236 N.C. App.—No. 2 Pages 248-507

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 15, 2016

MAILING ADDRESS: The Judicial Department
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OF

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 5 SEPTEMBER 2014 AND 16 SEPTEMBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Prosecutor's arguments—ruined victim's childhood—credibility of victim—The trial court did not err in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile case by failing to intervene ex mero motu during the prosecutor's challenged comments. The prosecutor's comment to the effect that defendant had ruined the victim's childhood represented a reasonable inference drawn from the record. Further, the comments were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing the victim because the record did not contain corroborative physical evidence. **State v. Harris, 388.**

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defensive force in the commission of a felony under N.C.G.S. § 14-51.4. That statute only applies to offenses committed on or after 1 December 2011 and the offense at issue in this case happened in 2006. The State, defendant, and the trial court all operated under the erroneous assumption that the law applied to defendant's offense. The instruction did not amount to plain error because defendant failed to show that the instruction had a probable impact on the verdict, as opposed to possibly influencing a single juror. **State v. Rawlings, 437.**

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SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2016:

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

Opinions will be filed on the first and third Tuesdays of each month.

THOMAS F. ADCOX, EMPLOYEE, MOVANT
v.
CLARKSON BROTHERS CONSTRUCTION COMPANY, EMPLOYER, AND UTICA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA14-313

Filed 16 September 2014

Workers' Compensation—attorney fees—award final—not specific assignment of error

The trial court erred in a workers' compensation case by finding that the Full Industrial Commission denied plaintiff's request for attorneys' fees in its 25 November 2008 opinion and award and, as a result, erred in dismissing his appeal on the grounds of res judicata. The deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission.

Appeal by plaintiff from order entered 17 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 August 2014.

R. James Lore, Attorney at Law, by R. James Lore; and Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by Kari L. Schultz and M. Duane Jones, for defendants-appellees.

GEER, Judge.

In a 27 March 2008 opinion and award, the deputy commissioner approved an attorneys' fee of 25% of the attendant care compensation awarded to plaintiff Thomas F. Adcox for his wife's services. Although defendants Clarkson Brothers Construction Company and Utica Mutual Insurance Company asked the Full Commission to reverse this award, the Commission, in a 25 November 2008 opinion and award, affirmed the deputy commissioner's opinion and award with modifications only as to the amount and rate of pay for the attendant care -- the Commission did not specifically address the 25% attorneys' fee award.

Subsequently, plaintiff filed a motion seeking an order requiring that the 25% be paid directly to plaintiff's counsel in order to alleviate the bookkeeping burden on plaintiff's wife. Defendants contended -- and the Commission agreed in an order entered 10 December 2012 -- that the Commission's November 2008 opinion and award, by not specifically mentioning the attorneys' fees, necessarily denied plaintiff's attorneys' request for approval of a fee. Plaintiff appealed to the superior court, and the trial court dismissed his appeal on the grounds that the Commission had not, in its December 2012 order, denied a request for fees.

We cannot agree with the Commission's and defendants' position that the November 2008 opinion and award denied plaintiff's attorneys' request for fees. Defendants' contention that the Commission *sub silentio* reversed the deputy commissioner's award of fees is not tenable and is inconsistent with controlling authority. The Commission's silence in November 2008 on the issue of the deputy commissioner's award of attorneys' fee can be interpreted in only one of two ways: either the Commission affirmed the deputy commissioner or the Commission did not address the issue.

In either event, defendants bore the burden to appeal that opinion and award to this Court. When they failed to do so, the deputy commissioner's approval of an attorneys' fee became the law of the case, and the Commission had no authority to declare, in December 2012, that the original panel had reversed the deputy commissioner and denied plaintiff's request for approval of an attorneys' fee. Consequently, we reverse and remand to the trial court for further remand to the Commission for reconsideration of plaintiff's motion.

Facts

On 28 February 1983, while employed by defendant Clarkson, plaintiff suffered an admittedly compensable head injury that left him permanently and totally disabled. Defendant Clarkson and defendant Utica National Insurance Group agreed to compensate plaintiff for his disability at a weekly rate of $248.00.

In February 2003, the parties filed a settlement agreement pursuant to which defendants agreed to pay plaintiff a lump sum of $250,000.00 in reimbursement for attendant care services provided by plaintiff's family members, including his wife Joyce Adcox, from 28 February 1983 until 3 February 2003. The Commission approved a 25% attorneys' fee for plaintiff's counsel, which was deducted from the sum due plaintiff and paid directly to plaintiff's counsel. Thereafter, defendants authorized and

began providing plaintiff with 60 hours of in-home professional attendant care services per week, provided by Kelly Home Health Services.

In 2007, Mrs. Adcox retired, and plaintiff moved to have defendants pay Mrs. Adcox directly for attendant care services instead of Kelly Services. The matter was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. On 27 March 2008, the deputy commissioner entered an opinion and award allowing Mrs. Adcox to assume attendant care responsibilities seven days a week at a rate of $188.00 per day. In his award, the deputy commissioner ordered that "[a]n attorneys' fee of 25% of the attendant care compensation is approved for the Plaintiff's counsel."

Both parties appealed to the Full Commission. On 25 November 2008, the Full Commission entered an opinion and award affirming the deputy commissioner's opinion and award "with modifications including the amount of attendant care and rate of pay for said care." The Full Commission allowed Mrs. Adcox to assume attendant care responsibilities seven days per week for 16 hours per day at a rate of $10.00 per hour. The opinion and award did not mention the 25% attorneys' fee award to plaintiff's counsel. Plaintiff appealed to this Court for reasons unrelated to the 25% attorneys' fee award. Defendants chose not to appeal. On 8 December 2009, this Court affirmed the 25 November 2008 opinion and award. *See Adcox v. Clarkson Bros. Constr. Co.*, 201 N.C. App. 446, ___ S.E.2d ___, 2009 WL 4576065, 2009 N.C. App. LEXIS 2308 (2009) (unpublished).

On 12 July 2012, plaintiff filed a motion with the Full Commission requesting that it direct payment of the attorneys' fees to plaintiff's counsel. The motion explained that "Mrs. Adcox is responsible for her own income tax record-keeping and reporting of the attendant care income she receives. For tax purposes the failure by the carrier to direct separate checks makes it appear as though Mrs. Adcox's attendant care income is higher than it actually is." Plaintiff requested that defendants be ordered to deduct 25% of the compensation payable to Mrs. Adcox to be paid directly to plaintiff's counsel because the record keeping "has become burdensome for Mrs. Adcox."

A new panel of commissioners heard plaintiff's 2012 motion. Commissioners Linda Cheatham and Tammy R. Nance replaced Commissioners Dianne C. Sellers and Laura Kranifeld Mavretic from the original 2008 panel. Commissioner Danny Lee McDonald served on both panels. On 10 December 2012, the Full Commission entered an order denying plaintiff's motion.

The Commission found that both parties had appealed Deputy Commissioner DeLuca's opinion and award to the Full Commission. Regarding defendants' appeal, the Commission noted that although defendants had not specifically assigned error to the attorneys' fee award in their form 44, they had generally challenged each paragraph of the deputy's award and had addressed the 25% attorneys' fee award in their brief to the Commission. The Commission then concluded:

> The Full Commission's Opinion and Award filed on November 25, 2008 directs Defendants to pay Mrs. Adcox for attendant care services from the date of the filing of the Opinion and Award at a rate of $10.00 per hour, 7 days per week, 16 hours per day. The Opinion and Award does not include an award of attorneys' fees for Plaintiff's counsel.
>
> Plaintiff appealed the Full Commission's decision to the North Carolina Court of Appeals. Based upon a review of the Court's Opinion, it does not appear that Plaintiff assigned error to the Full Commission's decision in its Opinion and Award not to award an attorneys' fee to Plaintiff's counsel.
>
> As Plaintiff seeks to have the Full Commission direct Defendants to deduct and pay directly to counsel for Plaintiff attorneys' fees which have not been awarded by the Full Commission, Plaintiff's Motion to Direct Payment of Attorneys' Fees to Plaintiff's Counsel is hereby DENIED.

Commissioner McDonald -- the one commissioner who had served on the 25 November 2008 panel -- dissented without opinion.

On 12 December 2012, plaintiff appealed the order to superior court pursuant to N.C. Gen. Stat. § 97-90. On 19 June 2013, defendants moved to dismiss plaintiff's appeal pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. On 25 June 2013, plaintiff moved to strike defendants' motion to dismiss for lack of standing.

After a 26 August 2013 hearing, the trial court entered an order dismissing plaintiff's appeal on 17 September 2013. The trial court took judicial notice of the 25 November 2008 opinion and award and the 10 December 2012 order of the Full Commission. It found in pertinent part:

> (2) that the December 10, 2012 Order from which Movant now purportedly appeals did not deny any attorneys fees, but simply clarified that the Commission

> had not awarded attorneys fees in the November 25, 2008 Order;
>
> (3) that Movant's litigated request for attorney fees was denied on November 25, 2008;
>
> (4) that Movant's current request for attendant care attorney fees per N.C. Gen. Stat. § 9-90 [sic] should be barred by § 97-90 and the doctrine of *res judicata*;
>
> (5) that the November 25, 2008, Order of the North Carolina Industrial Commission and the parties' appeal therefrom to the North Carolina Court of Appeals, represented a final judgment on the merits as to the issue of any attorney fee based on a percentage of attendant care medical benefits provided to Movant pursuant to North Carolina General Statutes § 97-25, which is the only claim at issue in this litigation[.]

The trial court, therefore, dismissed plaintiff's appeal with prejudice. Plaintiff timely appealed to this Court.

Discussion

Plaintiff first contends that defendants lacked standing to oppose both his motion to the Full Commission and his appeal from the 10 December 2012 decision of the Full Commission to superior court. As explained by this Court in *Diaz v. Smith*, ___ N.C. App. ___, ___, 724 S.E.2d 141, 144 (2012) (internal citations and quotation marks omitted):

> The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. Under N.C. Gen. Stat. § 1–271 (2009), "[a]ny party aggrieved" is entitled to appeal in a civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Plaintiff argues that because his motion to direct payments to plaintiff's counsel does not affect the total amount to be paid by defendants, defendants are not an "aggrieved" party. Defendants counter that they

are an "aggrieved" party because (1) "if Plaintiff's Counsel is awarded attorney's fees as a result of this appeal, Defendants would either be required to pay an additional 25% in the form of attorneys [sic] fees, or fund Plaintiff's Counsel's attorney's fees by reducing the amount of compensation to Mrs. Adcox, thereby subjecting Defendants to liability for compensation owed to Mrs. Adcox, as mandated in the Opinion and Award" and (2) "allowing a plaintiff's counsel to have a pecuniary interest in an authorized medical provider could create a conflict between his obligations to represent his client and a defendant's obligation to manage medical treatment pursuant to N.C. Gen. Stat. § 97-25."

Because of our resolution of this appeal, we need not decide whether defendants have standing in this case to challenge an award of attorneys' fees to plaintiff's attorney that does not affect the total amount payable by defendants. We express no opinion whether defendants' contentions are sufficient to make them aggrieved parties for purposes of an appeal.

Plaintiff's primary argument on appeal is that the trial court erred in finding that the Full Commission denied his request for attorneys' fees in its 25 November 2008 opinion and award and, as a result, erred in dismissing his appeal on the grounds of res judicata. Plaintiff argues that the deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. Alternatively, plaintiff argues that the Commission affirmed the award of attorneys' fees. We review these questions of law de novo. *McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 148, 590 S.E.2d 311, 312 (2004).

Rule 701 provides:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. *Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3)*. . . .
>
> (3) *Particular grounds for appeal not set forth in the application for review shall be deemed abandoned,*

> and argument thereon shall not be heard before the Full Commission.

(Emphasis added.)

This Court has emphasized that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). "Such notice is required for the appellee to prepare a response to an appeal to the Full Commission." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 252, 652 S.E.2d 713, 717 (2007). Thus, "the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned." *Id.* at 249, 652 S.E.2d at 715.

Defendants argue that they properly appealed the issue of attorneys' fees to the Full Commission because they specifically listed Deputy Commissioner DeLuca's Award, which included the award of attorneys' fees, in the third assignment of error on their Form 44 Application for review:

> Deputy Commissioner John B. DeLuca's Award, dated March 27, 2008, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

This assignment of error is similar to the appellant's assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005), which asserted generally that several rulings of the trial court were " 'erroneous as a matter of law.' " In concluding that this assignment of error was insufficient under the 2005 version of Rule 10 of the Rules of Appellate Procedure, this Court held that the "assertion that a given finding, conclusion, or ruling was 'erroneous as a matter of law' " violated Rule 10 because it "completely fail[ed] to *identify* the issues actually briefed on appeal." *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. Instead, " '[s]uch an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment -- like a hoopskirt -- covers everything and touches nothing.' " *Id.* at 783, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)).

Similarly, here, defendant's assignment of error " 'covers everything and touches nothing.' " *Id.* (quoting *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409). Although it states a general objection to each paragraph of the award (without specifically mentioning the attorneys' fee award), it does not state the basis of any objection to the attorneys' fee award with sufficient particularity to give plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response. *See Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910.

Defendants' third assignment of error also is in stark contrast to defendants' fourth assignment of error: "Deputy Commissioner John B. DeLuca's Award dated March 27, 2008, in that it failed to award attorney fees as requested by Defendants pursuant to §97-88.1." In this assignment of error, defendants indicated specifically which particular aspect of the award they challenged. Significantly, defendants did not include a similar assignment of error for the award of attorneys' fees challenged here.

Defendants nonetheless contend that they met the particularity requirement by addressing the question of attorneys' fees in their brief to the Full Commission, citing *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff argued that, pursuant to *Roberts*, the defendant's failure to file a Form 44 constituted an abandonment of defendants' grounds for appeal to the Full Commission, and therefore the Commission erred by hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. This Court disagreed, reasoning that

> unlike the appealing plaintiff in *Roberts*, defendants in the present case complied with Rule 701(2)'s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission. Additionally, plaintiff does not argue that she did not have adequate notice of defendants' grounds for appeal. Plaintiff asserts only that defendants' failure to file a Form 44 should have been deemed an abandonment of defendants' appeal. Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error.

Id. at 368-69, 672 S.E.2d at 753-54.

In other words, failure to file a Form 44 does not automatically result in a mandatory dismissal of the appeal by the Industrial Commission -- it is within the discretion of the Commission whether to deem the grounds for appeal waived. In determining whether the Commission abused its discretion in deciding not to deem an issue on appeal waived, this Court in *Cooper* considered whether the appellant provided the appellee with adequate notice of the grounds for appeal through other means such as addressing the issue in its brief to the Full Commission.

Here, unlike in *Cooper*, the Commission did not explicitly address the issue purportedly raised by defendants on appeal in its opinion and award. Under *Cooper*, it would not have been an abuse of discretion for the Commission to address the attorneys' fee issue, but it is unclear whether the Commission considered the issue or not. Although defendants contend that the "Full Commission Award removed the appealed prior award of attendant care attorney fees and awarded attendant care compensation to be paid directly to Mrs. Adcox[,]" nothing in the Commission's Opinion and Award indicates that it was "remov[ing]" the attorneys' fee award. Defendants have cited no authority -- and we have found none -- supporting their position that silence by the Commission regarding a determination by the deputy commissioner can amount to reversal.

In fact, this Court has already rejected such a contention in *Polk v. Nationwide Recyclers, Inc.*, 192 N.C. App. 211, 664 S.E.2d 619 (2008). In *Polk*, the plaintiff argued that the Full Commission failed to consider all the evidence presented because, unlike the deputy commissioner's order, the Full Commission did not make findings regarding all the issues presented on appeal. *Id.* at 218, 664 S.E.2d at 624. The Court rejected the plaintiff's argument, reasoning:

> [I]n this case, the Full Commission's opinion states outright that it "affirms the Opinion and Award of Deputy Commissioner Deluca *with modifications*." . . . That is, the Full Commission's opinion is not an order meant to stand on its own, but rather a modification of the deputy commissioner's order. As plaintiff herself states, the facts at issue were included in the deputy commissioner's order. We see no reason to require that such an order restate all the findings of fact and conclusions of law from the original order that need no modification. Considering that defendants filed an appeal containing thirty-two alleged errors, it is not surprising that the Full Commission did not address each individually.

Id. This Court assumed with regard to the omitted findings that the Commission wished to affirm the deputy commissioner's opinion and award, nothing else appearing in the opinion and award to the contrary. *Id.* at 218-19, 664 S.E.2d at 624.

Similarly, here, the Full Commission's opinion and award states that it "affirms the Opinion and Award of Deputy Commissioner DeLuca with modifications including the amount of attendant care and rate of pay for said care." As such, the Full Commission's opinion "is not an order meant to stand on its own." *Id.* at 218, 664 S.E.2d at 624. It is undisputed that the deputy commissioner awarded attorneys' fees to plaintiff's counsel, and there is no indication that the Commission intended to modify that award.

Indeed, plaintiff correctly notes that under N.C. Gen. Stat. § 97-90(c) (2013), the statute authorizing the award of attorneys' fees in this instance, any decision by the Commission to *deny* attorneys' fees must be supported by specific findings. N.C. Gen. Stat. § 97-90(c) provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

The lack of findings in the November 2008 opinion and award to justify a denial of attorneys' fees is contrary to defendants' contention and the Commission's assumption that the Commission in 2008 intended to deny the fee request.

