establish that it had been deprived of property, ordered to pay a fine or penalty, or substantially

prejudiced *in addition* to showing that the agency exceeded its authority or jurisdiction, acted erroneously, *failed to use proper procedure*, acted arbitrarily and capriciously, or failed to act as required by law or rule. *See* 1973 N.C. Sess. Laws 1331, sec. 1. Those burdens were added to the statute during the 1985 session of the General Assembly and came into effect on 1 January 1986. 1985 N.C. Sess. Laws 746, secs. 1, 19 ("This act shall not affect contested cases commenced before January 1, 1986."). As this Court has since explained, the amended provisions of section 150B-23(a) require the ALJ in a contested case hearing to "determine whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner's rights, *and* that the agency *also* acted outside its authority, acted erroneously, acted arbitrarily and capriciously, *used improper procedure*, or failed to act as required by law or rule." *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (emphasis modified), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). These burdens require that, when the petitioner alleges that the Agency did not properly apply its own rules, the petitioner *must also* prove, and the ALJ must separately decide the issue of, substantial prejudice, *i.e.*, that the Agency's failure to follow its rules *actually* caused sufficient harm to the petitioner. *See id.*; *see also Parkway Urology*, 205 N.C. App. at 535–37, 696 S.E.2d at 192–93; N.C. Gen. Stat. § 150B-23(a). The Agency's mere failure to follow its own rules is not enough. Accordingly, Defendant's argument in reliance on *Eaker* is overruled.

We turn now to the next case cited by Petitioners to support their contention that the Agency's alleged failure to follow its rules constitutes substantial prejudice as a matter of law. The petitioner in *Hospice at Greensboro* was a hospice service provider located in Greensboro. 185 N.C. App. at 3–5, 647 S.E.2d at 653–54. Following the Agency's issuance of a "no review" letter, which authorized the respondent to open an office in Greensboro without first obtaining CON review, the petitioner sought a contested case hearing. *Id.* The respondent filed a motion for summary judgment on grounds that the petitioner "was not an 'aggrieved party' because the issuance of [the letter] . . . did not 'substantially prejudice' [the petitioner's] rights," and that motion was granted. *Id.* at 5–6, 647 S.E.2d at 654–55.

On appeal by the respondent, we affirmed the decision to grant the petitioner's motion for summary judgment because the issuance of the letter, "which result[ed] in the establishment of a new institutional health service without a prior determination of need, substantially prejudice[d the petitioner,] a licensed, pre-existing competing health

service provider[,] as a matter of law." *Id.* at 16, 647 S.E.2d at 661. In so holding, we noted that "the CON [s]ection's issuance of [the letter] . . . effectively prevented any existing health service provider or other prospective applicant from challenging [the] proposal [to open a new office] at the agency level, except by filing a petition for a contested case." *Id.* at 17, 647 S.E.2d at 661–62.

In this case, unlike *Hospice at Greensboro*, the Agency conducted a full review of WakeMed's CON application. This review included consideration "of the applications submitted for this cycle[,] . . . the [CON] law, . . . the State Medical Facilities Plan, and other applicable information." The Agency elected to approve WakeMed's application only after completing the CON review process. Petitioners had the opportunity to comment on the application and took advantage of that opportunity by submitting a detailed discussion of the validity of WakeMed's CON application. In addition, Petitioners participated in a public hearing on 18 June 2012, summarizing their concerns. Thus, Petitioners were not prohibited from challenging WakeMed's CON application at the agency level. Petitioners' argument is overruled as it pertains to *Hospice at Greensboro*.

As for *HCA Crossroads*, the final case cited by Petitioners in support of their position, the controlling issue in that case was "whether the [relevant agency] lost subject matter jurisdiction when it failed to act, within the time prescribed by law, on applications for [CONs] for construction of chemical dependency treatment facilities." 327 N.C. at 574, 398 S.E.2d at 467. On that issue our Supreme Court held that the agency lost its authority to deny applications for CONs by failing to act in a timely manner. *Id.* The Court did not address section 150B-23(a) or the requirement that a petitioner opposing the issuance of a CON must establish substantial prejudice. *See id.* Accordingly, Petitioners' argument in reliance on *HCA Crossroads* is overruled.

Petitioners argue that they were substantially prejudiced as a matter of law because the Agency failed to apply the conversion rules. As discussed above, however, the petitioner must establish that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner's rights, *and*, *in addition*, the petitioner must establish that the agency's decision was erroneous in a certain, enumerated way, such as failure to follow proper procedure or act as required by rule or law. *Parkway Urology*, 205 N.C. App. at 535–37, 696 S.E.2d at 192–93; *see also* N.C. Gen. Stat. § 150B-23(a). These are discrete requirements and proof of one does not automatically establish the other. *See Parkway Urology*, 205 N.C. App.

at 535–37, 696 S.E.2d at 192–93; *see generally Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d at 459 (treating the substantial prejudice and agency error requirements as separate elements to be addressed at the hearing). As we have already stated,

> the ALJ [in a CON case must, in evaluating the evidence,] determine *whether the petitioner has met its burden in showing that* [(1)] *the agency substantially prejudiced* [*the*] *petitioner's rights, and* . . . [(2)] acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

205 N.C. App. at 536, 696 S.E.2d at 193 (citing *Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d at 459; certain emphasis added). Therefore, while the Agency's action under part two of this test might ultimately result in substantial prejudice to a petitioner, the taking of the action does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice. *See id.* Accordingly, Petitioners' argument that they were substantially prejudiced solely on the basis that the Agency failed to apply the conversion rules is overruled.

*(2) Substantial Prejudice by Competitive Disadvantage*

Second, Petitioners argue that they were substantially prejudiced by the Agency's decision because that decision will likely make it more difficult for Petitioners to acquire additional operating rooms in the future, giving WakeMed a competitive advantage. Again, we disagree.

Medical facilities, including operating rooms, are regulated by chapter 131E of the North Carolina General Statutes ("the Act"). In section 175, the General Assembly stated "[t]hat the proliferation of unnecessary health services facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). As a consequence, a CON is required for the development of an additional institutional health service, including the use and implementation of an operating room. *See* N.C. Gen. Stat. § 131E-178(a); *see also Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 281, 691 S.E.2d 421, 424 (2010) ("The fundamental purpose of the [CON] law is to limit the construction of health care facilities in this [S]tate to those that the public needs and that can be operated efficiently and economically for their benefit."), *disc. review denied*, __ N.C. __, 706 S.E.2d 254 (2011).

In order for the Agency to issue a CON, the proposed project must be "consistent with applicable policies and need determinations in the State Medical Facilities Plan [("SMFP")] . . . ." N.C. Gen. Stat. § 131E-183. The SMFP is a document prepared by the North Carolina State Health Coordinating Council and the Agency "which constitutes a determinative limitation on the provision of any . . . operating rooms . . . that may be approved." N.C. Gen. Stat. §§ 131E-183(a)(1), -176, -177(4). CON review is not typically required, however, if the party seeking to develop the additional health service acquires an existing health service facility. N.C. Gen. Stat. § 131E-184(a)(8).