In short, based on a review of the November 2008 opinion and award, either the Commission intended to affirm the deputy commissioner's award, or, alternatively, the Full Commission did not consider the issue -- whether through inadvertence or because it deemed the matter waived. Nothing in the opinion and award suggests and no authority exists that we can find, which would permit us to conclude that the Commission reversed the deputy commissioner's award and silently denied plaintiff's counsel the 25% attorneys' fee.

Assuming, without deciding, that defendants had standing to challenge the deputy commissioner's award of attorneys' fees, the burden

was on defendants to obtain a ruling from the Full Commission. When the Full Commission failed to explicitly reverse the deputy commissioner's award, defendants could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court. *See Hurley v. Wal-Mart Stores, Inc.*, ___ N.C. App. ___, ___, 723 S.E.2d 794, 798 (2012) (holding where Commission failed to address defendants' appeal of deputy commissioner's award of attorneys' fees to plaintiff's counsel in its opinion and award, defendants properly appealed to this Court after Commission denied their motion to reconsider).

This Court has held that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). Here, when defendants failed to appeal the Full Commission's 25 November 2008 opinion and award, defendants abandoned any contention that the ruling was erroneous, and the deputy commissioner's award of attorneys' fees became the law of the case.

Under the law of the case doctrine, defendants could not attack and the Commission could not reverse the award of attorneys' fees. *See id.* (holding that "since [defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of the case, and defendant "was barred from relitigating that issue in subsequent proceedings").

Because the November 2008 opinion and award left the deputy commissioner's award standing, plaintiff's 12 July 2012 motion to direct payment of attorneys' fees to plaintiff's counsel was not, as defendants contend, a motion to re-litigate the substantive issue whether attorneys' fees had been awarded by the Full Commission. Rather, it was simply a procedural motion regarding the way in which the awarded fees would be paid. The Commission's December 2012 order, as a result, had the effect of improperly denying plaintiff's attorneys' fees. Consequently, plaintiff was entitled to appeal the December 2012 order to superior court pursuant to N.C. Gen. Stat. § 97-90, and the superior court erred in dismissing plaintiff's appeal.

Defendants, nevertheless, contend that the Commission and the superior court did not have authority to award plaintiff's counsel fees under the rule set forth in *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003). This argument -- addressing the merits of plaintiff's request for attorneys' fees -- is not properly before this Court because

the award of attorneys' fees is the law of the case. *See Barrington v. Emp't Sec. Comm'n*, 65 N.C. App. 602, 605, 309 S.E.2d 539, 541 (1983) (declining to consider appellant's legal arguments when bound by law of the case). Defendants' arguments should have been raised in the first appeal to this Court. Nothing in this opinion expresses any view regarding defendants' arguments under *Palmer*.

We, therefore, reverse and remand to the superior court for remand to the Commission. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 opinion and award, the Commission must reconsider its ruling on that motion.

Reversed and remanded.

Judge STEELMAN concurs.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

COLLEGE ROAD ANIMAL HOSPITAL, PLLC; PHILLIP LANZI AND JAMIE LANZI, PLAINTIFFS

v.

JON KEDRICK COTTRELL AND JULIE COTTRELL, DEFENDANTS

No. COA14-29

Filed 16 September 2014

1. Loans—contribution—loan current—no liability under guaranty agreement

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs on the basis of a contribution theory. The loan at issue was current so defendants were not liable for any amount owed to Bank of America under the loan agreement as a result of their signing the guaranty agreement.

2. Loans—capacity in which loan documents signed—genuine issue of material fact

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs. There was a genuine issue of

material fact concerning the capacity in which plaintiff Dr. Lanzi and defendant Dr. Cottrell signed the loan agreement.

3. Loans—unjust enrichment—express contract—relief governed by contract

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs on the theory of unjust enrichment. Unjust enrichment relief is not available in instances governed by an express contract. The loan agreement in this case, when read in conjunction with applicable principles of North Carolina law, fully governed the relationship between the parties concerning the extent, if any, to which they were liable for any indebtedness arising under that instrument.

Appeal by defendants from order entered 11 September 2013 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 5 June 2014.

Marshall, Williams & Gorham, LLP, by John L. Coble, for Plaintiffs.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Defendants.

ERVIN, Judge.

Defendants Jon Kedrick Cottrell and Julie Cottrell appeal from an order granting summary judgment in favor of Plaintiffs College Road Animal Hospital, Phillip Lanzi, and Jamie Lanzi, and ordering Defendants to pay 50% of all past due and future payments required under a loan obtained from Bank of America. On appeal, Defendants contend that the trial court erred by entering summary judgment in favor of Plaintiffs and, concomitantly, declining to enter summary judgment in their favor on the grounds that the Lanzis and the Cottrells were not principals under the loan and that the existence of an express contract between the parties precluded the maintenance of an action for unjust enrichment. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that summary judgment was improperly entered in favor of Plaintiffs, that summary judgment should have been entered in favor of Ms. Cottrell with respect to Plaintiffs' contribution claim, and that summary judgment should have been entered in favor of Defendants with respect to Plaintiffs' unjust enrichment claim; that the trial court's order should be reversed; and that this case should be remanded to

the New Hanover County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

In May of 2009, Dr. Cottrell purchased the 50% interest in College Road that had been previously owned by Dr. Robert Weedon. Prior to that date, Dr. Cottrell had been employed by College Road and operated its Carolina Beach location. After purchasing Dr. Weedon's interest, Dr. Cottrell was responsible for operating the Carolina Beach location while Dr. Lanzi was responsible for operating the College Road location.

On 16 September 2009, College Road obtained a $293,000 loan from Bank of America for the purpose of making capital improvements at the Carolina Beach location. According to the loan agreement, the "Borrower shall make all scheduled payments to Lender." In addition, "[e]ach Borrower and each Guarantor agree[d] that [their] obligation to make payments to [the] Lender on the Indebtedness under [the] Agreement [was] absolute and unconditional." The "dismissal, resignation or other withdrawal" from College Road's practice by "any licensed professional who is an owner or shareholder" was prohibited under the loan agreement. The list of incidents of default specified in the loan agreement included, in addition to a failure to make required payments, any failure to adhere to any of the other covenants set forth in that document.

Dr. Lanzi and Dr. Cottrell signed the loan agreement in the section designated for the signature of the borrower. In addition, the two men, along with their wives, executed the guaranty agreement. The loan agreement was modified on 11 March 2010 to increase the principal amount from $293,000 to $312,000, with final disbursement under the loan agreement having been made in December of 2010.[1]

On 17 May 2011, the Cottrells sent an email to Dr. Lanzi indicating that Dr. Cottrell was relinquishing his interest in College Road and defaulting on his agreement to purchase shares in Dr. Weedon's business. On 15 June 2011, Dr. Lanzi's attorney responded to the Cottrells' e-mail by accepting Dr. Cottrell's resignation and indicating that Dr. Lanzi did not wish to enter into an employer-employee relationship with Dr. Cottrell. On 20 July 2011, the Cottrells' attorney notified Bank of America that Dr. Cottrell was no longer affiliated with College Road and that the Cottrells

1. LaWe Holdings, LLC, an entity in which Dr. Lanzi and Dr. Weedon were involved, became involved in this series of transactions as an additional guarantor on 28 October 2009.

had terminated their personal guarantee with respect to any further advances made to or obligations incurred by College Road.

According to Dr. Lanzi, he and Dr. Cottrell understood that the two of them would contribute half of the funds needed to repay the loan. The actual payments under the loan agreement, however, were made by College Road, with the funds needed for the making of these payments having been derived from the operation of both the College Road and Carolina Beach locations. After the termination of Dr. Cottrell's relationship with the practice, College Road continued to make the required regular monthly payments, which totaled $74,165.80 at the time of the hearing in the trial court, without any contribution from Dr. Cottrell. Bank of America has never made any demand for payment upon Dr. Cottrell.

B. Procedural History

On 29 August 2012, Plaintiffs filed a complaint against Defendants alleging claims sounding in equitable contribution and unjust enrichment. On 27 September 2012, Defendants filed an answer in which they denied the material allegations of Plaintiffs' complaint. On 5 June 2013, Plaintiffs filed a motion seeking the entry of summary judgment in their favor that was accompanied by an affidavit executed by Dr. Lanzi. On 28 August 2013, Defendants filed a motion seeking the entry of summary judgment in their favor that was accompanied by an affidavit executed by Dr. Cottrell. On 11 September 2013, the trial court entered an order granting Plaintiffs' summary judgment motion, denying Defendants' summary judgment motion, ordering Defendants to pay $37,082.90, an amount that represented half of the monthly payments that had been made to Bank of America under the loan agreement between July 2011 and May 2013, and ordering Defendants to provide 50% of the funds used to make the remaining payments required under the loan agreement. Defendants noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"Summary judgment is proper when '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.' " *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 25 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). During the consideration of a motion for summary judgment:

> The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, "we review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

Id. at 26, 588 S.E.2d at 25-26. We will now utilize this standard of review in analyzing the validity of Defendants' challenges to the trial court's order.

B. Substantive Legal Analysis

1. Contribution Claim

[1] The first of the two theories upon which Plaintiffs based their claim against Defendants was that of contribution.[2] "Contribution is generally defined as 'the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear.' " *Irvin v. Egerton*, 122 N.C. App. 499, 501, 470 S.E.2d 336, 337 (1996) (alteration in original) (quoting 18 C.J.S. *Contribution* § 2, at 4 (1990)). Although "[i]t is a prerequisite to a claim for contribution that the party seeking contribution 'satisfy, by payment or otherwise, more than his just proportion of the common obligation or liability,' " *id.* (quoting 18 Am. Jur. 2d *Contribution* § 9, at 16 (1985)), this Court has determined that a plaintiff is "entitled to contribution" and has "satisfied more than his just proportion of that common obligation" when the "parties ha[d] a monthly obligation" and "each month . . . the plaintiff paid more than one-half of the monthly obligation." *Id.* As a result, a plaintiff seeking contribution-based relief is simply required to prove that the obligation exists, that the parties are both required to pay the obligation, and that one obligor has paid a portion of the obligation for which the other obligor was legally responsible. *Id.*; *see also Nebel v. Nebel*, 223 N.C. 676, 686, 28 S.E.2d 207, 214 (1943) (stating that

2. In view of the fact that the trial court did not specifically delineate whether it found in favor of Plaintiffs on the basis of a contribution theory, an unjust enrichment theory, or both, we must analyze the validity of both of the theories set out in Plaintiffs' complaint in order to determine whether the trial court's order should be affirmed or reversed.

"[t]he right to sue for contribution does not depend upon a prior determination that the defendants are liable"); N.C. Gen. Stat. § 25-3-116(b) (providing that "a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law"). As a result of the fact that the trial court's order awarded relief against both Dr. Cottrell and Ms. Cottrell, we must examine their liability under a contribution theory separately.

a. Ms. Cottrell's Liability

As we have already noted, a litigant's ability to obtain relief on the basis of a contribution theory assumes that the plaintiff and the defendant are both obligated to make the underlying payment. For that reason, Plaintiffs were required to show that Ms. Cottrell was liable under the loan agreement in order to obtain relief from her based upon a contribution theory. We do not believe that Plaintiffs have made the required showing.

The only signatures appearing in the portion of the loan agreement at which the borrower or borrowers were supposed to sign were those of Dr. Lanzi and Dr. Cottrell, who were the sole owners of interests in College Road. On the other hand, a careful review of the record clearly establishes that Ms. Cottrell did not sign the loan agreement in the location designated for the borrowers and that the only location in the loan agreement at which the signatures of either Ms. Lanzi or Ms. Cottrell appear is at the conclusion of the guaranty agreement. As a result, an examination of the loan agreement reveals that Ms. Cottrell never agreed to shoulder any obligations under that document except those set out in the guaranty agreement.

"A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance." *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980). While "a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default," "[a] guarantor's duty of performance is triggered at the time of the default of another." *Id.* at 52-53, 269 S.E.2d at 122 (citations omitted). Consistently with this fundamental legal principle, the guaranty agreement contained in the loan agreement provides, in pertinent part, that the guarantors "shall immediately pay to [the] Lender the outstanding balance of all Indebtedness" "[i]f [the] Borrower fails to pay all or any part of any indebtedness when due."

According to the undisputed evidence contained in the record, the loan at issue in this case is current. For that reason, neither Ms. Lanzi nor Ms. Cottrell are currently liable for any amount owed to Bank of America under the loan agreement. Thus, Ms. Cottrell is not jointly obligated with the other parties to pay the amount owed to Bank of America under the loan agreement. As a result, the trial court erred by entering summary judgment in favor of Plaintiffs and against Ms. Cottrell on the basis of a contribution theory.

b. Guarantors' Liability

Secondly, Plaintiffs argue that Dr. Lanzi and Dr. Cottrell were primarily liable on the note given the presence of their signatures on the loan agreement in the block marked for borrowers and were, simultaneously, secondarily liable for the amount owed under the loan as evidenced by their signatures at the conclusion of the guaranty agreement. Although Plaintiffs appear to suggest that the joint obligation required for the successful assertion of a contribution claim can arise from Dr. Cottrell's status as a guarantor, we do not find this contention persuasive in light of the principle that "[a] guarantor's duty of performance is triggered at the time of the default of another," *id.* at 52, 269 S.E.2d at 122, and the fact that the guaranty agreement at issue in this case provides that the "Guarantor shall immediately pay to Lender the outstanding balance of all Indebtedness" if "Borrower fails to pay all or any part of any Indebtedness when due." As a result, given that a guaranty agreement constitutes nothing more than a "promise to pay the debt of another at maturity if not paid by the principal debtor," *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 220, 250 S.E.2d 587, 593 (1978), and the fact that "[t]he right to sue upon an absolute guaranty of payment arises immediately upon the failure of the principal debtor to pay at maturity," *id.*, the parties to the present guaranty agreement have no current obligation to make any payment to Bank of America relating to the loan agreement. As a result, to the extent that the trial court's decision to grant summary judgment in Plaintiffs' favor rested upon the understanding that Dr. Cottrell's decision to sign the guaranty agreement rendered him jointly liable on the underlying obligation created by the loan agreement, that decision constituted an error of law.[3]

3. In their brief, Plaintiffs emphasize the fact that Dr. Cottrell's withdrawal from the practice constituted an incident of default under the loan agreement. Although Plaintiffs' assertion is clearly correct as a factual matter, the record contains no indication that Bank of America has actually declared the loan in default. In addition, the liability of the guarantors is triggered by nonpayment rather than the occurrence of any incident of default. As a result, the fact that Dr. Cottrell's withdrawal from the practice constituted an incident of default under the loan agreement has no bearing on the proper resolution of this case.

c. Individual Liability

[2] The principal argument advanced in Plaintiffs' brief in support of the trial court's order is a contention that, since Dr. Lanzi and Dr. Cottrell signed the loan agreement in their individual capacities, they are co-borrowers under the loan agreement and are jointly obligated to repay the loan. According to Defendant, however, Dr. Lanzi and Dr. Cottrell signed the loan agreement as agents of College Road instead of in their individual capacities. As a result of the fact that the record demonstrates the existence of a genuine issue of material fact concerning the capacity in which Dr. Lanzi and Dr. Cottrell signed the loan agreement, we conclude that the trial court erred by granting summary judgment in favor of Plaintiffs and against Dr. Cottrell with respect to the contribution issue and that this issue needs to be decided after a full trial on the merits.

According to N.C. Gen. Stat. § 25-3-402(b):

> (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.
>
> (2) Subject to subsection (c) of this section, if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity, or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

Although the Supreme Court has clearly stated that, "when the issue to be decided is the intent of a party, the general rule is that it is a question of fact to be determined by a jury," *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 663, 370 S.E.2d 375, 388 (1988), that rule is modified in cases involving negotiable instruments by N.C. Gen. Stat. § 25-3-402(b), which provides that the signatory to a negotiable instrument is liable to a holder in due course unless his or her signature unambiguously shows that it was made in the person's representative capacity or the represented party is not named in the instrument and that the signatory of such an instrument is liable to anyone else other than a holder in due

course unless he or she demonstrates that the original parties did not intend for the representative party to be liable on the instrument. As a result, in cases in which the party seeking to hold a signatory liable on the instrument is a person or entity other than a holder in due course,[4] "[t]he presumption is that nothing else appearing, a person who signs his or her name on the right-hand bottom corner of the face of a promissory note is a maker of that note and is primarily liable thereon." *Federal Land Bank of Columbia v. Lieben*, 86 N.C. App. 342, 346, 357 S.E.2d 700, 703 (1987). However, "this presumption may be rebutted by parol evidence that the signer of the note is a surety and that the creditor knew at the time he received the note that the signer of the note was signing as a surety." *Id.* Thus, although "one who places his unqualified signature on an instrument as maker or indorser will not be able to escape liability as such by a mere assertion that he intended to sign only as the representative of a corporation of which he is an officer or director," *Keels v. Turner*, 45 N.C. App. 213, 217, 262 S.E.2d 845, 847, *disc. review denied*, 300 N.C. 197, 269 S.E.2d 264 (1980), Dr. Cottrell is entitled to attempt to rebut the presumption that he signed the note as a maker with parol or other evidence.