In determining whether there is a need for additional health service facilities, the Agency considers a number of factors, including the number of operating rooms currently in use and how regularly those rooms are being used. Operating rooms that are used infrequently are considered "underutilized" and are not a part of the Agency's calculus. At the time WakeMed filed its CON application, there was not a need for additional operating rooms in Wake County.

The operating rooms that WakeMed seeks to relocate from Southern Eye to its Raleigh Campus are currently considered "underutilized." Therefore, they are not counted in the Agency's formula for determining need. At the hearing, Petitioners presented testimony that the operating rooms would no longer be considered underutilized if transferred to the Raleigh Campus. As a result, those rooms would be counted in the Agency's subsequent need determination formula. Petitioners argue that this change constitutes substantial prejudice because it means that the Agency will be less likely to find a need for more operating rooms in the near future and, thus, Petitioners will be unable to expand their health care service. We do not find merit in Petitioners' argument.

In order to establish substantial prejudice, the petitioner must "provide specific evidence of harm resulting from the award of the CON . . . that went beyond any harm that necessarily resulted from additional . . . competition . . . ." *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 194–95 ("[The petitioner] did not, however, quantify th[e] financial harm in any specific way, other than testimony regarding the amount of revenue [it] receives . . . ."). The harm required to establish substantial prejudice cannot be conjectural or hypothetical. It must be concrete, particularized, and "actual" or imminent. *See Ridge Care, Inc. v. N.C. Dep't of Health & Human Servs.*, 214 N.C. App. 498, 506, 716 S.E.2d 390, 396 (2011) ("[The p]etitioner[s'] claims of potential harm should [the respondent] decide to develop facilities in the counties where petitioners are located or where they may wish to file CON applications

are similarly unsupported. There was no evidence presented that [the respondent] is planning to develop facilities in those counties or that petitioners have suffered any *actual harm*.") (emphasis added).

Petitioners' argument that they were substantially prejudiced by the Agency's decision is based on sheer speculation. They have neither alleged nor proven that the relocation of these two operating rooms has caused them any actual harm. In fact, SCA's vice president of operations admitted during the 15 April 2013 hearing that Petitioners had not undertaken any analysis of the economic impact of the Agency's decision upon them prior to filing their petition. According to the vice president, Petitioners have instead

> look[ed] at the fact that we need additional operating rooms based on surgeons and specialties that we're trying to move in and the space that we need to do those. And to me the harm comes from the surplus and this adding to the surplus and potentially just making it longer before we're ever able to expand.

As the vice president made clear in her testimony, the only purported harm to Petitioners is the possibility that the Agency's decision will make it more difficult for them to expand their business. This concern is based on their understanding of how the need-determination process works. It is not clear, however, that the outcome suggested by Petitioners will occur. When the vice president was asked whether SCA would "definitely decide to apply" for more operating rooms when a need determination is eventually made, she admitted that she could not be sure because "who knows when that will be and who knows what the situation will be then[.]"

At the moment, the operating rooms are still a part of Southern Eye. They have not been transferred to WakeMed's Raleigh Campus, and an SMFP taking those rooms into account has not been issued. Even if this occurs, however, Petitioners have not presented any evidence that the transfer of these rooms would result in substantial prejudice. Although Petitioners allege that they would like to expand their business, they have not and cannot assert that they will necessarily do so when or if the Agency finds a need. Indeed, it is entirely plausible that a health care provider other than Petitioners would obtain any new operating rooms found to be needed in the future. For these reasons, Petitioners' argument that the relocation of the operating rooms will likely result in substantial prejudice by competitive disadvantage is overruled.

Petitioners have failed to show that the Agency's decision to grant WakeMed's application resulted in substantial prejudice. Because a showing of substantial prejudice is a necessary element of Petitioners' attempt to successfully oppose the Agency's decision, we need not address Petitioners' argument that the Agency should have applied the conversion rules. We affirm the ALJ's final decision.

AFFIRMED.

Judges HUNTER, JR., ROBERT N., and ERVIN concur.

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WAKE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

BUNCOMBE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

DARE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

MECKLENBURG COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

No. COA13-594

Filed 19 August 2014

**1. Taxation—occupancy tax—gross receipts from rentals—online travel companies not operators of hotels**

The trial court did not err by determining that defendant online travel companies had no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants imposed on consumers. Defendants were not operators of hotels, motels, tourist homes, or tourist camps within the meaning of N.C.G.S. § 105-164.4(a)(3). Thus, the gross receipts defendants derived from the rentals were not subject to plaintiff counties' room occupancy tax.

**2. Appeal and Error—preservation of issues—insufficient notice—failure to argue**

The trial court did not err by dismissing plaintiff counties' claim that defendant online travel companies were contractually obligated to collect and remit an occupancy tax. There was insufficient notice of a contractual obligation claim. Further, plaintiffs raised this claim for the first time in a motion for summary judgment and on appeal.

**3. Taxation—failure to remit—failure to show legal duty**

The trial court did not err by dismissing plaintiff counties' claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes.

**4. Accountants and Accounting—occupancy tax—no legal obligation to remit**

The trial court did not err by dismissing plaintiff counties' claim for accounting. As plaintiffs could not establish that defendants were under a legal obligation based on their individual occupancy tax resolutions to collect and remit taxes to the respective county, plaintiffs could not prevail on their demands for accounting.

**5. Conversion—taxes—not a specific amount—category**

The trial court did not err by dismissing plaintiff Mecklenburg County's claim for conversion. The claim was not one for a specific amount of taxes alleged due, much less particular bills and coins, but instead was for a category of monies allegedly owed which was taxes.

**6. Trusts—constructive trust—summary judgment**

The trial court did not err by dismissing plaintiff counties' claim for a constructive trust. Plaintiffs were unable to establish any genuine issue of material fact as to whether defendants had retained monies collected from the rental of accommodations in the respective counties which were acquired through fraud, breach of duty or some other circumstance making it inequitable for defendants to retain it.

Appeal by plaintiffs from Order and Opinion filed on 19 December 2012 by Judge Calvin E. Murphy in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 19 November 2013.

*Ward and Smith, P.A., by Gary J. Rickner and Joseph A. Schouten; and Law Office of Michael Y. Saunders, by Michael Y. Saunders, for plaintiff-appellants.*

*Williams Mullen, by Charles B. Neely, Jr., Christopher G. Browning, Jr., Nancy S. Rendleman, Robert W. Shaw; Kelly Hart & Hallman, LLP, by Brian S. Stagner, pro hac vice, and Marcus G. Mungioli, pro hac vice; Skadden, Arps, Slate, Meagher & Flom LLP, by Darrel J. Hieber, pro hac vice, and Randolph K. Herndon, pro hac vice, for defendant-appellees.*

BRYANT, Judge.

Where the trial court did not err in concluding that defendants are not subject to plaintiffs' occupancy tax and where the trial court did not err in concluding that defendants were not required to collect and remit an occupancy tax, we affirm the trial court's grant of summary judgment in favor of defendants. Where the trial court dismissed plaintiffs' claim seeking recovery for collected but not remitted taxes on the basis of a contractual obligation because of plaintiffs' failure to provide sufficient notice of the claim in their pleadings, we affirm the dismissal. Lastly, where the trial court granted summary judgment in favor of defendants on plaintiffs' claims for an accounting, conversion, and seeking to impose a constructive trust, we affirm.