As Plaintiffs correctly note, the signatures of Dr. Lanzi and Dr. Cottrell on the loan document appear in the section in which the borrower or borrowers were supposed to sign and do not unambiguously reflect that the two men signed the loan agreement in a solely representative, rather than an individual, capacity. In addition, Dr. Lanzi asserted in his affidavit that the loan agreement was executed by Dr. Cottrell and himself "with the understanding and agreement that [the parties] would be responsible for contributing one-half of the payment of the loan amount due." On the other hand, the loan agreement unambiguously named College Road as the sole borrower without providing any indication that either Dr. Lanzi or Dr. Cottrell, whose names only appear on the signature line, had executed the loan agreement in their individual capacities. Moreover, the sole borrower named in the loan modification agreement, which only Dr. Lanzi signed, was College Road. Finally, the sole borrower named in the final disbursement notification, which Dr. Lanzi signed in his capacity as a "member," was College Road. In

4. Although Plaintiff correctly notes that Bank of America appears to be a holder in due course as defined in N.C. Gen. Stat. § 25-3-402(a), that fact has no bearing on the proper resolution of this case given that Bank of America has not attempted to enforce the note and is not a party to this action. As a result of the fact that College Road, Dr. Lanzi, and Ms. Lanzi do not hold the loan agreement, they cannot, by definition, be holders in due course, rendering the provisions of N.C. Gen. Stat. § 25-3-402(b) applicable to claims asserted on behalf of holders in due course irrelevant to a proper resolution of this case.

his affidavit, Dr. Cottrell asserted that the parties signed the loan agreement and the final disbursement statement "as owners and on behalf of College Road." Finally, Plaintiff's counsel stated at the summary judgment hearing that their clients did not "contest that the borrower under the loan is the PLLC." As a result, a simple examination of the contents of the various loan and loan-related documents, the parties' affidavits, and the comments made by the parties' counsel at the summary judgment hearing suggest the existence of a genuine issue of material fact concerning the capacity in which Dr. Lanzi and Dr. Cottrell signed the loan agreement.

Our conclusion that Dr. Cottrell forecast sufficient evidence to demonstrate the existence of a genuine issue of material fact concerning the extent to which he and Dr. Lanzi signed the loan agreement in a representative or an individual capacity is bolstered by a number of other factors. For example, the undisputed record evidence establishes that College Road made all of the payments required under the loan agreement, that the amortization schedule provided by Bank of America listed College Road as the sole borrower, and that the additional guarantee provided by LaWe Holdings was secured "[f]or the purpose of inducing Bank of America . . . to make, extend and renew a loan" made on behalf of a borrower elsewhere identified as College Road. In addition, the record clearly reflects that both Dr. Lanzi and Dr. Cottrell executed a guaranty agreement intended to secure the loan. As we have already noted, "[a] guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance." *Branch Banking & Trust Co.*, 301 N.C. at 52, 269 S.E.2d at 122; *see also Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972) (stating that obligations arising out of guaranty agreements are "separate and independent of the obligation of the principal debtor"); *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 146, 187 S.E.2d 752, 756 (1972) (stating that "[d]ecisions of [the Supreme] Court [have] treat[ed] the obligation of a guarantor of payment separate and distinct from that of the maker" on the theory that the " 'contract of guaranty is [the guarantors'] own separate contract jointly and severally to pay the debts' " and that guarantors " 'are not in any sense parties to the [note].' " (final alteration in original) (quoting *Arcady Farms Milling Co. v. Wallace*, 242 N.C. 686, 689, 89 S.E.2d 413, 415 (1955)); Sykes v. Everett, 167 N.C. 600, 608, 83 S.E. 585, 590 (1914) (holding "that a surety is considered as a maker of the note [while] a guarantor is never a maker"). As this Court has previously noted, " 'where individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate

officer signs twice, once as an officer and again as an individual.' " *Keels*, 45 N.C. App. at 218, 262 S.E.2d at 847 (quoting 19 Am. Jur. 2d *Corporations* § 1343 (1965)). In light of that logic, a reasonable finder of fact could conclude that the signatures of Dr. Lanzi and Dr. Cottrell on the loan agreement were affixed in their capacity as officers of College Road and that their signatures on the guaranty agreement were affixed in their individual capacity.[5] As a result, after "review[ing] the record in the light most favorable to the non-moving party," *Broughton*, 161 N.C. App. at 26, 588 S.E.2d at 25, we hold that there is a genuine issue of material fact with respect to the issue of whether the parties, including Bank of America, intended that Dr. Lanzi and Dr. Cottrell signed the loan agreement in their representative or individual capacities and that the trial court erred to the extent that it entered summary judgment in favor of Plaintiffs with respect to the contribution issue on the basis of a determination that Dr. Cottrell signed the loan agreement in his individual, rather than a representative, capacity.[6]

2. Unjust Enrichment Claim

[3] The second claim asserted in Plaintiffs' complaint sounded in unjust enrichment. "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor," *Atlantic Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73 (1966), with the availability of an unjust enrichment remedy " 'based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another.' " *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E.2d 382, 385 (quoting *Atlantic Coast Line R.R. Co.*, 268 N.C. at 96, 150 S.E.2d at 73), *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996). On the other hand, "[t]he hallmark rule

5. In view of the fact that the evidence concerning the intention with which Dr. Lanzi and Dr. Cottrell signed the loan agreement conflicts, we need not comment upon the absence of any evidence concerning the intentions with respect to this issue that Bank of America, which was clearly one of the "original parties," N.C. Gen. Stat. § 25-3-402(b)(2), may have had.

6. The same logic defeats Defendants' contention that the trial court erred by failing to enter summary judgment in their favor with respect to Plaintiffs' contribution claim. As a practical matter, the fact that the signatures of Dr. Lanzi and Dr. Cottrell on the loan agreement were not unambiguously made in their representative, rather than their individual, capacities coupled with the statement in Dr. Lanzi's affidavit to the effect that the parties contemplated that they would be equally responsible for repaying the loan amount would suffice to permit a trier of fact to conclude that Dr. Cottrell signed the loan agreement as a maker and was subject to individual liability for the resulting indebtedness.

of equity is that it will not apply 'in any case where the party seeking it has a full and complete remedy at law,' " *id.* (quoting *Jefferson Standard Ins. Co. v. Guilford Cnty.*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945)), which means that, "[w]here, as here, there is a contract which forms the basis for a claim, 'the contract governs the claim and the law will not imply a contract.' " *Id.* (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)); *see also Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (holding that "[o]nly in the absence of an express agreement of the parties will courts impose a [quasi-contract] or a contract implied in law in order to prevent an unjust enrichment"); *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (holding that "[i]t is a [well-established] principle that an express contract precludes an implied contract with reference to the same matter"). In light of the principle that unjust enrichment relief is not available in instances governed by an express contract, Defendants argue that the "contractual relationship between the Company and the Bank concerning the Loan to the Company, and the separate contractual relationship between the Bank and the [guarantors] on the Guaranty, are clearly defined and governed by said respective, express agreements." Defendants' argument has merit.[7]

As an initial matter, we have no hesitation in concluding that the loan agreement constitutes a "contract which forms the basis for [Plaintiffs'] claim." *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385. In addition, the loan agreement clearly governs the rights and responsibilities of all of the parties to that instrument with respect to the loan payment process. More specifically, the loan agreement provides that "[t]he liability of Borrower and each Guarantor hereunder is joint and several . . . upon an Event of Default hereunder." Although there is, as we have previously determined, a material factual dispute over the extent to which Dr. Lanzi and Dr. Cottrell are individually liable as borrowers and although the failure of payment necessary to trigger the obligation of the guarantors to make payment has clearly not yet occurred, there is no question but that the loan agreement makes each borrower jointly and severally liable[8] for the entire amount of the resulting indebtedness. Similarly, as

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7. In their brief, Plaintiffs failed to respond to this aspect of Defendants' challenge to the lawfulness of the trial court's order. Instead, their brief makes clear that the unjust enrichment claim was asserted in the alternative in the event that their contribution claim did not succeed.

8. As this Court has previously stated, "[w]hen joint and several liability is imposed, 'each liable party is individually responsible for the entire obligation.' " *In re D.A.Q.*, 214 N.C. App. 535, 539, 715 S.E.2d 509, 512 (2011) (quoting *Black's Law Dictionary* 997

we have previously noted, the loan agreement provides that, in the event that the borrowers fail to make any payment required under the loan agreement, the guarantors become liable for the full amount owed. "If a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right." 38 Am. Jur. 2d *Guaranty* § 100 (2010). As a result, since the loan agreement, when read in conjunction with applicable principles of North Carolina law, fully governs the relationship between the parties concerning the extent, if any, to which they are liable for any indebtedness arising under that instrument, the trial court erred to the extent that it entered summary judgment in Plaintiffs' favor and failed to enter summary judgment in Defendants' favor with respect to the unjust enrichment claim asserted in Plaintiffs' complaint.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by granting summary judgment in favor of Plaintiffs, by failing to grant summary judgment in favor of Ms. Cottrell with respect to Plaintiffs' contribution claim, and by failing to grant summary judgment in favor of Defendants with respect to Plaintiffs' unjust enrichment claim. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the New Hanover County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

Judges ROBERT N. HUNTER, JR. concurred in this opinion prior to 6 September 2014.

Judge DAVIS concurs.

(9th ed. 2009)). Thus, in instances involving joint and several liability, "'the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and [the] plaintiff may be made whole by a full recovery from any defendant.'" *Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 572, 501 S.E.2d 72, 74 (1998) (quoting 10 James W. Moore et al., *Moore's Federal Practice* ¶ 55.25, at 55-46 (3d ed. 1997)). As a result, given that "[c]ontribution is generally defined as the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear," *Irvin*, 122 N.C. App. at 501, 470 S.E.2d at 337 (alteration in original), a person who has paid a disproportionate share of a debt is entitled to contribution from any other person who was jointly and severally liable for the payment of that debt.

FELICIA RENEE CROGAN, PLAINTIFF
v.
JON BRENT CROGAN, DEFENDANT

No. COA14-214

Filed 16 September 2014

1. Statutes of Limitation and Repose—fraud—duress—undue influence—three years

The trial court did not err by applying a three-year statute of limitations to claims for fraud, duress, and undue influence. Plaintiff's claims were not counterclaims, and thus, did not involve the provisions of N.C.G.S. § 1-47(2).

2. Statutes of Limitation and Repose—breach of contract—separation agreement—contract under seal—ten years

Where plaintiff's claim for breach of a separation agreement arose pursuant to a contract under seal, the trial court erred by applying a three-year statute of limitations. N.C.G.S. § 1-47(2) provides that a ten-year statute of limitations applies to an agreement under seal.

Appeal by plaintiff from order entered 24 September 2013 by Judge Daniel F. Finch in Granville County Superior Court. Heard in the Court of Appeals 28 August 2014.

Dunlow & Wilkinson, P.A., by John M. Dunlow, for plaintiff-appellant.

Tharrington Smith, LLP, by Jill Schnabel Jackson, for defendant-appellee.

STEELMAN, Judge.

Where claims arose in tort, the trial court did not err in applying a three-year statute of limitations to claims for fraud, duress, and undue influence. Where plaintiff's claim for breach of contract arose pursuant to a contract under seal, the trial court erred in applying a three-year statute of limitations.

I. Factual and Procedural Background

Felicia Renee Crogan (plaintiff) and Jon Brent Crogan (defendant) were married on 23 March 1985. There were three children born to the marriage.

Plaintiff and defendant separated on 1 October 2004. Defendant's attorney prepared a Separation Agreement which was executed by the parties under seal and notarized on 16 November 2004. Paragraph 27 of the Separation Agreement dealt with the effect of a reconciliation of the parties upon their property settlement:

> 27. RECONCILIATION. In the event of a reconciliation and resumption of the marital relationship between the parties, the provisions hereof regarding settlement and disposition of property rights and other rights shall nevertheless continue in full force and effect without the abatement of any term or provision hereof, except as otherwise specifically provided herein or as later agreed in writing, by and between the parties. Except as otherwise provided by this Agreement or by an agreement or modification to this Agreement, performed in writing and notarized and executed by each of the parties after the date of this Agreement or the date of their reconciliation, no act on the part of either party shall serve to modify the property rights of the parties as established herein in this Agreement and the rights of the parties to the property which is transferred, set over and designated as property of either party shall remain separate property upon a reconciliation of the parties.

On 1 October 2005, the parties reconciled and resumed their marital relationship. The parties moved to West Virginia, but separated again on 13 March 2011. The parties subsequently engaged in litigation in the Family Court of Preston County, West Virginia. This litigation involved, among other things, the distribution of the parties' marital property. That court directed the parties to have the courts of this State determine the validity of the Separation Agreement.

On 17 August 2012, plaintiff filed a verified complaint, seeking a declaratory judgment as to the status of the Separation Agreement. The complaint also sought to void the Separation Agreement based upon the alleged fraud, duress, and undue influence of the defendant. Plaintiff also asserted breach of contract, alleging that defendant materially breached the provisions of paragraph 21 of the Separation Agreement:

> 21. FULL DISCLOSURE. Each party warrants, as part of the consideration for this Agreement, that each party has fully and completely disclosed all information regarding property and finances requested by the other and that no

> information of such nature has been subjected to distortion, nor in any manner been misrepresented.

Plaintiff alleged that defendant falsely represented to her that the values of their respective retirement accounts were "virtually the same," when in fact the value of plaintiff's account was $31,192.99 and the value of defendant's account was about $130,000.00.

On 10 October 2012, defendant filed an answer, asserting the affirmative defenses of ratification and the statute of limitations, as well as a counterclaim for a declaratory judgment declaring the Separation Agreement to be valid and enforceable. On 7 December 2012, plaintiff filed a reply to defendant's counterclaim.

On 10 May 2013, defendant filed a motion for summary judgment. On 24 September 2013, the trial court entered summary judgment in favor of defendant, declaring that "the Separation Agreement and Property Settlement executed by the parties on November 16, 2004, is a valid and enforceable contract."

Plaintiff appeals.

II. Standard of Review

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

III. Fraud, Duress, and Undue Influence

[1] In her first argument, plaintiff contends that the trial court erred in applying a three-year statute of limitations to her claims for fraud, duress, and undue influence. We disagree.

"Under North Carolina law, there is a three-year limitation for filing an action for duress, undue influence and fraud." *Dawbarn v. Dawbarn*, 175 N.C. App. 712, 717, 625 S.E.2d 186, 190 (2006) (citing N.C. Gen. Stat. § 1-52(9) (2005)). According to N.C. Gen. Stat. § 1-52(9), the statute of limitations begins to run on an action for fraud upon discovery of the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9) (2013).

The statute of limitations for plaintiff's claims for duress and undue influence began to run in 2004, when she alleges she was coerced into

signing the Separation Agreement. The statute of limitations on those claims would therefore have expired in 2007.

With regard to the claim for fraud, in her complaint, plaintiff does not allege when she discovered the fraud. However, in her deposition, plaintiff admitted that she began to manage defendant's account in "[m]aybe 2005, 2006." At that time, she would have discovered the fraud. During the hearing on summary judgment, defense counsel noted:

> She acknowledged, I believe on page 91 of the -- the -- of her deposition that she had the ability to look at the balance of his account at that time. So, my contention is that by the end of 2006, by her testimony, it was the latest, 2006, she had the ability to look at his Thrift Savings account. She had full access to his accounts and that the cause of action for fraud would have accrued no later than 2006 when she had full access to his retirement accounts. Which means, the three-year statute of limitations expired in 2009.

If plaintiff discovered the fraud in 2006, then the statute of limitations on that claim would have expired in 2009.

Plaintiff's complaint was filed in 2012, well after the statute of limitations on her claims for fraud, duress, and undue influence expired.

Plaintiff contends, however, that these actions arose pursuant to a document under seal. Plaintiff contends that, as a result, the ten-year statute of limitations in N.C. Gen. Stat. § 1-47 applies.

N.C. Gen. Stat. § 1-47(2) provides that a ten-year statute of limitations applies:

> Upon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Provided, however, that if action on an instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

N.C. Gen. Stat. § 1-47(2) (2013).

Plaintiff contends that her lawsuit in the instant case is effectively a counterclaim. More specifically:

> In the present case, the Plaintiff-Appellant was functioning, for all intents and purposes, as a Defendant, in that she was forced to come to the state of North Carolina to "defend" against the claim made by the Defendant-Appellee in the West Virginia litigation. Further, the Plaintiff-Appellant's claims for fraud, duress, undue influence and breach are, in essence, counterclaims asserted against the Defendant-Appellee in response to his claims asserted in the West Virginia litigation.

We find this logic baseless. We note that there is no indication in the record of whether plaintiff or defendant initiated the litigation in West Virginia; however, it is clear from the record that plaintiff initiated the instant action in North Carolina. Nothing in the record supports plaintiff's claim that she was "forced" to come to this State to "defend" against a claim by defendant; quite to the contrary, the filing of plaintiff's complaint forced action by defendant.

We acknowledge that a counterclaim for fraud pursuant to an instrument under seal is subject to a ten-year statute of limitations. *See McGuire v. Dixon*, 207 N.C. App. 330, 338, 700 S.E.2d 71, 76 (2010) (holding that the trial court erred in applying the three-year limitations period for fraud under N.C. Gen. Stat. § 1-52(9) where the ten-year statute of limitations under N.C. Gen. Stat. § 1-47(2) applied). Duress and undue influence are "forms of fraud," under N.C. Gen. Stat. § 1-52(9). *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 276-77 (1960). Under that logic, then, a counterclaim for fraud, duress, or undue influence pursuant to a document under seal should be controlled by a ten-year statute of limitations.

However, it is clear from the record before us that plaintiff's claims are not counterclaims, and thus do not involve the provisions of N.C. Gen. Stat. § 1-47(2). Thus, the three-year statute of limitations applies to plaintiff's claims for fraud, duress, and undue influence. We hold that the trial court applied the correct statute of limitations to these claims, and did not err in granting summary judgment in favor of defendant on the issues of fraud, duress, and undue influence.

This argument is without merit.

IV. Breach of Contract

[2] In her second argument, plaintiff contends that the trial court erred in applying a three-year statute of limitations to her claim for breach of contract. We agree.

The Separation Agreement, executed under seal, contained a warranty of full disclosure. The Separation Agreement further provided that, in the event of reconciliation by the parties, the Separation Agreement would remain in full force. As stated above, a ten-year statute of limitations applies to an agreement under seal. N.C. Gen. Stat. § 1-47(2) (2013).

Plaintiff alleged that defendant breached the warranty of full disclosure in the Separation Agreement by misrepresenting the balance in their respective retirement accounts. Because the Separation Agreement was executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations, is applicable to plaintiff's breach of contract claim. Since this action was commenced within ten years of the execution of the Separation Agreement, it was not barred.

We hold that the trial court erred in granting summary judgment in favor of defendant on the issue of breach of the Separation Agreement.

V. Conclusion

The trial court did not err in granting summary judgment in favor of defendant on the issues of fraud, duress, and undue influence. The trial court erred in granting summary judgment in favor of defendant on the issue of breach of the Separation Agreement. This matter is remanded to the trial court for further proceedings on the issue of breach of the Separation Agreement.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges GEER and HUNTER, Robert N., Jr. concur.

Robert N. Hunter, Jr. concurred on this opinion prior to 6 September 2014.

DAVID HYATT, PLAINTIFF
v.
MINI STORAGE ON THE GREEN, DAVID B. SMITH, AND NCI GROUP, INC. D/B/A DOORS AND BUILDING COMPONENTS (DBCI), DEFENDANTS

DAVID B. SMITH, THIRD-PARTY PLAINTIFF
v.
THE ESTATE OF JOHN ALVIN ROYALL, ROYALL COMMERCIAL CONTRACTORS, INC. AND E&S STEEL, INC., THIRD-PARTY DEFENDANTS

No. COA14-215

Filed 16 September 2014

1. Contracts—rental agreement—exculpatory clause—absolved from personal injury claims—no public interest exception—no unequal bargaining power

The trial court did not err by granting summary judgment in favor of defendant Mini Storage with respect to plaintiff's personal injury claim even though plaintiff contended that the rental agreement between these parties did not absolve defendant from responsibility for providing safe storage units. The pertinent exculpatory clause in the agreement absolved defendant from personal injury claims unless defendant acted negligently, and no negligence was shown. Further, the public interest exception did not invalidate the exculpatory clause and there was no unequal bargaining power.

2. Assignments—liability—stranger to original contract

The trial court did not err by granting summary judgment in favor of defendant Smith even though plaintiff contended that the assignment of the contract between defendant Smith and defendant Mini Storage to Royall did not relieve defendant Smith of his liability under the contract. Plaintiff has not established any basis for holding defendant Smith, a stranger to the original contract, liable for plaintiff's injuries.

Appeal by plaintiff from orders entered 18 July 2013 and 21 August 2013 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 5 June 2014.

David & Associates, P.L.L.C., by Stuart Smith; Hodges & Coxe P.C., by Bradley A. Coxe, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for Defendant Mini Storage on the Green.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by P.C. Barwick, Jr., Stuart L. Stroud, and Donald K. Phillips, for Third-Party Plaintiff David B. Smith.

ERVIN, Judge.

Plaintiff David Hyatt appeals from an order entered 18 July 2013 granting summary judgment in favor of Defendant Mini Storage on the Green and from an order entered 19 August 2013 granting summary judgment in favor of Defendant and Third-Party Plaintiff David B. Smith. On appeal, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Mini Storage because it breached a duty to provide renters with safe storage units and because the rental agreement between Plaintiff and Defendant Mini Storage fails to exculpate Defendant from liability for failing to provide safe storage units. In addition, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Smith because any assignment of the contract between Defendant Smith and Defendant Mini Storage did not relieve Defendant Smith of liability and because the completed and accepted work doctrine did not apply to the work that Defendant Smith performed on the storage units. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

1. Liability of Defendant Mini Storage

Defendant Mini Storage owns a storage facility located in Hampstead. On 15 October 2007, Plaintiff rented Unit No. 816 from Defendant Mini Storage pursuant to a written agreement. The rental agreement provided, among other things, that "[l]andlord [shall not] be liable to tenant and/or tenants guest or invitees for any personal injuries sustained by tenant and/or tenants guest or invitees while on or about landlord's premises." Plaintiff admitted that he had read and signed the agreement and that he had not had any questions regarding the terms of that agreement.

On 3 July 2008, Plaintiff went to his unit to collect various personal items. After entering the unit and collecting his property, Plaintiff attempted to close the roller door to his storage unit by pulling it down. As he did so, the door became stuck. Acting on the basis of a belief that he could pull the door down past the point at which it was stuck, Plaintiff attempted to close the door with some force, at which point the

door came off of its tracks and struck Plaintiff in the head, causing him to sustain personal injuries.

2. Liability of Defendant Mr. Smith

In 2005, Defendant Mini Storage accepted a bid from Defendant Smith in connection with the construction of Building No. 8, which consisted of 35 storage units, including Unit No. 816. On 30 December 2005, Defendant Mini Storage and Defendant Smith entered into a contract pursuant to which Defendant Smith agreed to "furnish material and labor" for the project for a total cost of $92,000. Defendant Smith subsequently assigned his contract with Defendant Mini Storage to John Alvin Royall and Royall Commercial Contractors, Inc., for $10,000. Royall received the balance of the contract payments, which was $82,000, in return for completing the project.

B. Procedural History

On 4 November 2009, Plaintiff filed a complaint seeking to recover damages for negligence. On 1 July 2011, Plaintiff filed an amended complaint that asserted claims sounding in breach of contract and breach of express and implied warranty against Defendant Smith and sounding in breach of express and implied warranty against NCI Group, Inc., d/b/a Doors and Building Components. Plaintiff filed a second amended complaint on 15 July 2011 and a third amended complaint on 5 October 2011. Defendant Mini Storage and Defendant Smith filed answers denying the material allegations of Plaintiff's third amended complaint and asserting various affirmative defenses on 28 October and 3 November 2011, respectively.

On 4 June 2013, Defendant Mini Storage filed a motion for summary judgment with respect to all of Plaintiff's claims. On 7 June 2013, Defendant Smith filed a motion for summary judgment as well. Defendants' summary judgment motions came on for hearing before the trial court at the 15 July 2013 civil session of the Pender County Superior Court. On 18 July 2013, the trial court entered an order granting summary judgment in favor of Defendant Mini Storage. On 21 August 2013, the trial court entered an order granting summary judgment in favor of Defendant Smith based upon the fact that Defendant Smith had assigned his contract with Defendant Mini Storage to Royall. Plaintiff noted an appeal to this Court from the trial court's orders.[1]

1. As a result of the fact that all of the other claims that had been asserted in this case have been dismissed, the challenged trial court orders represent an appealable final judgment.

II. Substantive Legal Analysis

A. Standard of Review

" '[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.' " *Blackburn v. Carbone*, 208 N.C. App. 519, 525, 703 S.E.2d 788, 794 (2010) (quoting *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)), *disc. review denied*, 365 N.C. 194, 710 S.E.2d 52 (2011). Summary judgment is proper "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." N.C. Gen. Stat. § 1A-1, Rule 56. We review orders granting or denying summary judgment using a *de novo* standard of review, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), under which "this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Defendant Mini Storage's Liability

[1] In his brief, Plaintiff contends that the trial court erred by granting summary judgment in favor of Defendant Mini Storage on the grounds that the rental agreement between Plaintiff and Defendant Mini Storage does not absolve Defendant Mini Storage from responsibility for providing safe storage units. More specifically, Plaintiff argues that the relevant provision in the rental agreement is not sufficiently explicit to operate as a valid exculpatory clause. Plaintiff's argument lacks merit.

According to well-established North Carolina law, contracts "which exculpate persons from liability for negligence are not favored," *Johnson v. Dunlap*, 53 N.C. App. 312, 317, 280 S.E.2d 759, 763 (1981), *cert. denied*, 305 N.C. 153, 289 S.E.2d 380 (1982), and must be strictly construed against the person seeking to escape liability. *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397 (1955). "Nonetheless, such an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson v. McClellan*, 131 N.C. App. 635, 636, 508 S.E.2d 549, 551 (1998). "This principle arises out of 'the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit[.]' " *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 428, 623 S.E.2d 785, 790 (2006) (quoting *Hall*, 242 N.C. at 709,

89 S.E.2d at 397-98). "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). As a result, given the absence of any factual dispute concerning the nature and extent of the contractual language at issue here, the ultimate question raised by Plaintiff's challenge to the trial court's decision is the extent to which Defendant Mini Storage is entitled to judgment as a matter of law based upon the language of the rental agreement.

The relevant provision in the rental agreement between Plaintiff and Defendant Mini Storage states that "[l]andlord [shall not] be liable to tenant and/or tenants guest or invitees for any personal injuries sustained by tenant and/or tenants guest or invitees while on or about landlord's premises." As Plaintiff concedes in his initial brief, the fact that this contractual language completely exempts Defendant Mini Storage from liability for any personal injuries that Plaintiff sustained as a result of Defendant Mini Storage's negligence while on Defendant Mini Storage's premises renders this provision exculpatory in nature.[2] In addition, despite Plaintiff's argument to the contrary, the exculpatory language contained in the rental agreement is clear, unambiguous, and enforceable. In attempting to persuade us that the relevant contractual language is not sufficiently explicit to exculpate Defendant Mini Storage from liability for the personal injuries that he sustained, Plaintiff directs our attention to a number of decisions. However, an examination of the decisions upon which Plaintiff relies demonstrates that the exculpatory provision contained in the agreement at issue here is more explicit than the language in any of the decisions upon which Plaintiff relies.[3] Simply put, the exculpatory clause at issue here clearly and explicitly

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2. Plaintiff clearly states in his initial brief that "the contract clause must be analyzed as an exculpatory clause." Furthermore, Plaintiff did not argue that this clause was not exculpatory at the hearing held before the trial court for the purpose of considering Defendant Mini Storage's summary judgment motion. However, Plaintiff does, for the first time, argue in his reply brief that it was not clear whether the contractual provision in question constituted an indemnity clause or an exculpatory clause. In spite of the fact that this Court "will not entertain what amounts to a new argument presented in th[e] reply brief," *Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994), we do believe, as Plaintiff conceded until the filing of his reply brief, that the contractual language at issue here constitutes an exculpatory, rather than an indemnity, clause.

3. *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190-91 (1953) (holding that a provision to the effect that "the lessees shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building herein demised, excepting in the case of . . . fire," did not operate to excuse the defendant from negligence liability); *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952) (holding that a provision indemnifying the defendant from "all

provides that Defendant Mini Storage would not be liable for personal injuries sustained on the premises. Such liability could only exist in the event that Defendant Mini Storage acted negligently. As a result, given that the exculpatory clause at issue here clearly absolved Defendant Mini Storage from personal injury claims that could only have arisen in the event that Defendant Mini Storage had been negligent, we must next determine whether any of the exceptions to the rule providing that sufficiently clear exculpatory clauses are enforceable enunciated in *Fortson* apply.

As we have already noted, an otherwise enforceable exculpatory clause will not be enforced in the event that it "violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson*, 131 N.C. App. at 636, 508 S.E.2d at 551. As an initial matter, we note that Plaintiff has not cited any statute that is inconsistent with the exculpatory provision at issue here, and we have not located any such statute in the course of our own research. For that reason, the first *Fortson* exception does not bar enforcement of the exculpatory clause at issue here.

Secondly, we must determine if the exculpatory clause at issue here "is contrary to a substantial public interest." *Id.* "[A] party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty." *Hall*, 242 N.C. at 710, 89 S.E.2d at 398. "An activity falls within the public policy exception when the activity is extensively regulated to protect the public from danger, and it would violate public policy to allow those engaged in such an activity to 'absolve themselves from the duty to use reasonable care.' " *Fortson*, 131 N.C. App. at 637, 508 S.E.2d at 551 (quoting *Alston v. Monk*, 92 N.C. App. 59, 64, 373 S.E.2d 463, 466 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420

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losses thru fire, theft & collision" did not suffice to preclude negligence liability arising from the defendant's negligence); *Atlantic Contracting and Material Company, Inc. v. Adcock*, 161 N.C. App 273, 279-80, 588 S.E.2d 36, 41 (2003) (holding that language indemnifying the defendant "against all losses, damages, injuries, claims, demands and expenses" was not sufficiently explicit to be enforceable); *City of Wilmington v. North Carolina Natural Gas Corporation*, 117 N.C. App. 244, 248, 450 S.E.2d 573, 576 (1994) (holding that the contractual language upon which the defendant relied did not explicitly absolve the defendant from responsibility for its own negligence); and *Lewis v. Dunn Leasing Corporation*, 36 N.C. App. 556, 559-60, 244 S.E.2d 706, 708-09 (1978) (holding language indemnifying the defendant from "any and all claims or liability of every kind and nature" not sufficiently specific). In each instance, the cases upon which Plaintiff relies applied to a wide range of injuries in addition to personal injuries or did not clearly indicate that negligence-based claims were excluded.

(1989)). The self-storage industry is not, unlike the industries to which the public interest exception has been deemed applicable, extensively regulated by North Carolina law. *Alston*, 92 N.C. App. at 64, 373 S.E.2d at 466-67 (invalidating a release signed by a customer who received cosmetology services in light of the extensive regulation of the cosmetology industry and the use of hazardous chemicals); *Fortson*, 131 N.C. App. at 638, 508 S.E.2d at 552 (invalidating a release executed in connection with a rider's participation in a motorcycle safety training program). On the contrary, the present case is more analogous to *Hall*, in which the Supreme Court refused to invalidate a liability waiver contained in a rental contract relating to the installation of a gas tank and pumping equipment. *Hall*, 242 N.C. at 710-11, 89 S.E.2d at 398. As a result, we conclude that the public interest exception does not invalidate the exculpatory clause at issue here.

Finally, an exculpatory contract that has been "gained through inequality of bargaining power" is unenforceable. *Fortson*, 131 N.C. App. at 636, 508 S.E.2d at 551. In applying this exception to the general rule allowing the enforcement of otherwise-enforceable exculpatory clauses, reviewing courts give "consideration to the comparable positions which the contracting parties occupy in regard to their bargaining strength, i.e., whether one of the parties has unequal bargaining power so that he must either accept what is offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere." *Hall*, 242 N.C. at 710, 89 S.E.2d at 398. In addition to admitting that he had read and understood the provisions of the rental agreement before signing it, Plaintiff acknowledged that there was another storage facility "up the road" that he considered dealing with before electing to obtain a storage unit from Defendant Mini Storage. As a result, given that Plaintiff had other options for obtaining the storage unit that he needed, we are unable to conclude that the exculpatory provision contained in the rental agreement resulted from the exercise of unequal bargaining power.[4] As a result, given that the exculpatory clause at issue here is enforceable and clearly barred Plaintiff's claim, we hold that the trial court correctly granted summary judgment in favor of Defendant Mini Storage with respect to Plaintiff's personal injury claim.

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4. Plaintiff does not attempt to argue in his brief or reply brief that any of the *Fortson* exceptions apply.

C. Defendant Smith's Liability

[2] Secondly, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Smith on the grounds that the assignment of the contract between Defendant Smith and Defendant Mini Storage to Royall did not relieve Defendant Smith of his liability under the contract. Plaintiff's argument lacks merit.

As a result of the fact that the work that allegedly resulted in Plaintiff's injuries was actually performed by Royall rather than Defendant Smith, Plaintiff must, in order to successfully pursue a claim against Defendant Smith, establish that Defendant Smith violated some duty that he owed to Plaintiff. In attempting to persuade us that the assignment of Defendant Smith's rights and duties under his contract with Defendant Mini Storage to Royall did not relieve Defendant Smith of liability for any injury that he might have sustained, Plaintiff directs our attention to numerous decisions that hold, in effect, that a party to a contract who completely assigns all rights and duties under the contract to another party remains liable to the original party with whom the assignor contracted. *See*, *e.g.*, *Rose v. Vulcan Materials Company*, 282 N.C. 643, 662, 194 S.E.2d 521, 534 (1973) (stating that "the assignor has power only to delegate and not to transfer the performance of duties as against the other party to the contract assigned"); *Atlantic & N.C.R. Co. v. Atlantic & N.C. Co.*, 147 N.C. 368, 380, 61 S.E. 185, 189 (1908) (holding that, in the absence of a novation, "the assignor would, notwithstanding the assignment, still remain liable"). A careful study of the decisions upon which Plaintiff relies demonstrates, however, that all of them address the assignor's liability to the other party to the original contract rather than to a third party like Plaintiff. As a result, none of the decisions upon which Plaintiff relies undercut the validity of the trial court's order in any way.