Defendants are approximately eleven online travel companies (OTC) that operate websites which allow consumers to select and pay for hotel rooms directly online using a credit card. Consumers can make reservations with airlines, car rental companies, and cruise lines in addition to hotels. Defendants negotiate and contract with hotels to obtain rooms at discount rates, these rooms are then sold to customers at a rate the hotel is obligated to honor. Consumers who take advantage of this offer never pay the hotel directly, only the OTC.

Plaintiffs are four counties—Wake, Dare, Buncombe, and Mecklenburg—who are required by North Carolina statutes and local ordinances to collect and remit an occupancy tax based on a percentage of the receipts derived from the rental of hotel rooms in their respective counties. Plaintiffs claim that defendants charge consumers a rate higher than the discount rate negotiated with the hotel yet only remit to plaintiffs a tax amount based on the reduced rate. Plaintiffs contend defendants are liable for substantial unremitted tax amounts.

*Procedural History*

We discuss the procedural history for the lawsuits initially brought by each county.

Wake County

In Wake County Superior Court on 2 November 2006, Wake County filed a verified complaint and action for declaratory judgment against defendants Hotels.com, LP; Hotwire, Inc.; Trip Network, Inc. (d/b/a Cheap Tickets.com); Expedia, Inc.; Internetwork Publishing Corp. (D/B/A Lodging.com); Lowestfare.com, Inc.; Maupin-Tour Holding, LLC[1]; Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.)[2]; Orbitz, LLC; Priceline.com, Inc.; Site59.com, LLC; Travelocity.com, LP; Travelweb LLC; and Travelnow.com, Inc.[3] Wake County asserted that the action was to collect occupancy taxes and penalties due Wake County from gross receipts defendants derived from the rental of rooms, lodging, and other accommodations furnished by hotels, motels, and similar places located in Wake County. By county ordinance, Wake County imposed a six percent "room occupancy tax" on the gross proceeds derived from the rental of hotel rooms and other accommodations within the county.[4] Wake County sought a declaratory judgment and injunction declaring that defendants' actions subjected defendants to payment of the occupancy tax. Wake asserted the following: violation of the room occupancy tax ordinance; conversion; imposition of a constructive trust; a demand for accounting; unfair and deceptive trade practices; agency; and claim for statutory penalties pursuant to Wake County ordinances. Wake County alleged damages in excess of $1,000,000.00 annually.

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1. On 6 November 2007, Wake County filed notice of voluntary dismissal without prejudice of its claims against defendant Maupin-Tour Holding, LLC.

2. On 25 January 2008, Wake County filed notice of voluntary dismissal without prejudice of its claims against defendant Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.).

3. On 11 December 2011, Wake County filed notice of voluntary dismissal without prejudice of its claims against Travelnow.com, Inc.

4. "The County of Wake hereby imposes and levies a tax of six percent (6%) of the gross receipts derived by any person, firm, corporation, or association from the rental of any room, lodging or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the County that is subject to the State sales tax imposed under Section 105-164.4(a)(3) of the North Carolina General Statutes." WAKE COUNTY, N.C., R-91-107 § 1 (1991).

Dare County

In Dare County Superior Court, on 26 January 2007, Dare County filed a verified complaint and action for Declaratory Judgment against the identical entities named in the Wake County complaint.[5,6,7] Dare County, like Wake County, asserted that the action was to collect occupancy taxes and penalties due Dare County from gross receipts defendants derived from the rental of rooms, lodging, and other accommodations furnished by hotels, motels, and similar places located in Dare County. Dare County imposed a five percent "room occupancy tax" on the gross proceeds from the rental of hotel rooms and other accommodations within the county.[8] Like Wake County, Dare County sought a declaratory judgment and injunction declaring that defendants' actions subjected defendants to payment of the occupancy tax. Dare asserted the following: violation of the room occupancy tax ordinance; conversion; imposition of a constructive trust; a demand for accounting; unfair and deceptive trade practices; agency; and claim for statutory penalties pursuant to enabling legislation for the Dare County ordinance enacted by the North Carolina General Assembly. Dare County alleged damages in excess of $1,000,000.00 annually.

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5. On 20 August 2007, Dare County filed notice of voluntary dismissal without prejudice of its claims against Maupin-Tour Holding, LLC.

6. On 7 December 2007, Dare County filed notice of dismissal without prejudice of its claims against Travelnow.com, Inc.

7. On 1 February 2008, Dare County filed notice of voluntary dismissal without prejudice of its claims against Travelport, Inc. (f/k/a Cendant travel Distribution Services Group, Inc.).

8. "There is hereby levied in the County of Dare a room occupancy tax of three per cent [sic] (3%) on the gross receipts derived from the rental of any room, lodging, or similar accommodation subject to sales tax under G.S. 105-164.4(a)(3)." Dare County, N.C., Resolution 91-9-26 § 1 (1992).

"There is hereby levied within Dare County a room occupancy and tourism development tax of one per cent [sic] (1%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation subject to sales tax under G.S. 105-164.4(a)(3) . . . ." Dare County, N.C., Resolution 91-9-27 § 1 (1992).

"Whereas, the General Assembly of North Carolina . . . has authorized the Dare County Board of Commissioners to levy a supplemental room occupancy tax of 1% of the gross receipts derived from the rental of any room, lodging, or similar accommodations subject to sales tax under G.S. 105-164.4(a)(3) . . . located in Dare County . . . the Dare County Board of Commissioners desires to levy the said 1% supplemental occupancy tax . . . ." Dare County, N.C., Resolution implementing supplemental occupancy tax (Dec. 3, 2001).

Buncombe County

In Buncombe County Superior Court on 1 February 2007, Buncombe County filed a declaratory judgment action against Hotels.com[9]; Hotels.com, LP[10]; Hotels.com GP, LLC; Hotwire, Inc.; Trip Network, Inc., d/b/a Cheaptickets.com; Travelport, Inc., (f/k/a Cendant Travel Distribution Services Group, Inc.)[11]; Expedia, Inc.; Internetwork Publishing Corp., d/b/a Lodging.com; Lowestfare.com, Inc.; Orbitz, Inc.; Orbitz, LLC; Priceline.com, Inc.; Priceline.com LLC; Sites59.com, LLC; Travelweb, Inc.; Travelnow.com, Inc.; Cheap Tickets, Inc.; and Sabre, Inc. Buncombe County sought "a declaratory judgment concerning its power, privilege, and right to audit and collect from [] defendants the North Carolina Occupancy Tax, N.C.G.S. 153A-155 . . . ." Buncombe County alleged that its ordinances imposed a room occupancy and tourism development tax on the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by any hotel, motel, inn, tourist camp, or other similar place within the county.[12] On the date the declaratory judgment action was filed, the room occupancy tax was four percent.