In addition, Plaintiff cites N.C. Gen. Stat. § 25-2-210(1), which provides that "[n]o delegation of performance relieves the party delegating of any duty to perform or any liability for breach." N.C. Gen. Stat. § 25-2-210(1). Although he acknowledges that the statutory provision upon which he relies is only applicable to contracts for the sale of goods, Plaintiff contends that the General Assembly intended for the principle enunciated in N.C. Gen. Stat. § 25-2-210(1) to apply outside the sale of goods context given the citation to *Atlantic & N.C.R. Co.* in the comments relating to that statutory provision. Once again, however, Plaintiff fails to recognize that *Atlantic & N.C.R. Co.* and "general North Carolina contract law" provide for an assignor's continued liability to the other party to the original contract rather than to a third party. As a result,

N.C. Gen. Stat. § 25-2-210(1) has no bearing on the proper resolution of this issue.

Simply put, the only arguments advanced in Plaintiff's brief in opposition to the trial court's decision to grant summary judgment in favor of Defendant Smith establish that Defendant Smith, as an assignor, remains liable to Defendant Mini Storage under the original contract. Nothing in Plaintiff's briefs provides any basis for believing that Defendant Smith should be held liable to him as a stranger to the original contract. As a result, given that Plaintiff has not established any basis for holding Defendant Smith liable for his injuries, the trial court did not err by granting summary judgment in favor of Defendant Smith.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff's challenges to the trial court's orders lack merit.[5] As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

Judge DAVIS concurs.

5. Although the parties have debated other issues in their briefs in addition to those discussed in the text of this opinion, we need not address these issues given our decision to hold that the exculpatory clause barred Plaintiff's claim against Defendant Mini Storage and that the assignment of Defendant Smith's contract with Defendant Mini Storage to Royall barred Plaintiff's claim against Defendant Smith.

IN RE D.C.

[236 N.C. App. 287 (2014)]

IN THE MATTER OF D.C.

No. COA13-502-2

Filed 16 September 2014

1. Termination of Parental Rights—reunification efforts ceased—sufficient findings of fact—permanency planning order—termination of parental rights order—read together

The trial court did not err in a termination of parental rights case by entering a permanency planning review order changing the permanent plan for the minor child to adoption, effectively ceasing reunification efforts. The findings of fact in the termination of parental rights order in conjunction with the permanency planning order satisfied the requirements of N.C.G.S. § 7B-507(b)(1).

2. Termination of Parental Rights—termination in child's best interest—no abuse of discretion

The trial court did not abuse its discretion by concluding that the minor child's best interests were served by termination of respondent-mother's parental rights.

Appeal by respondent from orders entered 18 April 2012 and 24 January 2013 by Judge Beverly Scarlett in District Court, Chatham County. By opinion entered 15 October 2013, this Court reversed and remanded the trial court's orders. By order entered on or about 11 June 2014, the North Carolina Supreme Court remanded to this Court.

Holcomb & Cabe, LLP, by Carol J. Holcomb and Samantha H. Cabe, for appellee Chatham County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for guardian ad litem.

J. Thomas Diepenbrock, for appellant-respondent-mother.

STROUD, Judge.

This case comes to us by order of the North Carolina Supreme Court remanding this case to us for reconsideration in light of *In re L.M.T.*, ___ N.C. ___, 752 S.E.2d 453 (2013). For the following reasons, we affirm.

I. Background

We recite the background and applicable law from our prior opinion:

> On 15 March 2011, the Chatham County Department of Social Services ("DSS") filed a juvenile petition alleging that Derrick[1] was a neglected and dependent juvenile, and on 1 June 2011, the trial court adjudicated Derrick a neglected juvenile. On 18 April 2012, the trial court changed Derrick's permanent plan to adoption and ordered that "[a] Termination of Parental Rights Motion shall be filed" ["Permanency Planning Order"]. Respondent filed notice preserving her right to appeal the 18 April 2012 order. On 24 January 2013, the trial court terminated respondent-mother's parental rights due to neglect, failure to make reasonable progress, and failure to pay a reasonable portion of support ["TPR Order."]. Respondent appealed the 24 January 2013 order.
>
> On appeal, respondent contends that the trial court erred in its 18 April 2012 permanency planning order by ceasing reunification efforts without entering the necessary findings of fact required by North Carolina General Statute § 7B-507(b)(1). DSS argues that the trial court never ordered the cessation of reunification efforts and, therefore, was not required to make findings under North Carolina General Statute § 7B-507(b). . . . Moreover, the trial court here changed the permanent plan to adoption, and respondent-mother properly preserved her right to appeal the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B–507(c). This Court determined in *In re A.P.W.* that an order which directs the filing of a petition to terminate parental rights and changes the permanent plan to adoption has implicitly ordered the cessation of reunification efforts. ___ N.C. App. ___, ___, 741 S.E.2d 388, 391 ("As in *J.N.S.*, the trial court in the instant case directed DSS to file a petition to terminate parental rights. Moreover, the trial court here changed the permanent plan to adoption, and respondent-mother properly preserved her right to appeal the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B–507(c). Based on the foregoing, we hold that the trial court's 21 June 2011

1. A pseudonym will be used to protect the identity of the child involved.

order implicitly ceased reunification efforts, and we reject DSS's argument for dismissal."), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2013).

In re D.C., ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished) (heading omitted).

II. Permanency Planning Order

[1] Respondent argues that "the trial court erred when it entered a permanency planning review order changing the permanent plan to adoption because the order effectively ceased reunification efforts without including the findings of fact required by statute[.]" (Original in all caps.)

> "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).
>
> North Carolina General Statute § 7B-507(b) provides:
>
> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]
>
> N.C. Gen. Stat. § 7B-507(b)(1) (2011).

In re D.C., ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished).

The Supreme Court has directed that our reconsideration be directed by the requirements of *L.M.T.*, which states that

> [s]trict adherence to this statute [North Carolina General Statute § 7B-507(b),] ensures that the trial court fulfills the aspirations of the Juvenile Code by allowing our appellate courts to conduct a thorough review of the order.

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." The trial court's written findings must address the statute's concerns, but need not quote its exact language. On the other hand, use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

___ N.C. ___, ___, 752 S.E.2d 453, 455 (2013). The Supreme Court further clarified that the order ceasing reunification should be considered together with the termination of parental rights order in cases such as this; in other words, either order standing alone or the orders as read together can be enough to satisfy the language of North Carolina General Statute § 7B-507(b). *Id.* at ___, 752 S.E.2d at 456-57.

The guardian ad litem brief to this Court acknowledged that the Permanency Planning Order was deficient because of its failure to make the findings of fact as required by North Carolina General Statute § 7B-507(b). In our prior opinion, we agreed and reversed and remanded "to the trial court for further proceedings." *In re D.C.*, ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished) (citation and quotation marks omitted). Now that we reconsider the Permanency Planning Order in light of our Supreme Court's directives in *L.M.T.*, the Permanency Planning Order standing alone remains deficient, but we must reconsider it in conjunction with the TPR Order.

The 18 April 2012 Permanency Planning Order that ceased reunification made general findings regarding respondent's lack of complete compliance with her drug treatment program. The trial court also made numerous positive findings of fact regarding respondent's completion of parent-child therapy, her strong bond with Derrick, her attendance of her individual therapy sessions including progress with her goals, her enrollment in college, her maintenance of weekly visits and regular phone calls with Derrick wherein her interactions were "positive and appropriate[,]" and her claimed attendance to substance abuse treatment. In this regard, as far as we can tell from the trial court's orders, this situation was different from that presented by *L.M.T.*, in which even the permanency planning order alone showed that the respondent continued to

have a drug problem that had worsened over time, lived in an environment involving serious domestic violence, and had also received an eviction notice from her current home. *Id.* at ___, 752 S.E.2d at 455-56. The trial court found in the "cease reunification order" in *L.M.T.* that

> the Respondent Mother was sinking deeper and deeper into an abyss of domestic violence and drug abuse all the while covering it up and refusing to acknowledge the fact of its existence in order that the Court, the Department, the Guardian ad Litem and others surrounding her could assist her and help the juveniles. The deception of the Court during this process is bad enough, but the Respondent Mother has completely let her children down.

Id. at ___, 752 S.E.2d at 455-56 (emphasis added).

In *L.M.T.*, the Supreme Court determined that the "cease reunification order" alone was sufficient to satisfy the requirements of North Carolina General Statute § 7B-507(b), but went on to address the termination of parental rights order as well. *Id.* at ___, 752 S.E.2d at 455-58. Specifically, the Supreme Court stated:

> *Even if the cease reunification order standing alone had been insufficient, that would not end the appellate court's inquiry.* Parents may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B–1001(a)(5)(a), which provides that
>
> a. The Court of Appeals shall review [an] order [entered under section 7B–507] to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.
>
> *Id.* § 7B–1001(a)(5) (2011). In other words, if a termination of parental rights order is entered, the appeal of the

> cease reunification order is combined with the appeal of the termination order.

Id. at ___, 752 S.E.2d at 456.

As noted above, the Permanency Planning Order is insufficient, standing alone, to satisfy the requirements of North Carolina General Statute § 7B-507(b)(1). Accordingly, as directed by *L.M.T.*, we turn to the TPR Order to see if the findings of fact in that order in conjunction with the Permanency Planning Order which ordered a permanent plan of adoption would satisfy the requirements of North Carolina General Statute § 7B-507(b)(1). *See id.* at ___ 752 S.E.2d at 456-57. In the TPR Order, the trial court made additional detailed findings of fact regarding respondent's drug abuse and failures of treatment, going back to February of 2010 and continuing up to the time of the hearing on termination of parental rights. It is apparent, reading the Permanency Planning Order and TPR Order together, that respondent continued in her pattern of attempts at recovery from her substance abuse problems and relapsing into abuse. Respondent does not challenge the sufficiency of the evidence to support the findings of fact in either order. Based upon all of the findings, considering the two orders together, "the order[s] embrace[] the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *Id.* at ___, 752 S.E.2d at 456-57 (citation and quotation marks omitted).

In addition, we note that the Permanency Planning Order did not order DSS to cease its reunification efforts with respondent, despite changing the permanent plan to adoption; thus, respondent had the benefit of continued access to the services and assistance of DSS in attempting to correct the conditions which led to the child's removal even though the permanent plan had been changed to adoption. In this situation, the deficiencies of the Permanency Planning Order did not impair respondent's ability to improve her situation prior to the hearing on termination of parental rights. As such, this argument is overruled.

III. TPR Order

[2] Respondent also contends that the trial court "abused its discretion by concluding that the best interest of the minor child would be served by termination of the respondent-mother's parental rights." (Original in all caps.) Respondent does not challenge the grounds for termination but solely whether the trial court properly considered whether termination of her parental rights was in Derrick's best interests. We review the

trial court's determination of what is in the best interests of the child for abuse of discretion. *Id.* at ___, 752 S.E.2d at 457.

North Carolina General Statute § 7B-1110(a) provides,

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2013). Defendant contends that the trial court failed to properly consider and make findings of fact regarding factors 3, 4, and 5 in North Carolina General Statute § 7B-1110(a).

As to "[w]hether the termination of parental rights will aid in the accomplishment of the permanent plan[,]" *id.*, for Derrick the trial court found:

> b. Termination of Respondent's parental rights is necessary to implement the permanent plan of adoption.
>
> c. Termination of Parental Rights is the only barrier to the adoption of the child.

As to "[t]he bond between the juvenile and the parent[,]" while the trial court may not have used the exact word "bond" it did find that Derrick "is approximately five and one-half (5 ½) years old and has been in foster care for over two years[,]" indicating that Derrick could not have had a

strong bond with respondent as he would barely, if at all, have remembered her as his primary guardian. The trial court further found that Derrick "was happy to see his siblings and Mr. Johnson[, prospective adoptive father,] and did not want to leave when the visit ended" indicating that Derrick's primary bond is with the prospective adoptive family and not respondent. As to "[t]he quality of the relationship between the juvenile and the proposed adoptive parent[,]" *id.*, the trial court found that the prospective adoptive parents "are willing to adopt [Derrick] and have him as a part of their large and loving family." As the trial court considered the appropriate factors, we conclude that the trial court did not abuse its discretion in determining termination of respondent's parental rights was in Derrick's best interests. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm both the Permanency Planning Order and the TPR Order.

AFFIRMED.

Judges McGEE and BRYANT concur.

IN THE MATTER OF THE APPEAL OF INTERSTATE OUTDOOR INCORPORATED FROM THE DECISION OF THE JOHNSTON COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATION OF CERTAIN BUSINESS PERSONAL PROPERTY FOR TAX YEAR 2012

No. COA14-223

Filed 16 September 2014

Taxation—ad valorem taxes—billboards—valuation method not arbitrary or illegal

The Property Tax Commission did not err by affirming ad valorem tax assessments for 2011 and 2012 made by Johnston County regarding sixty-nine billboards that Interstate Outdoor Incorporated (Interstate) owned. Interstate failed to produce substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

Appeal by Interstate Outdoor Incorporated from Final Decisions entered on or about 19 September 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 August 2014.

Spence & Spence, P.A., by Robert A. Spence, for appellant Interstate Outdoor Incorporated.

David F. Mills, P.A., by David F. Mills, for appellee County of Johnston.

STROUD, Judge.

Interstate Outdoor, Inc. ("Interstate") appeals from two final decisions of the Property Tax Commission. It argues that the Commission erroneously affirmed *ad valorem* tax assessments for 2011 and 2012 made by Johnston County regarding 69 billboards it owns. We affirm the Commission's decisions because Interstate failed to produce substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

I. Background

Interstate is a corporation that owns and rents out billboards in 40 counties in North Carolina, including approximately 80 billboards in Johnston County. Interstate appealed Johnston County Tax Administration's valuation of 60 billboards it owned in Johnston County for tax years 2011 and 2012, as well as nine new billboards it bought in 2012. For tax year 2011, the county valued Interstate's property at $2,547,577. Interstate asserts its property was actually worth $1,923,746. For tax year 2012, the county valued Interstate's property at $2,786,200. Interstate asserted that its property was actually worth $1,790,691. To value the billboards, Johnston County relied on the Billboard Structures Valuation Guide published by the North Carolina Department of Revenue, which is updated annually.

On appeal to the Property Tax Commission, Interstate argued that the county had significantly overestimated the value of its property and introduced what it considered the proper estimate for each billboard. To do so, it asked one of its normal billboard contractors for ten quotes on different types of billboards. It then used one of the ten quotes for each of the billboards of contested value. Additionally, Interstate highlighted that the 2011 and 2012 tax values were approximately eighteen percent higher than those for 2010. In 2010, Interstate had appealed the valuation of its billboards. The parties reached a negotiated settlement, which valued its property at $1,923,746. Interstate argued that the value should remain the same for the 2011 and 2012 tax years.

The Property Tax Commission found that Interstate failed to show that the quotes it used "included all the costs that make the property ready for its intended uses," or a substantial connection between the quotes and the actual costs of constructing the billboards at issue. It therefore affirmed Johnston County's valuation for both tax years, with one dissent. Interstate timely appealed to this Court.

II. Standard of Review

In reviewing the decision of the Property Tax Commission,

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

N.C. Gen. Stat. § 105–345.2(b) (2011). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105–345.2(c).

> The court may not consider the evidence which in and of itself justifies the Commission's decision without also taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn. . . . Therefore, under N.C. Gen. Stat. § 105–345.2(b), 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 Blue Ridge Housing of Bakersville LLC, ___ N.C. App. ___, ___, 738 S.E.2d 802, 807 (citations, quotation marks, ellipses, and brackets omitted), *app. dismissed and rev. allowed*, ___ N.C. ___, 747 S.E.2d 526 (2013), *disc. rev. improvidently allowed*, ___ N.C. ___, 753 S.E.2d 152 (2014). "If the court finds substantial evidence to support the Commission's decision, the Commission's decision may not be overturned." *Matter of Moses H. Cone Memorial Hosp.*, 113 N.C. App. 562, 571, 439 S.E.2d 778, 783 (1994), *aff'd in part*, 340 N.C. 93, 455 S.E.2d 431 (1995).

III. Analysis

Although Interstate frames its arguments on appeal as four distinct issues, in reality, it raises but one. In essence, it argues that the County used an illegal and arbitrary method of valuation because it followed the Department of Revenue schedules for the valuation of billboards without taking into account local conditions in Johnston County.

> A county's *ad valorem* tax assessment is presumptively correct. However, the taxpayer may rebut this presumption by presenting competent, material, and substantial evidence that tends to show that (1) either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably* high.
>
> Once the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values. The critical inquiry in such instances is whether the County's appraisal methodology is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value. To determine the appropriate appraisal methodology under the given circumstances, the Commission must hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.

In re Parkdale Mills, ___ N.C. App. ___, ___, 741 S.E.2d 416, 419-20 (2013).

Thus, we must first consider whether there is substantial evidence in the record, considering it as a whole, to support the Commission's conclusion that Interstate failed to carry its burden of showing that Johnston County used an arbitrary or illegal method of valuation.

N.C. Gen. Stat. § 105-291(g) (2011) authorizes the Department of Revenue to "develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation." The Local Government Division of the Department of Revenue created a Billboard Structures Valuation Guide ("Billboard Guide") for tax years 2011 and 2012. Johnston County used the guide to appraise Interstate's billboards for the relevant tax years.