Mecklenburg County

In Mecklenburg County Superior Court on 14 January 2008, Mecklenburg County filed a verified complaint and action for declaratory judgment against the same entities named in the Wake County complaint with the exception of Maupin-Taylor Holding, LLC, and Travelnow.com, LLC.[13]

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9. On 4 April 2007 Buncombe County filed notice of dismissal without prejudice of its claims against Hotels.com; Orbitz.Inc.; Priceline.com, LLC; Site59.com, LLC; Travelocity.com, Inc.; Travelnow.com, Inc.; Cheap Tickets. Inc.; Sabre, Inc.; and Travelweb, Inc.

10. On 10 December of 2007, Buncombe County filed notice of dismissal without prejudice its claims against Hotels.com GP, LLC.

11. On 12 February 2008 Buncombe County filed notice of dismissal without prejudice of its claims against Travelport, Inc. (f/k/a Cendent Travel Distribution Services Group, Inc.).

12. In its declaratory judgment action, Buncombe County asserts that on 23 August 1983 by Resolution #17680, the Buncombe County Board of Commissioners "enacted a two percent (2%) room occupancy and tourism development tax on the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by any hotel, motel, inn, tourist camp, or other similar place within the County"; on 26 August 1986, "the Commissioners by Resolution #18510 enacted and adopted an additional one percent (1%) occupancy tax"; and on 19 June 2001, the "Commissioners enacted an additional one percent (1%) room occupancy tax . . . ."

13. On 4 February 2008, Mecklenburg County filed notice of voluntary dismissal without prejudice of its claim against Travelport Americas, LLC (f/k/a Cendant Travel Distribution Group, Inc.).

Mecklenburg County asserted that the action was to declare the rights of the parties concerning taxes and penalties due to Mecklenburg County from receipts realized by defendants derived from the rental of rooms, lodging and other accommodations furnished by hotels, motels, and similar places located in Mecklenburg County. Mecklenburg County alleged that at the time the complaint was filed, it imposed an eight percent "room occupancy tax" and defendants failure to remit the tax owed deprived Mecklenburg County of more than $1,000,000.00 annually.[14] In addition to its request for an injunction, Mecklenburg County asserted the following claims: violation of occupancy tax ordinances; conversion; imposition of constructive trust; demand for accounting; unfair and deceptive trade practices; agency; and a claim for statutory penalties pursuant to both the Mecklenburg County tax ordinance and North Carolina General Statutes.

All defendants filed motions to have their respective actions designated as complex business cases. Thereafter, Chief Justice Sarah Parker issued orders designating each action as a complex business case.

On 4 April 2007, Special Superior Court Judge Albert Diaz of the North Carolina Business Court was appointed to preside over the designated complex business cases and granted defendants' motions to consolidate the actions filed in Buncombe County, Dare County, and Wake County for pretrial matters. Thereafter, Mecklenburg County's complaint was consolidated and joined with the other actions.

On 1 November 2010, all parties filed motions for summary judgment under seal; plaintiffs filed a consolidated motion as did defendants.

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14. "Mecklenburg County hereby levies a room occupancy tax of six percent (6%) of the receipts, net of any taxes or discounts, derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within Mecklenburg County that is subject to sale tax imposed by the State of North Carolina under Section 105-164.4(a)(3) of the North Carolina General Statutes." Mecklenburg County, N.C., Amended and Restated Mecklenburg County Ordinance to impose and levy a room occupancy tax and a prepared food and beverage tax (Sept. 1, 1990).

"Mecklenburg County hereby levies a room occupancy tax of two percent (2%) of receipts, net of any taxes or discounts, derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within Mecklenburg County that is subject to sales tax imposed by the State of North Carolina under Section 105-164.4(a)(3) of the North Carolina General Statutes. This room occupancy tax is . . . in addition to the six percent (6%) Room Occupancy Tax previously levied by the Mecklenburg County Board of Commissioners which is in effect and remains in full force and effect." Mecklenburg County, N.C., Mecklenburg ordinance to impose and levy a two percent room occupancy tax (Hall of Fame Complex Tax) (March 21, 2006).

On 4 February 2011, a summary judgment hearing was held before the Honorable Calvin E. Murphy, Special Superior Court Judge presiding in the North Carolina Business Court. After considering the parties' motions and briefs, including supporting authority and arguments of counsel, the trial court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiffs appeal.

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On appeal, plaintiffs raise the following questions: (I) whether the trial court erred in concluding that defendants have no liability under the ordinances; (II) concluding that defendants are not contractually obligated to collect and remit the occupancy tax; (III) concluding that there was no legal support for plaintiffs' collected but not remitted claim; and (IV) dismissing plaintiffs' claims for accounting, conversion, and constructive trust.

*Standard of Review*

"We review a trial court's order granting summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party. We are to determine whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 644-45, 692 S.E.2d 470, 472 (2010) (citation and quotations omitted).

*I*

**[1]** Plaintiffs first argue that the trial court erred in determining defendants have no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants impose on consumers. We disagree.

The respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties impose a tax on the gross receipts derived from the rental of any room, lodging or accommodation furnished by a hotel, motel, inn, tourist camp, or "similar place" that is subject to the State sales tax imposed under General Statutes, section 105-164.4(a)(3).

In its 19 December 2012 order, the trial court reasoned that "[t]o determine whether the Defendants are obligated to pay the Occupancy Tax under the counties' ordinances or resolutions, the Court must decide 'what' and 'who' is taxed." The court reasoned that as to the "who" is taxed, Mecklenburg and Wake counties impose the responsibility of

collection upon the "operator of a taxable establishment." Dare and Buncombe counties impose the responsibility of tax collection upon the "operator of a business subject to a room occupancy tax." The court concluded that defendants "can not [sic] be classified as operators of 'taxable establishments' or 'businesses subject to a room occupancy tax' under any of Plaintiff's Occupancy Tax ordinances or resolutions, and are thus, not subject to the counties' Occupancy Taxes."

Plaintiffs contend the trial court violated the principle of statutory construction that all parts of a statute must be given effect and thereby rendered critical sections of the ordinances meaningless. Specifically, plaintiffs contend that as to "who" is taxed, the ordinances and enabling legislation make clear that the tax is levied against the occupant of the room. As to "what" is taxed, the ordinances establish that the levy is applied to the gross receipts derived from the rental of the accommodation.

> When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself:
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

*State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

"A county may impose taxes only as specifically authorized by act of the General Assembly." N.C. Gen. Stat. § 153A-146 (2005). Our General Assembly has authorized Buncombe, Dare, Mecklenburg, and Wake counties to impose room occupancy taxes pursuant to appropriate county ordinances and resolutions. *See* 1991 N.C. Sess. Laws ch. 594 (Wake); 1985 N.C. Sess. Laws ch. 449 (Dare); and 1983 N.C. Sess. Laws. ch. 908, parts IV and VI (Mecklenburg and Buncombe). The General Assembly limited the applicability of the occupancy tax to gross receipts derived from rental transactions also subject to our State sales tax. *See* 2001 N.C. Sess. Laws ch. § 7.1 ("The Dare County Board of Commissioners may levy a room occupancy tax . . . [on] the gross receipts derived from the rental of the following in Dare County: (1) Any room, lodging, or

similar accommodation subject to sales tax under G.S. 105164.4(a)(3)[.]" (revisions omitted)); 2001 N.C. Sess. Laws ch. 162, § 1 ("The Board of Commissioners of Buncombe County may levy a room occupancy and tourism development tax . . . [on] the gross receipts derived from the rental of accommodations within the county that are subject to sales tax imposed by the State under G.S. 105-164.4(a)(3)." (emphasis and revisions omitted)); 1989 N.C. Sess. Laws ch. 821, § 1 ("Mecklenburg County may, by resolution of its Board of Commissioners, levy a room occupancy tax . . . [on] the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3)."); and 1991 N.C. Sess. Laws ch. 594, § 4 ("The Wake County Board of Commissioners may, by resolution, levy a room occupancy tax . . . [on] the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to the State sales tax imposed under G.S. 105-164.4(a)(3)."). To determine whether the gross receipts derived from the rentals in which defendants engage are subject to the occupancy tax, we must consider whether the gross receipts are subject to the State sales tax in accordance with our General Statutes, section 105-164.4(a)(3).

Section 105-164.4 ("Tax imposed on retailers") of the North Carolina General Statutes, in pertinent part, states the following:

> (a) . . . A privilege tax is imposed on a retailer . . . [on] the retailer's net taxable sales or gross receipts, as appropriate.
>
> . . .
>
> (3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration.

N.C. Gen. Stat. § 105-164.4(a)(3) (2005) (effective for sales made on or after July 1, 2007).

Whether the gross receipts derived from the rentals in which defendants engage are subject to the occupancy tax hinges on whether defendants are "retailers" within the meaning of section 105-164.4(a)(3). *See id.* ("A privilege tax is imposed on . . . the retailer's net taxable sales

or gross receipts . . . . Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article.").

The trial court found that plaintiffs did not contend defendants were operators of hotels, motels, tourist homes, or tourist camps. Therefore, the court considered only whether defendants were operators of "similar type businesses."

In addressing this issue, we note with favor the reasoning of the Fourth Circuit Court of Appeals in *Pitt Cnty. v. Hotels.com, GP, LLC*, 553 F.3d 308 (4th Cir. 2009), considering "whether the phrase 'operators of hotels, motels, tourist homes, tourist camps, and similar type businesses' in § 105–164.4(a)(3) in the North Carolina sales tax statute applies to online travel companies." *Id.* at 313. In considering whether OTC and hotels operated "similar type businesses," the Court found applicable the principle of *ejusdem generis*, the canon of statutory construction standing for the proposition that "where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *Id.* (citing *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682, 686–87 (1985)); *see also State ex rel. Utilities Comm'n v. Envtl. Def. Fund*, 214 N.C. App. 364, 368, 716 S.E.2d 370, 373 (2011) ("North Carolina courts have followed this explanation of how the doctrine of *ejusdem generis* should be applied by employing the doctrine when a list of specific terms is followed by a general term. *See Liborio v. King*, 150 N.C. App. 531, 536–37, 564 S.E.2d 272, 276 (2002) (interpreting the term "misrepresentation" to be limited to knowing and intentional behavior, where the term followed the words fraud and deception); [*Smith*, 314 N.C. at 87, 331 S.E.2d at 687] (interpreting a provision allowing the court to consider "any other factor which the court finds to be just and proper" to be limited to economic factors, where the provision followed eleven other provisions having to do with the economy of the marriage); [*State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)] (interpreting the phrase "or other like weapons" to be limited to automatic or semiautomatic weapons, where the phrase followed a specific list of automatic and semiautomatic weapons).")).

In section 105-164.4(a)(3), the phrase "similar type businesses" follows the list: "hotels, motels, tourist homes, [and] tourist camps[.]" N.C.G.S. § 105-164.4(a)(3). A "hotel" is defined as "[a]n establishment

that provides lodging and usu [sic]. Meals and other services for travelers and other paying guests." AMERICAN HERITAGE COLLEGE DICTIONARY 658 (3d ed. 1993). A motel is "[a]n establishment that provides lodging for motorists in rooms usu. having direct access to a parking area." *Id.* at 890. A "tourist home" is "a house in which rooms are available for rent to transients." Tourist home definition, merriam-webster.com, http://www.merriam-webster.com/dictionary/tourist%20home (last visited August 11, 2014). We were unable to find a definition for "tourist camp,"; however, we note that "tourist" is defined as "[o]ne who travels for pleasure," and "camp" is defined as "[a] place where tents, huts, or other temporary shelters are set up . . . . [, or] [a] place in the country that offers simple group accommodations and organized recreation or instruction." AMERICAN HERITAGE COLLEGE DICTIONARY 202, 1431. A common characteristic of such establishments is that they are physical structures with rooms or at least physical locations. Per section 105-164.4(a)(3), the "operator" of such an establishment is a "retailer." "Operator" is defined as "[t]he owner or manager of a business or industrial enterprise." AMERICAN HERITAGE COLLEGE DICTIONARY 957.

Plaintiffs do not contend that defendants are owners or managers of the establishments providing accommodations; rather, plaintiffs argue that this Court should interpret the word "business" broadly. However, such an analysis would ignore the requirements of section 105-164.4(a)(3), that defendants be operators of "*similar type* businesses." We hold that defendants are not operators of hotels, motels, tourist homes, or tourist camps within the meaning of section 105-164.4(a)(3). This holding is consistent with the reasoning of the trial court and the *Pitt* Court. *See Pitt Cnty.*, 553 F.3d at 313 (hotels, motels, tourist homes, and tourist camps – "all provide physical establishments . . . where guests can stay. A business that arranges for the rental of hotel rooms over the internet, but that does not physically provide the rooms, is not a business that is of a similar type to a hotel, motel, or tourist home or camp."). Defendants are neither operators nor retailers within the meaning of section 105-164.4(a)(3). *See* N.C.G.S. § 105-164.4(a)(3) ("A privilege tax is imposed on . . . the retailer's net taxable sales or gross receipts . . . . Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article."); *see also Pitt Cnty.*, 553 F.3d at 314 (holding that an online travel company is not a retailer within the plain meaning of General Statutes, section 105-164.4(a)(3)).

Applying our holding that defendants are not "retailers" within the meaning of General Statutes, section 105-164.4(a)(3)[15], we must also conclude that defendants' gross receipts are not subject to the State sales tax under section 105-164.4(a)(3) ("A tax . . . is levied on the gross receipts derived by these retailers . . . ."). Thus, the gross receipts defendants derive from the rentals are not subject to plaintiffs' room occupancy tax. *See* 2001 N.C. Sess. Laws ch. 439 § 7.1; 2001 N.C. Sess. Laws ch. 162 § 1; 1991 N.C. Sess. Laws ch. 594, § 4; and 1989 N.C. Sess. Laws ch. 821, § 1. Because the trial court did not err in determining that defendants have no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants impose on consumers, plaintiffs' argument is overruled.

*II*

**[2]** Plaintiffs next argue that the trial court erred in determining that defendants are not contractually obligated to collect and remit the occupancy tax. We disagree.