The Billboard Guide recommended applying a replacement cost approach to valuation because of the difficulty of acquiring the information necessary to accurately value billboards using either the income or sales comparison approaches.[1] The schedule was created based on data "extracted from material costs, labor, and other integral components of billboard construction." George Hermane, the personal property manager for Johnston County Tax Administration, testified that use of a sales or income approach would not be possible because the necessary information is not normally available. As a result, the Billboard Guide suggests that "[t]he valuation of each sign . . . be determined by calculating the replacement cost new (RCN) and then deducting depreciation based on an effective age depreciation schedule."

The Billboard Guide divides billboards into four general categories: (1) wood structures, (2) steel "A-Frame" structures, (3) multi-mast structures, and (4) monopole structures. It then further divides the various classes of billboards into subclasses based on the size, height, and number of panels and design. The Billboard Guide also established special guidelines for electronic displays, tri-fold, and tri-vision billboards. Each one of these categories is assigned an RCN value. There is also a schedule of depreciation which takes into account the age of the billboard.

"The use of schedules of values and rules of application not only makes the valuation of a substantial number of [pieces] of property feasible, but also ensures objective and consistent countywide property valuations and corollary equity in property tax liability." *In re Allred*,

1. Replacement cost is a valid method of appraising personal property under N.C. Gen. Stat. § 105-317.1(a)(1) (2011).

351 N.C. 1, 10, 519 S.E.2d 52, 58 (1999). Nevertheless, use of a schedule alone "does not prove that the valuation and assessment of the subject property was itself not arbitrary." *In re Lane Company-Hickory Chair Div.*, 153 N.C. App. 119, 125, 571 S.E.2d 224, 228 (2002).

Here, Interstate argues the use of the Billboard Guide in Johnston County is arbitrary and illegal because it fails to take into account the wind load and soil conditions in the area, which could affect construction costs. But "the fact that independent valuations of each [piece of personalty] might be more accurate than a mass appraisal does not make the county's method arbitrary. Considerations of practicality must enter into the choice of method." *Appeal of Wagstaff*, 42 N.C. App. 47, 49, 255 S.E.2d 754, 756 (1979). As our Supreme Court noted in *McLean Trucking*, "[t]he task of examining and appraising each of the thousands of [pieces of personalty in a given class] would be almost impossible." *In re McLean Trucking Co.*, 281 N.C. 375, 387-88, 189 S.E.2d 194, 202 (1972) (citation, quotation marks, and brackets omitted), *app. dismissed and cert. denied*, 409 U.S. 1099, 34 L.Ed. 2d 681 (1973).

"To avoid this, the County is justified in using some recognized dependable and uniform method of valuing them." *Id.*; *see also Appeal of Bosley*, 29 N.C. App. 468, 471-72, 224 S.E.2d 686, 688 (noting that "[t]he difficulty of estimating the value of household property makes it impossible to appraise each item of such property precisely at actual market value"), *disc. rev. denied*, 290 N.C. 551, 226 S.E.2d 509 (1976). "A uniform and dependable method of property appraisal which gives effect to the various factors that influence the market value of property and results in equitable taxation does not violate the appraisal provisions of the Machinery Act." *Bosley*, 29 N.C. App. at 472, 224 S.E.2d at 688. Indeed, N.C. Gen. Stat. § 105-317.1(a) specifically permits an appraiser of personal property to appraise either "each item" or a "lot of similar items." Interstate is not the only owner of billboards in Johnston County and it alone owns more than 80 billboards in various locations across the county. The impracticality of assessing each and every billboard based on the precise soil conditions at its base and wind load is a valid consideration for the county. *See Wagstaff*, 42 N.C. App. at 49, 255 S.E.2d at 756.

Interstate presented various invoices for what it considered "similar" signs in an attempt to demonstrate the application of the Billboard Guide did not result in the true value of the billboards. But these quotes were not for the particular signs at issue. Interstate requested 10 estimates to use for all of the signs. It then used the estimates to argue that what it considered similar signs should be valued at the amount quoted.

The estimates produced by Interstate often used dimensions that did not match the actual billboards. Interstate used quotes for smaller billboards to provide estimates for larger billboards, some significantly so. For instance, Interstate estimated the replacement costs for one 12'x 40' sign that is 65' tall using a quote for a billboard 10'6" by 40' and 40' tall.

Moreover, we note that Interstate's prices are based on estimates provided by one of its regular suppliers. Mr. Hermane explained that in "outdoor advertising . . . the structures are sold in bulk transfers and often through other agreements that would throw off the valuation."

> The appraisal of property for taxation cannot be made to depend upon the number of units of similar properties owned by the taxpayer or upon the varying abilities of the several taxpayers to negotiate for favorable terms in buying or selling such units. To hold otherwise would depart from the principle of equality of appraisal which is fundamental in the Machinery Act.

In re McLean Trucking Co., 281 N.C. at 387, 189 S.E.2d at 202. Thus, there was substantial reason to doubt that the quotes reflected the true value of the billboards.

Additionally, Interstate argues that it should have been evident to the Commission that the 2011 and 2012 appraisals were arbitrary and illegal because they were so much higher than the 2010 appraisal. But the 2010 appraisal was a compromise reached between the parties for that tax year. Interstate cites no case holding that a settlement concerning a prior tax year is substantial evidence that the appraisal should remain the same into the future.

Given these facts, it was not illegal or arbitrary for Johnston County to appraise Interstate's billboards in bulk. The method followed by Johnston County took into account the relevant properties of the billboards, such as their size, design, and age. Interstate has failed to show that the method prescribed by the Billboard Guide produces a value significantly higher than the true value. Therefore, we affirm the Property Tax Commission's Final Decisions as to both the 2011 and 2012 tax years.

IV. Conclusion

We affirm the Commission's final decisions regarding both the 2011 and 2012 tax years because Interstate failed to present substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

KAYLA J. INMAN
v.
CITY OF WHITEVILLE, A MUNICIPALITY INCORPORATED UNDER THE LAWS OF THE STATE OF NORTH CAROLINA

NO. COA14-94

Filed 16 September 2014

Negligence—public duty doctrine—investigation of motor vehicle accident—no duty to individual

The trial court did not err by dismissing plaintiff's negligence claim against the City of Whiteville based on the public duty doctrine. The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. This case fell within the scope of the public duty doctrine and plaintiff did not allege the applicability of either the special relationship or the special duty exceptions to the public duty doctrine.

Appeal by plaintiff from order entered 2 August 2013 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 5 June 2014.

Lee & Lee, Attorneys, by Junius B. Lee, III, for plaintiff-appellant.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, and Williamson Walton & Scott, LLP, by Carlton F. Williamson, for defendant-appellee.

DAVIS, Judge.

Kayla J. Inman ("Plaintiff") appeals from the trial court's order dismissing her complaint against the City of Whiteville ("the City") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, she contends that the trial court erred in dismissing her complaint based on the public duty doctrine. After careful review, we affirm the trial court's order.

Factual Background

We have summarized the pertinent facts below using the statements contained in Plaintiff's complaint, which we treat as true when reviewing an order dismissing a complaint pursuant to Rule 12(b)(6). *See Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

On 12 September 2011, Plaintiff was involved in a motor vehicle accident near the intersection of South Madison Street and East Hayes Street in Whiteville, North Carolina. Plaintiff was "run off the road" by another motorist, and Plaintiff and her passenger suffered significant injuries arising from the accident. Officer Donnie Hedwin ("Officer Hedwin") of the Whiteville Police Department was called to the scene to investigate the accident. Officer Hedwin spoke with the other motorist but did not ascertain his identity or include his name in the accident report. When questioned about this omission, Officer Hedwin and his supervisor, Sergeant Mark McGee, both stated that the accident had not been investigated further because there had been no physical contact between the two vehicles.

On 30 April 2012, Plaintiff filed a complaint against the City in Columbus County Superior Court alleging that Officer Hedwin and Sergeant McGee, who were agents of the City acting in the course and scope of their employment, were negligent in their investigation of the accident, primarily because they failed to ascertain the identity of the other motorist. Plaintiff asserted that "[b]ased upon the failure of the officers to properly and completely investigate, the identity of the party responsible for this accident has not been determined" and that "[b]ut for the negligent acts of [the City], by and through its employees, the plaintiff could have and would have maintained an action against the unknown driver of the second vehicle for her damages."

On 7 August 2012, the City filed an answer and motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The City's motion to dismiss came on for hearing on 15 July 2013, and the trial court entered an order dismissing Plaintiff's complaint on 2 August 2013. Plaintiff filed a timely notice of appeal to this Court.

Analysis

> When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the

> allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6).

Horne v. Cumberland Cty. Hosp. Sys., Inc., ___ N.C. App. ___, ___, 746 S.E.2d 13, 16 (2013) (internal citations and quotation marks omitted).

In order to successfully assert a claim for negligence, a plaintiff must allege that the defendant owed a legal duty to her. *See Derwort v. Polk Cty.*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 381 (1998) ("It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff." (citation and quotation marks omitted)). "[I]n the absence of any such duty owed [to] the injured party by the defendant, there can be no liability [and] when the public duty doctrine applies, the government entity, as the defendant, owes no legal duty to the plaintiff." *Scott v. City of Charlotte*, 203 N.C. App. 460, 464, 691 S.E.2d 747, 750-51 (citations, quotation marks, brackets, and emphasis omitted), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (2010).

The public duty doctrine, adopted by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), provides that "when a governmental entity owes a duty to the general public . . . individual plaintiffs may not enforce the duty in tort." *Strickland v. Univ. of N.C. at Wilmington*, 213 N.C. App. 506, 508, 712 S.E.2d 888, 890 (2011) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 677 (2012). Application of this doctrine has traditionally arisen in cases in which a plaintiff asserts a negligence claim alleging that a law enforcement officer breached his duty to protect a victim from a third party's criminal act and that this failure caused the victim's injury or death. *Id.* at 508-09, 712 S.E.2d at 890.

In such scenarios, the municipality is generally insulated from liability because in providing police protection, "[the] municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Accordingly, "while the law

enforcement agency owes a 'duty to protect' the public at large, individual members of the public as plaintiffs generally may not enforce that duty in tort." *Strickland*, 213 N.C. App. at 509, 712 S.E.2d at 890.

The Supreme Court has, however, recognized two specific exceptions to the public duty doctrine:

> (1) where there is a special relationship between the injured party and the police, for example a state's witness or informant who has aided law enforcement officers; and
>
> (2) when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (citation and quotation marks omitted).

Our Supreme Court has made clear that with regard to local governments, the public duty doctrine only extends to actions taken in the exercise of their general duty to protect the public. *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) ("While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public." (internal citations omitted)); *see also Wood v. Guilford Cty.*, 355 N.C. 161, 169, 558 S.E.2d 490, 496 (2002) (explaining that public duty doctrine "retains limited vitality, as applied to local government, within the context of government's duty to protect the public generally, which is necessarily limited by the resources of the local community" (internal citations, quotation marks, and brackets omitted)). The public duty doctrine "acknowledges the limited resources of law enforcement and works against judicial imposition of an overwhelming burden of liability." *Little v. Atkinson*, 136 N.C. App. 430, 432, 524 S.E.2d 378, 380, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

This Court has applied the public duty doctrine to limit the liability of municipalities and their law enforcement agencies in circumstances beyond the "classic example of . . . a negligence claim alleging a law enforcement agency's failure to protect a person from a third party's criminal act." *Strickland*, 213 N.C. App. at 508, 712 S.E.2d at 890. Indeed,

we have applied the doctrine where — as here — the allegations of negligence stem from a law enforcement officer's handling of a motor vehicle accident. For example, in *Lassiter v. Cohn*, 168 N.C. App. 310, 607 S.E.2d 688, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005), we concluded that the public duty doctrine shielded the City of Durham and one of its police officers from liability in an action arising out of the officer's allegedly negligent management and control of a multi-vehicle accident scene. We reasoned that imposing liability upon the city and its officer, who was "fulfilling her general duties owed when responding to the many and synergistic elements of a traffic accident. . . . is exactly that which the public duty doctrine seeks to alleviate." *Id.* at 318, 607 S.E.2d at 693.

In *Scott*, we held that the public duty doctrine barred the plaintiff's negligence claim against the City of Charlotte where officers of the Charlotte-Mecklenburg Police Department had pulled over an individual, David Scott ("Mr. Scott"), on suspicion of impaired driving, determined that he was "physically impaired in some respect," been informed that Mr. Scott had suffered a stroke during the past year, and failed to call for medical assistance. *Scott*, 203 N.C. App. at 464, 691 S.E.2d at 750. Mr. Scott later collapsed in the parking lot as he was waiting for the plaintiff, his wife, to pick him up and died the following day. *Id.* at 462-63, 691 S.E.2d at 749-50.

The plaintiff filed a complaint against the City of Charlotte alleging that the officers were negligent in failing to summon medical assistance for Mr. Scott. *Id.* at 463, 691 S.E.2d at 750. We concluded that the City of Charlotte was entitled to summary judgment in its favor based on the public duty doctrine because the officers "were engaged in their general law enforcement duty to protect the public from an erratic driver who they believed could be intoxicated" when they made the discretionary decision not to call for medical assistance, thereby indirectly harming Mr. Scott. *Id.* at 468, 691 S.E.2d at 752.

In both *Lassiter* and *Scott*, this Court recognized that the plaintiffs' claims arose from circumstances in which the local governments at issue, through their law enforcement officers, were engaged in their general duty of protecting the public and that, consequently, they were shielded from liability by the public duty doctrine. *See id.* at 467, 691 S.E.2d at 752 ("*Braswell* and its progeny have not wavered from the general principle that when a police officer, acting to protect the general public, indirectly causes harm to an individual, the municipality that employs him or her is protected from liability.").

Here, Plaintiff's negligence claim is premised on the manner in which a motor vehicle accident was investigated by law enforcement officers. Specifically, Plaintiff has alleged that Officer Hedwin and his supervisor "failed in their obligation and duty to perform competent law enforcement services in that they failed to determine both the responsible party [for] this [accident] and the facts indicating his responsibility." The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. *See Lassiter*, 168 N.C. App. at 320, 607 S.E.2d at 694 (describing officer's interview with parties involved in car accident as "general investigatory dut[y]"); *see also* N.C. Gen. Stat. § 20-166.1 (2013) (requiring police department of city or town to investigate "a reportable accident" and "make a written report of the accident within 24 hours of the accident"). As such, the circumstances at issue in this case fall within the scope of the public duty doctrine.

In attempting to avoid the application of the public duty doctrine, Plaintiff relies heavily on our decision in *Strickland*. However, *Strickland* is clearly distinguishable from the present case.

In *Strickland*, the plaintiff's son ("the decedent") was mistakenly shot and killed by a member of the New Hanover County Emergency Response Team (the "ERT") during an attempt to serve a warrant for the decedent's arrest. The University of North Carolina at Wilmington Police Department ("UNC-W Police Department") was investigating the decedent for an assault and theft on the university's campus and had requested the ERT's assistance in serving the arrest warrant on him. *Strickland*, 213 N.C. App. at 506-07, 712 S.E.2d at 889. The shooting occurred when an ERT member mistook for a gunshot the sound of a battering ram striking the door of the decedent's residence and fired his weapon into the residence. *Id.* The plaintiff filed a wrongful death suit against the University of North Carolina at Wilmington ("UNC-W") and the UNC-W Police Department, alleging that officers of the UNC-W Police Department "negligently provided false, misleading, and irrelevant information to . . . ERT members" in order to secure their assistance in executing the warrant. *Id.* at 507, 712 S.E.2d at 889. The plaintiff further alleged that this false information, which included statements that the decedent was involved in gang activity and known to be armed and dangerous, "proximately caused [the decedent's] death by leading ERT members to believe that they were entering into . . . a severely dangerous environment including heavily armed suspects with histories of intentional physical violence causing injuries to persons." *Id.*

In concluding that the public duty doctrine did not insulate UNC-W and its police department from liability, we explained that the duty of a law enforcement officer "not to negligently provide false and misleading information . . . during a criminal investigation" did not "resemble the types of duties to the general public for which the public duty doctrine normally precludes liability." *Id.* at 511-12, 712 S.E.2d at 892. In particular, we emphasized that

> [i]n all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or of the effects of such a force. *See, e.g.*, *Myers*, 360 N.C. 460, 628 S.E.2d 761 (negligent control of a forest fire not started by fire fighting agency); *Wood v. Guilford Cty.*, 355 N.C. 161, 558 S.E.2d 490 (2002) (failure to prevent third party's criminal act on county property); *Stone*, 347 N.C. 473, 495 S.E.2d 711 (failure to ensure plant worker's ability to escape plant fire not started by inspection agency); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (negligent inspection of amusement ride prior to ride's malfunction, which was not caused by the inspection); *Braswell*, 330 N.C. 363, 410 S.E.2d 897 (failure to prevent a third party's criminal act). In this case, however, the alleged breach is not a negligent action with respect to some external injurious force. Rather, the UNC-W police department's act of negligently providing misleading and inaccurate information *was itself the injurious force.*

Id. at 512, 712 S.E.2d at 892 (emphasis added and footnote omitted).

Here, unlike in *Strickland* in which "UNC-W police officers' negligent provision of inaccurate information *brought about* the ERT member's decision to fire his weapon through [the decedent's] front door," *id.* at 514, 712 S.E.2d at 893, Officer Hedwin's alleged negligence in failing to ascertain the other motorist's identity did not bring about the physical injuries, medical bills, lost wages, and pain and suffering alleged in Plaintiff's complaint. Instead, Plaintiff is alleging that Officer Hedwin negligently failed to properly investigate an accident caused by "an external injurious force" — namely, the third-party motorist who ran her vehicle off the road. Accordingly, as in *Lassiter*, the public duty doctrine shields the City from liability arising from Officer Hedwin's investigation of the accident. *See Lassiter*, 168 N.C. App. at 321, 607 S.E.2d at 695 (concluding that officer's management of accident scene "fell completely within Durham's immunization of performing a public duty").