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15. We note that pursuant to 2009 N.C. Sess. Laws 2010-31, § 31.6(a) (effective July 1, 2010), N.C. Gen. Stat. § 105-164.4(a)(3) was re-written. As re-written, section 105-164.4(a)(3) includes the following language:

> Gross receipts derived from the rental of an accommodation include the sales price of the rental of the accommodation. . . . The sales price of the rental of an accommodation marketed by a facilitator includes charges designated as facilitation fees and any other charges necessary to complete the rental.
>
> A person who provides an accommodation that is offered for rent is considered a retailer under this Article. A facilitator must report to the retailer with whom it has a contract the sales price a consumer pays to the facilitator for an accommodation rental marketed by the facilitator. A retailer must notify a facilitator when an accommodation rental marketed by the facilitator is completed and, within three business days of receiving the notice, the facilitator must send the retailer the portion of the sales price the facilitator owes the retailer and the tax due on the sales price.
>
> . . .
>
> The following definitions apply in this subdivision:
>
> . . .
>
> b. Facilitator. – A person who is not a rental agent and who contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation.

2009 N.C. Sess. Laws ch. 2010-31, §31.6(a).

In its order, the trial court concluded that as to a recovery based on a theory of contractual undertaking, "Plaintiffs failed to provide sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it." The court went on to reason that even if it were to consider plaintiffs' claim for recovery under a theory of contractual undertaking, "it would [] have to acknowledge that there is no legal support for such a theory in North Carolina's case law." For these reasons, the trial court granted defendants' motion to dismiss the claim.

"The grant of a motion to dismiss is reviewed *de novo* on appeal." *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007) (citation omitted).

Pursuant to General Statutes, section 1A-1, Rule 8,

> [a] pleading which sets forth a claim for relief . . . shall contain
>
> (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief and
>
> (2) A demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2013). By enacting section 1A-1, Rule 8(a), our General Assembly adopted the concept of notice pleading. *See Sutton v. Duke*, 277 N.C. 94, 100, 176 S.E.2d 161, 164 (1970). Under notice pleading, "a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought." *Id.* at 102, 176 S.E.2d at 165 (citation omitted). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citation omitted). "Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim . . . ." *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007) (citation and quotations omitted).

Plaintiffs contend defendants had sufficient notice of plaintiffs' contractual obligation theory from the complaints and plaintiffs' summary judgment trial briefs.

In their brief to this Court, plaintiffs combine and point to five allegations scattered throughout the complaint filed by Mecklenburg County and argue the allegations are sufficient to provide defendants with notice of plaintiffs' contractual obligation theory.

> Mecklenburg County's Complaint alleges that: (1) Defendants contract with local hotels for rooms at negotiated discounted rates and "charge and collect the Tax from occupants at the time of the sale based on the marked up room rates"; (2) Defendants were "authorized to act on behalf of the hotels"; (3) Defendants, as "agents" for the hotels, "were required to collect the Tax from the consumers of the rooms"; (4) Defendants, as agents for the hotels, have collected the Tax but failed to pay the full amount due to Plaintiffs; and (5) Plaintiffs are entitled to a declaratory judgment that Defendants are agents for taxable establishments and "as such, are required to collect the County's full tax from the consumers of the rooms."

The referenced allegations were found in separate sections of the complaint including: in assertions of underlying fact; in a request for a declaratory judgment; in a claim for recovery based on a theory of agency; and in plaintiff Mecklenburg County's prayer for relief. However, even reading these statements together, we cannot interpret them as providing notice of a cognizable claim. Plaintiffs attempt to seek recovery for breach of contract based on a contractual obligation to collect the occupancy tax on the gross receipts defendants derived from the rental of accommodations. On this record, we cannot find that plaintiffs' contract theory has been sufficiently pled and therefore, find no error in the trial court's ruling granting defendants' motion to dismiss this claim. Though not specifically argued, plaintiffs reference statements in the complaints of Wake County, Buncombe County, and Dare County. A review of these complaints reveals a repetition of some portions of the allegations made in the Mecklenburg County complaint, but they are likewise insufficient to provide notice of a cognizable claim. Thus, we find insufficient notice of a contractual obligation claim as to the complaints of Buncombe, Dare, and Wake Counties.

Plaintiffs further contend that a claim raised during summary judgment may provide sufficient notice to the opposing party where the

party asserting the claim did not earlier disavow it. In support of their contention, plaintiffs cite cases from the Sixth Circuit Federal Court interpreting Federal Rules of Civil Procedure:

> Where language in a complaint is ambiguous, the Sixth Circuit employs a "course of the proceedings test" to determine whether defendants have received notice of the plaintiff's claims, analyzing the adequacy of notice on a case-by-case basis. *Accord Moore v. City of Harriman*, 272 F.3d 769, 772, 774 (6th Cir.2001) (en banc) (plurality opinion) ("Subsequent filings in a case may rectify deficiencies in the initial pleadings." (citations omitted)). A plaintiff may sufficiently notify a defendant of an argument by raising it in a response to summary judgment, provided that the party does not disavow its intent to use the argument earlier in the proceedings.

*Copeland v. Regent Elec., Inc.*, 499 F. App'x 425, 435 (6th Cir. 2012) (unpublished) (citations and quotations omitted).

Interpreting our Rules of Civil Procedure as to notice pleading, our Supreme Court has held that "notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc.*, 321 N.C. at 442-43, 364 S.E.2d at 384. Plaintiffs raised a claim for the first time in a motion for summary judgment and on appeal, provide no authority from our General Statutes or North Carolina jurisprudence to support their argument to do so. We affirm the trial court's dismissal of plaintiff's claim that defendants are contractually obligated to collect and remit the occupancy tax.

*III*

**[3]** Plaintiffs argue the trial court erred by dismissing their claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Specifically, plaintiffs contend Judge Murphy impermissibly overruled the prior holding of another superior court judge, Judge Diaz. We disagree.

"Litigants and superior court judges must remain mindful that the power of one judge of the superior court is equal to and coordinate with that of another." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 651, 692 S.E.2d 470, 476 (2010) (citation and quotations omitted).

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

*Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted).

Here, Judge Diaz was presented with a challenge to plaintiffs' claim for collected but not remitted taxes in the form of defendants' Rule 12(b)(6) motion to dismiss. When the motion was denied, defendants subsequently challenged the same claim in the form of a motion for summary judgment before Judge Murphy.

> The test [for a] Rule 12(b)(6) [motion] is whether the pleading is legally sufficient. The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is whether on the basis of the materials presented to the courts there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Therefore, the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56.

*Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256 (1978). "[T]he Rule 12(b)(6) motion is addressed solely to the sufficiency of the complaint . . . ." *Indus., Inc. v. Constr. Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 53 (1979) (citation omitted).

In his 19 November 2007 order addressing defendants' motion to dismiss plaintiffs' claim for failure to remit taxes, Judge Diaz gave the following summary as to plaintiffs' allegations:

> (71) The Complaints in these cases allege (either directly or by implication) that Defendants are in fact charging and collecting the Occupancy Tax from consumers, but not remitting to Plaintiffs the full amount collected. In fact, Plaintiffs allege Defendants are charging and collecting the tax on the higher retail rate charged to consumers, but only remitting to Plaintiffs an amount

> of tax based on the lower wholesale rate paid to hotel owners, thereby pocketing the difference. Plaintiffs also allege Defendants are not filing occupancy returns, as required by law. . . .