Finally, because Plaintiff has not alleged the applicability of either the special relationship exception or the special duty exception to the public duty doctrine, we decline to address the potential applicability of these exceptions. *See Myers v. McGrady*, 360 N.C. 460, 468-69, 628 S.E.2d 761, 767 (2006) (declining to address exceptions to public duty doctrine where plaintiffs did not raise them); *Rev O, Inc. v. Woo*, ___ N.C. App. ___, ___, 725 S.E.2d 45, 52 (2012) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." (citation and quotation marks omitted)). As such, Plaintiff's negligence claim against the City is barred by the public duty doctrine, and the trial court therefore properly granted the City's motion to dismiss.

Conclusion

For the reasons stated above, the trial court's 2 August 2013 order is affirmed.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

Judge HUNTER, JR. concurred in this opinion prior to 6 September 2014.

STEPHEN C. NICHOLSON, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF GERALDINE ANNE NICHOLSON, PLAINTIFF
v.
ARLEEN KAYE THOM, M.D., DEFENDANT

No. COA13-1053

Filed 16 September 2014

1. Appeal and Error—mootness—production of medical records—not introduced—used during questioning

In a negligence action against a surgeon who had suffered a back and arm injury, defendant's appeal from a trial court order allowing the production of her medical and pharmaceutical records was not moot even though the subpoenaed documents were never entered into evidence. The result of the production of defendant's records was the extensive use of those documents during plaintiff's

questioning of defendant, which remained in controversy between the parties.

2. Appeal and Error—standard of review—use of material protected by physician-patient privilege—abuse of discretion

In a negligence action against a surgeon who had suffered a back and arm injury, the standard of review for issues involving the production and use of the surgeon's medical records was abuse of discretion. The parties did not dispute the protection of the records by the physician-patient privilege, which would have meant de novo review, but contested the trial court's decisions concerning the production and use of those documents during the questioning of defendant. Challenging a trial court's decision that the administration of justice requires the disclosure of information protected by the physician-patient privilege requires a showing of abuse of discretion.

3. Discovery—motion to quash—subpoenas duces tecum—not improper discovery

Subpoenas duces tecum for the medical records of a surgeon were not issued for an improper fishing expedition where the documents produced were not introduced at trial in a negligence action against the surgeon. The trial court had determined in a pre-trial hearing that the records would not be admitted, plaintiff's attorneys did not have the opportunity to inspect the documents before the trial's court's determination that some should be produced, and the trial court's decision that some of the requested records were sufficiently relevant to require production to plaintiff but not admission as substantive evidence was neither arbitrary nor manifestly unsupported by reason.

4. Discovery—subpoenas duces tecum—defendant's medical records—HIPPA violations

To the extent plaintiff's subpoenas duces tecum for the medical records of a surgeon in a negligence action did not comply with the HIPPA regulations, those violations should be charged against the covered entities that provided those records, not against plaintiff.

5. Appeal and Error—settlement of record—presumption of correctness

In an appeal that involved the discovery of a surgeon's medical records, the trial court was presumed to have correctly produced documents to plaintiff where the settlement of the record left no way to determine whether the documents in defendant's supplement

to the record were the same documents that the trial court turned over to plaintiff at trial.

6. Evidence—medical negligence—physician's use of pain killers—relevant and not prejudicial

The trial court did not abuse its discretion on relevance or prejudice issues in a medical negligence case where it allowed a line of questions about a surgeon's use of prescription drugs after an injury, with her medical records used as a basis for the questions. Plaintiff's questions elicited relevant testimony concerning defendant surgeon's use of pain medicines and their side effects.

7. Medical Malpractice—surgeon's medications—side effects—expert testimony—not needed

Expert testimony was not required in a medical negligence action to establish the side effects of drugs taken by defendant surgeon after an injury and during the general time period when this surgery occurred. A sponge was left in decedent's abdominal cavity after the surgery; when the standard of care is established pursuant to res ipsa loquitur, as here, expert testimony is not necessary to establish the relevant standard of care.

8. Evidence—hearsay—information told to counsel by pharmacist—not used to prove the truth of the matter

In a negligence action against a surgeon who took medications after an injury, plaintiff's reference when questioning defendant to information plaintiff's counsel had obtained from the local pharmacist about side effects did not constitute inadmissible hearsay. Plaintiff's questions were not asked to establish the truth of the warnings obtained from the pharmacist but to elicit defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery.

9. Medical Malpractice—standard of care—expert testimony—not required—sponge left inside body

In a negligence action against a surgeon, expert testimony about the standard of care was not necessary when plaintiff asked the surgeon whether she had a "legal duty" to advise the decedent regarding defendant's use of medications prior to the surgery. In this case, an inference of a lack of due care was raised because a sponge was left in the decedent's body; furthermore, the cited portions of the transcript did not indicate that counsel for plaintiff ever used the phrase "legal duty" when examining defendant.

10. Evidence—collateral source rule—voluntary forgiveness of debt by hospital—rule not applicable

The collateral source rule was not applicable in a medical malpractice action and the trial court erred by failing to admit evidence of the hospital system's write-offs. The bills were forgiven by the hospital of its own accord as a business loss; the paying party was not independent and not collateral to the matter. It was noted that this action was begun in 2008, before the effective date of N.C.G.S. § 8C-1, Rule 414, which abrogated the collateral source rule.

11. Damages and Remedies—instructions—permanent injury—improper for deceased victim

It was noted that the trial court's instruction on permanent injury in a medical malpractice action was erroneous in light of the fact that the decedent was not alive at the time of the trial and plaintiff (her estate) did not bring suit for wrongful death. The purpose of the permanent injury instruction is to compensate the plaintiff for additional future harm such as impaired earning capacity or pain.

Appeal by Defendant from Judgment entered 16 October 2012 and Order entered 19 December 2012 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 19 February 2014.

Comerford & Britt, L.L.P., by John A. Chilson and Clifford Britt, and Musselwhite, Musselwhite, Branch & Grantham, by James W. Musselwhite, for Plaintiff.

Yates McLamb and Weyher, L.L.P., by Dan McLamb and Andrew C. Buckner, for Defendant.[1]

STEPHENS, Judge.

Background

This case arises from claims of negligence and loss of consortium brought on 21 May 2008 by Plaintiff Stephen C. Nicholson, administrator of the estate of his wife Geraldine Anne Nicholson ("the decedent"). Prior to 28 June 2005, at the age of fifty-four, the decedent began experiencing heavy rectal bleeding. It was later discovered that she had a cancerous tumor in her rectum. Plaintiff's claims stem from a surgical procedure performed by Defendant Arleen Kaye Thom, M.D., to remove the tumor.

1. Different counsel represented Defendant at trial.

The surgery was performed at Cape Fear Valley Medical Center ("Cape Fear") on 28 June 2005. At the time of the surgery, Defendant was a general surgeon with special training and experience in performing cancer surgery. In order to remove the tumor, Defendant made a large abdominal incision to expose the decedent's bowels, a separate incision to completely remove the rectum and anus, and inserted a colostomy bag to allow stool to pass through the abdominal wall.

The decedent's post-surgical treatment included chemotherapy and radiation therapy. Over the next few weeks, as the treatment was beginning, the decedent started to get unusually sick. She had problems with nausea and diarrhea that led to abnormalities with her body chemistry. She got weaker and was readmitted to Cape Fear for weakness, inability to eat, diarrhea, and problems with electrolytes. On 31 August 2005, two months and twenty-six days after the surgery, an X ray revealed a retained surgical sponge in the right lower quadrant of the decedent's abdomen.

One week later, on 7 September 2005, an additional operation was performed to remove the sponge. The middle part of the decedent's abdomen was reopened, and the sponge was removed. According to expert testimony offered on Plaintiff's behalf, the surgery revealed that "there was a perforation of the bowel [and] the [retained sponge] was contaminated with intestinal contents. There was an abscess[2] around [the sponge and] dense adhesions[3] all the way around." As a result, the surgeon removed a section of the decedent's bowel, spent forty-five minutes dividing the scar tissue that was nearby, and ultimately removed the sponge. The surgeon did not close the skin around the abdominal wall because of "the amount of infection that was present."[4]

After the September surgery, the decedent received additional care for the open wound. She also underwent multiple additional surgeries between September 2005 and February 2006. The first of these additional surgeries was an attempt to close the abdominal wound resulting from the previous surgery. This surgery failed, and another surgery was required to complete that procedure. The decedent also needed a third operation, according to Plaintiff's expert, "because she developed

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2. The expert testified that an abscess is "the combination of bacteria together with the body's inflammatory cells."

3. An adhesion is "scar tissue."

4. Specifically, the surgeon "was able to close the inner layer [of the abdominal wound, but] he was not able to close the subcutaneous fat and the skin . . . ."

progressive blockage of her intestines from the scar tissue that was related to the sca[r]ring from the sponge." A fourth operation was later required to repair leakage resulting from the third surgery. Lastly, the decedent required surgery to address an infection of the skin. Plaintiff's expert testified that all of these surgeries were necessary as a result of the retained sponge.

The expert also testified that the decedent was not able to complete her chemotherapy and radiation therapy as a result. The decedent's cancer returned in July of 2006 and metastasized to her brain. From the date of her admission to Cape Fear on 31 August 2005 to the date of her death in 2006, the decedent changed hospitals, "but she never left a hospital bed." She died in 2006 as a result of the cancer.

In his complaint, Plaintiff alleged that Defendant negligently failed to remove the surgical sponge from the decedent's abdomen and, in failing to do so, caused much of "the damage[] sustained by the dece[dent] prior to her death[.]" Specifically, Plaintiff contended that Defendant's actions directly and proximately damaged the decedent in the form of medical bills, pain and suffering, scarring and disfigurement, "multiple additional medical impairments," "multiple additional surgical procedures," 401 days of life spent in the hospital, and an inability to complete recommended cancer treatments leading to a "shortened life expectancy." Plaintiff also brought a cause of action for loss of consortium, asserting that Defendant's alleged negligence caused "a loss and disruption of the marital relationship" he had enjoyed with the decedent, including "the loss and disruption of her marital services, society, affection, companionship and/or sexual relations." Plaintiff did not bring a cause of action for wrongful death. Defendant denied the material allegations of Plaintiff's complaint by answer filed 30 July 2008.

During discovery Plaintiff learned that Defendant had been "disabled" since the middle of August 2005. As a result, Plaintiff served a second request for production of documents on 8 January 2010, seeking a copy of Defendant's application for disability benefits, correspondence regarding that claim, and a copy of all of Defendant's medical records "that relate or pertain to [a disability] in her left arm that she sustained on or about" 17 August 2005. Plaintiff served a third[5] set of interrogatories on Defendant that same day, seeking the "full details" of the 17 August 2005 injury to Defendant's arm. Defendant objected to

5. In his brief, Plaintiff appears to refer to these interrogatories as his "[s]econd [s]et of [i]nterrogatories." The supplemental record indicates, however, that the interrogatories at issue were Plaintiff's "third set," not his second.

these discovery requests on 10 February 2010. One week later Plaintiff filed a motion to compel Defendant to respond to the challenged discovery requests. In an affidavit filed with the trial court, one of Defendant's attorneys averred that he believed the requested documents were protected under the physician-patient privilege. The trial court, Judge Ola M. Lewis presiding, granted Plaintiff's motion to compel by order entered 7 April 2010, with the limitation that the requested documents would be disclosed only to Plaintiff's counsel. Defendant appealed that order to this Court.

Following Defendant's appeal, the trial court entered an order staying discovery until the matter could be reviewed on appeal. Defendant also filed a motion to stay proceedings of the trial court, and that motion was granted on 15 April 2010. Despite the interlocutory nature of Defendant's appeal, we reviewed the trial court's order granting Plaintiff's motion to compel as affecting a substantial right and affirmed the decision of the trial court. *Nicholson v. Thom*, 214 N.C. App. 561, 714 S.E.2d 868 (2011) (unpublished opinion), *available at* 2011 WL 3570122, at *2, *8 [hereinafter *Nicholson I*], *disc. review denied*, __ N.C. __, 724 S.E.2d 509 (2012). In so holding, we noted that the requested documents were protected by the physician-patient privilege, but pointed out that the trial court is authorized to order the production of documents protected by the physician-patient privilege, in its discretion, when, in the opinion of the judge, they are necessary to serve the proper administration of justice. *Id.* at *4–*5. Because of "the potential relevance of the information contained in the disputed records," we concluded that the trial court did not abuse its discretion by granting Plaintiff's motion to compel. *Id.* at *8. As a consequence, Defendant produced copies of the requested records on 29 March 2012.[6]

On 14 May 2012, after reviewing the documents, Plaintiff served a third request for production of documents on Defendant. Specifically, Plaintiff sought access to "all of" Defendant's medical and pharmaceutical records pertaining to: (1) "her cervical spine, cervical disc disease, cervical radiculopathy, cervical stenosis, disc bulge, and laminectomy surgery," including magnetic resonance imaging scans; (2) "her diagnosis, treatment, and monitoring of sacroiliitis"; (3) "her diagnosis and treatment of depression and/or post-traumatic stress disorder"; (4) "her

6. Plaintiff alleges in his brief that, despite this order, Defendant failed to respond to his "[s]econd" set of interrogatories. As we noted in footnote 5, it is unclear whether Plaintiff is actually referring to his third set of interrogatories, the subject of the litigation at issue on appeal, or whether he is referring to a separate, second set of interrogatories, which are not included in the record on appeal.

diagnosis and treatment of Parsonage-Turner Syndrome"; and (5) "the brachial plexus neuropathy in her left arm that she sustained on . . . [17 August 2005]." Plaintiff also requested a copy of Defendant's records "from Advanced PT Solutions, UNC Chapel Hill (neurosurgery), Dr. Viren Desai, Dr. Pendleton, Dr. Robertson, Dr. Johnson, Dr. Stratus, Dr. Gluck, Dr. Bettendorf, Home Instead, Kohll's/RxMPSS Pharmacy, CapeFearDiscountDrug, and Walmart Pharmacy." Defendant objected on grounds that the documents were privileged, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence, and Plaintiff again moved to compel production.

On 7 August 2012, the trial court, Judge James Gregory Bell presiding, allowed Plaintiff's motion to compel. The court concluded that the requested discovery was "relevant and reasonably calculated to lead to the discovery of admissible evidence," "reasonably tailored to address questions raised by the recent production of Defendant's medical and disability records, . . . not overly burdensome, and its probative value outweigh[ed] any potential prejudice to . . . Defendant." The court also concluded that the requested medical records were protected under the physician-patient privilege, but that they "should be produced because the interests of justice outweigh the protected privilege." Defendant appealed that order to this Court on 13 August 2012.[7]

Four days later, on 17 August 2012, Plaintiff served a subpoena and subpoenas *duces tecum* on counsel for Defendant, seeking to have Defendant appear on 21 August 2012, testify, and produce the following documents: (1) "all records requested by Plaintiff in his 3rd [r]equest for [p]roduction of documents which were ordered to be produced by . . . Judge Bell on August 7, 2012" and (2) "[t]he original or certified copy of Cape Fear['s] entire chart for [Defendant]." Defendant filed objections and motions to quash on 21 August 2012.[8]

Between August 29 and 31 of 2012, Plaintiff issued fifty-four subpoenas *duces tecum* to various persons, pharmacies, and corporations,

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7. The record does not indicate that the trial court entered an order staying the proceedings below or that Defendant sought such a stay pending review by this Court. Nonetheless, there is no evidence that Defendant produced the requested discovery. Rather, the parties proceeded toward trial. Following the trial, Plaintiff moved to dismiss the appeal as moot, and this Court granted that motion.

8. On 31 August 2012, Plaintiff also served a subpoena *duces tecum* on Cape Fear, again seeking production of Defendant's "entire chart." Cape Fear filed a motion to quash, and the trial court denied that motion on 1 October 2012. Defendant appealed that order to this Court on 30 October 2012, but eventually withdrew that appeal.

requiring them to produce either Defendant's "entire chart" or her medical and pharmaceutical records from between January and September of 2005. Counsel for Defendant was served with copies of those subpoenas on 12 September 2012. On 18 September 2012, Defendant filed an objection and motion to quash these subpoenas or, in the alternative, for entry of a protective order.

The matter came on for trial beginning 1 October 2012 in Robeson County Superior Court, Judge Mary Ann Tally presiding. Following an *in camera* review of the subpoenaed documents, the trial court denied Defendant's motion and allowed certain of the documents to be produced to Plaintiff. The documents were not admitted into evidence, but were referenced extensively by counsel for Plaintiff in his questioning of Defendant.[9] Plaintiff's counsel also questioned Defendant about descriptions of Defendant's medical condition from sealed affidavits submitted to the trial court in March of 2010. The affidavits, which concerned the state of Defendant's health at that time, had been submitted by two of Defendant's health care providers in support of her request to refrain from attending the trial, which at that time was scheduled to occur in 2010.

Other evidence admitted at trial described the course of the decedent's cancer treatment. In addition, Plaintiff introduced a summary of the decedent's medical bills, totaling $1,219,660.36, approximately $860,000 of which was considered a "write-off[]" by the Cumberland County Hospital System and had not been paid by any source.

At the conclusion of the trial, the jury returned verdicts awarding $5,050,000 to the estate and $750,000 to Plaintiff, individually, for a total award of $5,800,000. The trial court reduced that amount by $1,150,000 pursuant to Plaintiff's settlement with "other defendants in another case" and entered judgment against Defendant on 16 October 2012 for a total amount of $4,650,000.[10] On 19 October and 21 November 2012, respectively, Defendant filed motions for "Amendment of Judgment (Remittitur) or New Trial" pursuant to Rule 59(a) and "Relief from Judgment" pursuant to Rule 60(b). The trial court denied those motions by order filed on 19 December 2012. Defendant appealed that order and

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9. Counsel for Defendant lodged a continuing objection to this line of questioning at the beginning of Defendant's testimony.

10. The trial court's 16 October 2012 judgment does not indicate the name of the other defendants. Other sections of the record on appeal and portions of the trial transcript, however, indicate that the other defendants included the Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center.

the trial court's judgment entered upon the jury's verdict to this Court on 15 January 2013.

Discussion

On appeal, Defendant argues that the trial court erred by: (1) denying her motion to quash the subpoenas *duces tecum* or, alternatively, for entry of a protective order; (2) providing her medical records to counsel for Plaintiff; (3) allowing counsel for Plaintiff to question her concerning her health and her medical records for the purpose of suggesting that she was impaired during the surgery she performed on the decedent; (4) allowing counsel for Plaintiff to question her and other witnesses about the propriety of advising the decedent of the medications Defendant was taking at the time of the operation; (5) allowing counsel for Plaintiff to introduce evidence of medical bills "which were not actually incurred or paid by [Plaintiff] . . . or any other entity"; (6) instructing the jury on permanent injury; and (7) denying Defendant's motion for amendment of judgment (remittitur) or new trial. As discussed below, we find no error in part, but remand for a new trial on damages.

I. Defendant's Medical and Pharmacy Records

A. Mootness

[1] As a preliminary matter, we address Plaintiff's argument that Defendant's appeal from the trial court's order denying her motion to quash and allowing the production of her medical and pharmaceutical records is moot because the subpoenaed documents were never entered into evidence. We disagree.

In North Carolina, an issue is moot

> [w]henever[] during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[. In those circumstances,] the case should be dismissed [as moot], for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Hamilton, __ N.C. App. __, __, 725 S.E.2d 393, 396 (2012) (citation omitted).

In this case Defendant requests that this Court determine the validity of the trial court's rulings because she contests the *result* stemming from the production of her records to Plaintiff — the extensive use of those documents by Plaintiff during questioning of Defendant. This

issue remains in controversy between the parties and, therefore, would not require this Court to merely determine an abstract proposition of law. Therefore, the issue of the validity of the trial court's ruling on the production and use of Defendant's medical and pharmaceutical records is not moot. Accordingly, Plaintiff's argument is overruled, and we proceed with a review of Defendant's arguments on the merits.

B. Standard of Review

[2] "When the propriety of a subpoena *duces tecum* is challenged, it is . . . addressed to the sound discretion of the court in which the action is pending." *Vaughn v. Broadfoot*, 267 N.C. 691, 697, 149 S.E.2d 37, 42 (1966). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's ruling] was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

With regard to the production and use of contested medical records, a trial court's determination regarding the applicability of the physician-patient privilege is a legal question, which is reviewed *de novo* on appeal. *See Nicholson I*, 2011 WL 3570122 at *3. However,

> [t]he decision as to whether disclosure of information protected by the physician-patient privilege is required to serve the proper administration of justice is one made in the discretion of the trial judge, and the appellant must show an abuse of discretion in order to successfully challenge the ruling.

Id. at *8. Here, the parties do not dispute the fact that Defendant's medical records are protected by the physician-patient privilege. Rather, Defendant contests the validity of the trial court's decisions to produce those documents to Plaintiff and allow Plaintiff to use the documents during questioning of Defendant. Accordingly, the standard of review for each of these issues is abuse of discretion.[11]

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11. Defendant argues in her brief that the standard of review in this context is *de novo*. At oral argument, however, counsel for Defendant conceded that the proper standard of review is abuse of discretion.

C. Subpoenas Duces Tecum

[3] Defendant contends that the trial court abused its discretion in overruling her objection and denying her motion to quash Plaintiff's subpoenas *duces tecum* or, in the alternative, for entry of a protective order because the subpoenas were improperly used for purposes of discovery and their issuance violated the Health Insurance Portability and Accountability Act ("HIPAA"). In response, Plaintiff contends the subpoenas were not issued for the purpose of discovery and Defendant was properly given notice of their issuance and an opportunity to object. We find no error.

i. The Purpose of the Subpoenas Duces Tecum

> The subpoena *duces tecum* . . . is the process by which a court requires the production at the trial of documents, papers, or chattels material to the issue. . . .
>
> . . . .
>
> Anything in the nature of a mere fishing expedition is not to be encouraged. A party is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence.[12]
>
> The law recognizes the right of a witness subpoenaed *duces tecum* to refuse to produce documents which are not material to the issue or which are of a privileged character. Nevertheless, whether a witness has a reasonable excuse for failing to respond to a subpoena *duces tecum* is to be judged by the court and not by the witness. Though he may have [a] valid excuse for not showing . . . the document in evidence, yet he is bound to produce it, which is a matter for the judgment of the court and not the witness.
>
> . . . . [On a motion to quash] a subpoena *duces tecum* . . . , the court . . . examine[s] the issues raised by the pleadings and, in the light of that examination, . . . determine[s] the apparent relevancy of the documents or the right of the witness to withhold production upon other grounds. An adverse ruling upon [the] movant's motion to quash . . . gives counsel [for the respondent] no right to inspect the

12. To the extent this paragraph might be read to allow fishing expeditions under certain circumstances, we note this Court's clarification that such ventures are prohibited in their entirety. *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986).

> books, documents, or chattels ordered to be produced at the trial, nor does it determine the admissibility of [those] items at the trial. The subpoena merely requires the witness to bring them in so that the court, after inspection, may determine their materiality and competency, or so that the witness, by reference to the books or papers, can answer any questions pertinent to the inquiry.

Vaughn, 267 N.C. at 695–97, 149 S.E.2d at 40–42 (citations, internal quotation marks, parentheses, and an ellipsis omitted).

Defendant contends that Plaintiff's subpoenas *duces tecum* were improper because they "were not issued to secure evidence for presentation for trial, as proven by the fact that none of the documents were offered into evidence." Rather, Defendant contends, "they were simply an improper form of discovery." We disagree.

The subpoenaed documents were not offered into evidence during the trial because the trial court determined in a pre trial, *in camera* hearing that they could not be admitted into evidence. This fact was already established by the time the trial began and has no bearing on whether the subpoenas were issued for purposes of engaging in an improper fishing expedition. Indeed, as Plaintiff notes in his brief, his attorneys were never given an opportunity to inspect the subpoenaed documents prior to their production. They were sealed, sent directly to the courthouse, and ultimately inspected by the trial court, which determined that some of the documents should be produced to Plaintiff's counsel for use during the trial, and some should not. Plaintiff was never allowed to fish through the documents to gather evidence and, thus, was not engaging in discovery. Moreover, in light of our opinion in *Nicholson I*, we believe the trial court's decision that some of the requested records were sufficiently relevant to require production to Plaintiff, but not so relevant as to be admitted as substantive evidence, was neither arbitrary nor manifestly unsupported by reason. *See* 2011 WL 3570122 at *8 ("In view of the potential relevance of the information contained in the disputed records, we are unable to conclude that the trial court abused its discretion by ordering Defendant to produce the requested materials in the interest of justice."). Accordingly, Defendant's argument is overruled.

ii. HIPAA

[4] In the alternative, Defendant contends that Plaintiff's subpoenas *duces tecum* violated HIPAA because they were not accompanied by a court order showing that "reasonable efforts have been made to ensure that [Defendant was] . . . given notice of the request and an opportunity

to object or that efforts have been made to obtain a protective order prohibiting the use of the records for any use other than the proceeding," citing 45 C.F.R. § 164.512(e)(1)(ii). Defendant contends that the alleged violation was prejudicial because her objections would have been heard prior to the issuance of the subpoenas "[h]ad . . . Plaintiff[] sought the order [as] required by HIPAA." Therefore, Defendant alleges, "[t]he trial judge . . . [denied] defense counsel any opportunity to review [the subpoenaed documents] and assert appropriate objections prior to their production." We are unpersuaded.

Section 164.512 of Subchapter C of Title 45, Subtitle A, of the Code of Federal Regulations provides in pertinent part that, under HIPAA:

> A covered entity may use or disclose protected health information without the written authorization of the individual . . . or the opportunity for the individual to agree or object . . . subject to the applicable requirements of this section. . . .
>
> . . . .
>
> (e) *Standard: Disclosures for judicial and administrative proceedings* — (1) *Permitted disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> . . .
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order . . . .

45 C.F.R. 164.512 (2013). Section 160.102 of Subchapter C also states that:

> (a) Except as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to the following entities:
>
> (1) A health plan.
>
> (2) A health care clearinghouse.
>
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

45 C.F.R. 160.102 (2013).

To the extent Plaintiff's subpoenas did not comply with the regulations cited above,[13] such violation should be charged against the *covered entities* that provided those records, not against Plaintiff. Section 160.102 clearly states that Subchapter C of HIPAA applies to health plans, health care clearinghouses, and certain health care providers. Plaintiff is none of these things. Assuming without deciding that the subpoenaed entities in this case qualify as "covered entities," it was their obligation to refrain from producing the requested documentation when they received Plaintiff's subpoenas if they determined that the subpoenas did not comply with HIPAA. Because Plaintiff is not a "covered entity" within the meaning of section 160.512, he cannot be held liable under Subchapter C of HIPAA for the subpoenaed entities' production of the requested documents. Therefore, the requirements cited by Defendant have no bearing on whether Plaintiff's subpoenas *duces tecum* were properly issued. Accordingly, Defendant's argument is overruled.

D. Providing Defendant's Records to Plaintiff

[5] Defendant next argues that the trial court erred by providing Plaintiff with medical and pharmaceutical records that did not comply with its own order. Specifically, Defendant alleges that the trial court provided Plaintiff with records created after 28 June 2005, despite its explicit statement at trial that documents generated after that date should not be produced to Plaintiff. In response, Plaintiff asserts that "the documents provided to this Court . . . [by Defendant][14] were not properly preserved for appeal" because Defendant did not take the opportunity to preserve a copy of the documents at trial and the documents merely

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13. We offer no opinion as to whether they did.

14. These documents were not included in the record on appeal. Rather, they were submitted to this Court, under seal, pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure. Plaintiff was not served with a copy.

constitute those documents that Defendant "*believes* may have been provided to Plaintiff's trial counsel at trial." (Emphasis in original). Alternatively, Plaintiff asserts that the documents provided to counsel caused Defendant no harm because Plaintiff already knew about her use of pain medications. We find no error.

Rule 11(c) of the North Carolina Rules of Appellate Procedure provides that, when settling the record on appeal,

> [i]f any party to the appeal contends that materials proposed for inclusion in the record or for filing . . . were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.
>
> . . . .
>
> The judge shall send written notice to counsel for all parties setting a place and time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. . . .
>
> If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled at the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

N.C.R. App. P. 11(c).

Citing Rule 11(c), Defendant has provided this Court with a number of documents that she believes were produced to Plaintiff during the trial. In an attached letter to the trial judge, Defendant requested confirmation that the documents submitted to this Court represent those produced to Plaintiff. Plaintiff's attorneys were provided with a copy of the letter, but not with a copy of the proposed documents. There is no indication in the record before this Court that the accuracy of the documents provided by Defendant was ever verified by the trial judge or that further action was taken to settle the record on appeal with regard to this question.

As described above, Rule 11(c) operates to settle the record on appeal in accordance with the objections of the appellee when no judicial settlement is timely sought at the expiration of the requisite time period. *Id.*; *see also Johnson v. Nash Comm. Coll.*, 203 N.C. App. 572, 692 S.E.2d 890 (2010) (unpublished opinion), *available at* 2010 WL 1542534 ("When the [appellee] objected to [the appellant's] proposed record on appeal . . . , [the appellant] filed a statement that he was not requesting judicial settlement. The record on appeal was, therefore, deemed settled in accordance with the [appellee's] objections by operation of Rule 11(c) . . . .").[15] Rule 11(c) makes no provision, however, for the requirements for settling the record on appeal when the appellant is admittedly unsure about the nature of the proposed supplement to the record, requests judicial settlement, does not serve the proposed documentation on the appellee, and judicial settlement never occurs. In that circumstance, we must default to the broader requirements of Rule 9(a).

Rule 9(a) states in pertinent part that "review is solely upon the record on appeal." N.C.R. App. P. 9(a).

> This Court has held that where certain exhibits presented to the trial court were not included in the record on appeal, those exhibits could not be considered on review to this Court. To raise the issue of the sufficiency of the evidence to support that finding on appeal, [the] defendant must preserve the record for appeal. Where the record is silent[,] we will presume the trial court acted correctly.

State v. Reaves, 132 N.C. App. 615, 619–20, 513 S.E.2d 562, 565 (citations and internal quotation marks omitted), *disc. review denied*, 350

15. *Johnson* is an unpublished opinion and, therefore, has no precedential value. N.C.R. App. P. 30(e). Nevertheless, case law on Rule 11(c) is scant, and our opinion in *Johnson* provides a helpful example of the practical application of this rule.

N.C. 846, 539 S.E.2d 4 (1999). When the record is "not completely silent," but fails to include the information necessary for appellate review, "we presume the correctness of the trial court's decision." *See id.* at 620, 513 S.E.2d at 565 (presuming the correctness of the trial court's decision to order the defendant to produce a report, which the defendant argued was protected work product, when the record on appeal included references to the content of the report, but did not include the report itself).

Regarding the documents produced to Plaintiff in this case, the trial court ruled as follows:

> THE COURT: . . . .
>
> . . . .
>
> I have reviewed the medical records and information of [Defendant] that was provided pursuant to the subpoenas. And after reviewing that information, I find that it's in the interest of justice and outweighs the privilege for certain information to be turned over to Plaintiff's counsel. The information is contained in this material that I have in my hand.
>
> For the record, basically, what I have done is delineated information concerning [Defendant] that may have some bearing on issues in this case using the date of June 28, 2005, as the cutoff date. I am withholding and upholding the privilege with regard to any medical information that has to do with dates and times after June 28, 2005.

On appeal, we have no way to ascertain whether the documents submitted in Defendant's supplement to the record are the same documents that the trial court turned over to Plaintiff at trial. Defendant avers that she believes they are, but there is no evidence that the trial court ever settled this matter. Therefore, we must presume that the trial court correctly produced documents to Plaintiff in accordance with the court's order. *See id.* at 619–20, 513 S.E.2d at 565. Accordingly, Defendant's argument is overruled.

E. Plaintiff's Questions Regarding Defendant's Records

[6] Defendant next argues that the trial court erred in allowing counsel for Plaintiff to question her (1) concerning the information contained in Defendant's medical records that the trial court ordered produced to counsel for Plaintiff, as well as the sealed affidavits provided by Defendant, and (2) with regard to Defendant's alleged "legal duty" to

advise the decedent that Defendant was taking medications at the time of the operation. Defendant contends that certain of those questions were irrelevant, highly prejudicial, improper without the support of medical expert testimony, and inadmissible hearsay. We find no error.

i. Legal Background and Standards of Review

Rule 401 of the North Carolina Rules of Evidence establishes that evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). All relevant evidence is admissible unless otherwise provided by rule or law. N.C. Gen. Stat. § 8C-1, Rule 402. "Evidence which is not relevant is not admissible." *Id.* "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . , such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and internal quotation marks omitted).

Rule 403 of the North Carolina Rules of Evidence provides that relevant evidence may nonetheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needles presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. We review a trial court's decision regarding whether to exclude evidence under Rule 403 for abuse of discretion. *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 200 (2011).

Rule 611 of the North Carolina Rules of Evidence provides the following direction with regard to the manner and order of questioning and the presentation of evidence at trial:

> (a) *Control by court.* — The court shall exercise reasonable control . . . so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) *Scope of cross-examination.* — A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.
>
> (c) *Leading questions.* — Leading questions should not be used on direct examination of a witness except as may

> be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

N.C. Gen. Stat. § 8C-1, Rule 611. This Court has determined that the trial court's rulings regarding questioning by an attorney on direct examination and cross-examination under Rule 611 is reviewed for abuse of discretion. *State v. Thompson*, 22 N.C. App. 178, 180, 205 S.E.2d 772, 774 (1974) (holding that the trial court did not abuse its discretion in allowing the prosecutor to ask his own witness leading questions relating to matters not giving rise to the charge); *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006) ("The trial court is vested with broad discretion in controlling the scope of cross-examination[,] and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.").

We also note that, when considering alleged evidentiary errors in civil cases, "[n]o error . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (2013). An error affects a substantial right of the appellant when it prejudiced her and, thus, when "it is likely that a different result would have ensued had the error not been committed." *In re Chasse*, 116 N.C. App. 52, 60, 446 S.E.2d 855, 859 (1994) (citation omitted).

ii. On the Issue of Impairment During Surgery

Defendant argues that the trial court erred in allowing counsel for Plaintiff to question her about information contained in