Based on these allegations, Judge Diaz concluded that "Defendants have not complied with the plain language of the Occupancy Tax (and the corresponding enabling acts) requiring them to account for and remit all such taxes." Thus, "[a]t this stage . . . the Court need only look to Plaintiffs' pleadings to conclude that dismissal of the principal claims is not appropriate." Judge Diaz, therefore, denied defendants' motion to dismiss pursuant to Rule 12(b)(6).

On 4 February 2011, Judge Murphy heard arguments from plaintiffs and defendants on cross motions for summary judgment. Based on their briefs and arguments before the trial court, Judge Murphy granted summary judgment in favor of defendants, dismissing plaintiffs' claim for collected but not remitted taxes.

In his order, Judge Murphy discussed three cases presented by plaintiffs in support of their motion: "*City of Rome v. Hotels.com*, No.4:05-CV-249-HLM, 2006 U.S. Dist. LEXIS 56369 (N.C. May 8, 2006)"; "*Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122 (Ga. Sup. Ct. 2009)"; and "*City of Gallup v. Hotels.com, L.P.*, No.06-0549-JC, 2007 U.S. Dist. LEXIS 86720 (January 30, 2007)." Each case dealt with similar questions of tax liability and OTCs in other jurisdictions. Judge Murphy observed that where an OTC had been held responsible for remitting a tax, the conclusion was predicated upon a statutory requirement or contractual provision imposing upon the OTC the responsibility for collecting the tax. By comparison, Judge Murphy noted that our North Carolina General Statutes did not impose the same duty upon defendants, and plaintiffs provided no authority supporting a recovery predicated on a theory of contractual undertaking. Accordingly, Judge Murphy concluded that "Plaintiffs' [sic] have been unable to direct this Court to any binding legal precedent to support a 'collected-but-not-remitted' theory of recovery" and on this basis, granted defendants' motion to dismiss the claim.

Judge Diaz and Judge Murphy addressed motions in this case at different stages in the action and based on different rules. Judge Diaz concluded pursuant to Rule 12(b)(6) that the factual allegations in plaintiffs' complaints were legally sufficient so as to not preclude their claims for recovery of taxes. *See Barbour*, 37 N.C. App. at 692, 247 S.E.2d at 256 ("The test [for a] Rule 12(b)(6) [motion] is whether the pleading is legally sufficient."). Thereafter, Judge Murphy concluded pursuant to

Rule 56 that as to the issue of whether defendants were subject to the Occupancy Tax, plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes. *See* N.C. Gen. Stat. § 1-1A, Rule 56(c) (2013) (Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."). Based on our jurisprudence, Judge Murphy's ruling pursuant to Rule 56 was proper. Therefore, plaintiffs' argument is overruled.

*IV*

Lastly, plaintiffs argue that the trial court erred in dismissing their claims for accounting, conversion, and constructive trust. We disagree.

Again, "[w]e review a trial court's order granting summary judgment *de novo* . . . ." *Stanly Cnty. Bd. of Educ.*, 203 N.C. App. at 644, 692 S.E.2d at 472 (citation omitted).

*Accounting*

**[4]** In the complaints filed by Dare County, Mecklenburg County, and Wake County, each county's demand for an accounting was predicated upon the assertion that defendants were under a legal obligation based on their respective Occupancy Tax resolution or ordinance to collect and remit taxes to the County on the gross receipts derived by them as compensation or consideration for renting rooms in the county. Buncombe County's declaratory judgment action sought a ruling declaring "its affirmative rights to audit and collect occupancy tax obligations owed by these Defendants to [] Plaintiff."

In Issue I, we held that the enabling legislation enacted by our General Assembly as to Buncombe, Dare, Mecklenburg, and Wake counties allowing the counties to impose an occupancy tax by resolution did not encompass the transactions wherein consumers rented lodging accommodations through defendants' websites. Therefore, as plaintiffs cannot establish that defendants were under a legal obligation based on their individual occupancy tax resolutions to collect and remit taxes to the respective county, plaintiffs cannot prevail on their demands for accounting. Accordingly, we overrule plaintiffs' argument and affirm the trial court's ruling dismissing plaintiffs' demand for accounting.

*Conversion*

**[5]** First, we note that while claims of conversion were asserted in the complaints of Dare County, Mecklenburg County, and Wake County,

the trial court addressed only Mecklenburg County's conversion claim in the trial court's summary judgment order.

On 19 November 2007, the trial court granted defendants' 12(b)(6) motion to dismiss the conversion claims brought by plaintiffs Buncombe County, Dare County, and Wake County. No appeal was taken by Buncombe County, Dare County, and Wake County from these dismissals.

On 14 January 2008, Mecklenburg County filed its complaint asserting a claim for conversion. In its complaint, Mecklenburg County alleged the following:

> Defendants, upon information and belief, keep the difference between the amount of Tax charged to the public and the amount of Tax remitted to the hotel, motel, or inn, which then remits this lower tax amount to the County. At all times herein mentioned, Defendants wrongfully possessed and/or controlled the monies which constitute this difference between the amount of Tax charged to the public and the amount of Tax remitted to the County. Defendants have converted or taken these Tax monies for their own use and benefit, thereby permanently depriving the County of the use and benefit thereof.

Following the assignment of Mecklenburg County's complaint to the business court and the consolidation of these actions, both plaintiffs and defendants filed motions for summary judgment. The trial court addressed only Mecklenburg County's claim for conversion in its summary judgment order and dismissed the claim.

"In North Carolina, conversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986) (citation omitted).

> The general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property. Therefore, two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant.

*Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2008) (citation and quotations omitted).

"[T]he general rule is that money may be the subject of an action for conversion only when it is capable of being identified and described." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 528, 723 S.E.2d 744, 750 (2012) (citation omitted).

> The requirement that there be earmarked money or specific money capable of identification before there can be a conversion has been complicated as a result of the evolution of our economic system. Recognizing this reality, numerous courts around the country have adopted rules requiring the specific identification of a sum of money, rather than identification of particular bills or coins.

*Id.* at 528-29, 723 S.E.2d at 750 (citations and quotations omitted). "In the context of this conversion claim, we conclude that funds transferred electronically may be sufficiently identified through evidence of the specific source, specific amount, and specific destination of the funds in question." *Id.* at 529, 723 S.E.2d at 750-51 (addressing a claim involving transfers of funds in specific dollar amounts totaling approximately $888,000.00).

Here, Mecklenburg County's conversion claim is not one for a specific amount of taxes alleged due, much less particular bills and coins; rather, Mecklenburg County's claim is for a category of monies allegedly owed, taxes. Even reading *Variety Wholesalers, Inc.*, broadly to presume that in the context of any conversion claim where funds are transferred electronically the establishment of the funds' specific source, specific amount, and specific destination is sufficient to connote identification, Mecklenburg County's complaint fails to allege such requirements. *See id.*; *see also State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, *57*, *571 S.E.*2d 836, 844 (2002) (holding the evidence supported the conversion claim where the spouse of the decedent, acting as an administratix, failed to properly distribute the decedent's share of three $75,000.00 certificates of deposit as a portion of his estate). Therefore, we see no error in the trial court's dismissal of Mecklenburg County's conversion claim.

*Constructive Trust*

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

*Variety Wholesalers, Inc.*, 365 N.C. at 530, 723 S.E.2d at 751 (citation omitted).

Here, plaintiffs have been unable to establish any genuine issue of material fact as to whether defendants have retained monies collected from the rental of accommodations in the respective counties which were "acquired through fraud, breach of duty or some other circumstance making it inequitable for [defendants] to retain it[.]" *Id.* As such, summary judgment was appropriate. Accordingly, we affirm the trial court's dismissal of plaintiffs' claims seeking imposition of a constructive trust.

Affirmed.

Judges McGEE and STROUD concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 AUGUST 2014)

| | | |
|---|---|---|
| BRAWLEY v. ELIZABETH TOWNES HOMEOWNERS ASS'N, INC.<br>No. 14-135 | Iredell<br>(13CVS1289) | Affirmed |
| ESTATE OF SCURLOCK v. WELLS FARGO HOME MTGE., INC.<br>No. 13-1254 | Durham<br>(12CVS5773) | Affirmed |
| FOSS v. MILLER<br>No. 13-1451 | Iredell<br>(05CVD2831) | Affirmed in Part;<br>Reversed and<br>Remanded in Part |
| HARRIS v. BALLANTINE<br>No. 13-1041 | Guilford<br>(12CVS5643) | Vacated and Remanded |
| HOMETRUST BANK v. TSIROS<br>No. 14-267 | Buncombe<br>(12CVS5768) | Reversed in part;<br>affirmed in part |
| IN RE C.A.<br>No. 13-1468 | Wake<br>(12JT137-138) | Affirmed |
| IN RE C.D.P.<br>No. 13-1438 | Wake<br>(09JB532) | Reversed and<br>Remanded |
| IN RE C.E.C.B.<br>No. 14-164 | New Hanover<br>(10JT159-161) | Affirmed |
| IN RE H.S.<br>No. 14-292 | Swain<br>(10JT28-30) | Affirmed |
| IN RE J.D.G.<br>No. 14-117 | Randolph<br>(13JB23) | Affirmed |
| IN RE K.B.J.N.<br>No. 14-352 | Mecklenburg<br>(12JT308-309) | Affirmed in Part;<br>Remanded in Part |
| IN RE K.H.<br>No. 14-211 | Guilford<br>(12JA42-44) | Affirmed |
| IN RE K.M.D.<br>No. 14-370 | Surry<br>(12JT25) | Affirmed |
| IN RE K.R.M.<br>No. 14-248 | Cumberland<br>(10JT89-90) | Affirmed |
| IN RE M.S.<br>No. 14-348 | Forsyth<br>(11JT216) | Affirmed |

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| IN RE S.B.O.<br>No. 14-299 | Brunswick<br>(12JT09-11) | Affirmed |
| IN RE W.J.B.<br>No. 14-351 | Rutherford<br>(12JT7) | Affirmed |
| JUSTICE v. MAYES<br>No. 13-1216 | McDowell<br>(11CVS1014) | Affirmed |
| K2 ASIA VENTURES v. TROTA<br>No. 13-1376 | Forsyth<br>(09CVS2766) | Affirmed |
| LAWS v. LAWS<br>No. 14-55 | Alamance<br>(03CVD2839) | Affirmed |
| PACKERS PRINTING & PUBL'G CO., INC. v. ANAJET, LLC<br>No. 13-1449 | Columbus<br>(13CVS675) | Affirmed |
| STATE v. BLANKS<br>No. 14-282 | Bladen<br>(12CRS50891) | No prejudicial error |
| STATE v. BROWN<br>No. 14-278 | New Hanover<br>(13CRS54532) | No Error |
| STATE v. BUSTLE<br>No. 14-65 | Mecklenburg<br>(10CRS227936) | No Error |
| STATE v. GRAHAM<br>No. 13-1459 | Durham<br>(11CRS55324)<br>(11CRS55331) | No Error |
| STATE v. HALL<br>No. 13-1411 | Robeson<br>(10CRS50185-86) | No Error |
| STATE v. HARRIS<br>No. 13-1332 | Mecklenburg<br>(12CRS219403)<br>(12CRS219404)<br>(12CRS39332) | No Error |
| STATE v. HONEYCUTT<br>No. 13-1307 | Mecklenburg<br>(10CRS250187-89)<br>(12CRS20133839)<br>(12CRS201341) | No Error |
| STATE v. KEANE<br>No. 14-171 | Wake<br>(08CRS76979) | No Error |
| STATE v. KELLY<br>No. 13-1383 | Buncombe<br>(13CRSS1609) | No Error |

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|---|---|---|
| STATE v. LEWIS<br>No. 14-20 | Cabarrus<br>(08CRS7351) | No Error |
| STATE v. LUCAS<br>No. 14-245 | Guilford<br>(11CRS81948) | Reversed and Remanded |
| STATE v. MATTHEWS<br>No. 14-109 | Mecklenburg<br>(11CRS219314) | No Error |
| STATE v. McGIRTH<br>No. 13-1172 | Gaston<br>(11CRS7117) | No Error |
| STATE v. McKINNON<br>No. 13-1446 | Buncombe<br>(12CRS984-985) | No Error in Buncombe County, File No. 12 CRS 984; Judgment Arrested in Buncombe County, File No. 12 CRS 985 |
| STATE v. McNEILL<br>No. 14-238 | Cumberland<br>(12CRS58034) | No Error |
| STATE v. McPHAIL<br>No. 13-1182 | Mecklenburg<br>(11CRS218388)<br>(11CRS218434) | No Error in Part; Vacated and Remanded in Part. |
| STATE v. MURRAY<br>No. 13-1207 | Clay<br>(10CRS188)<br>(10CRS190) | No Prejudicial Error. |
| STATE v. NEIL<br>No. 14-201 | Nash<br>(11CRS3612)<br>(11CRS51708)<br>(11CRS51710) | No Error |
| STATE v. NEW<br>No. 14-495 | Mecklenburg<br>(12CRS224818-19) | No Error |
| STATE v. POSTELL<br>No. 13-1390 | Lincoln<br>(11CRS50314-15) | No Error |
| STATE v. ROYALL<br>No. 14-363 | Yadkin<br>(13CRS348)<br>(13CRS50470) | No Error |
| STATE v. SCHWENDEMAN<br>No. 14-159 | Onslow<br>(10CRS57151) | No Error |
| STATE v. SCRUGGS<br>No. 14-22 | Macon<br>(12CRS51062)<br>(12CRS702006) | No Error |

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|---|---|---|
| STATE v. SMITH<br>No. 14-34 | Johnston<br>(82CRS5044-47) | Affirmed |
| STATE v. SMITH<br>No. 14-296 | Guilford<br>(12CRS87589) | No Error |

**COMMERCIAL PRINTING COMPANY**
**PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS**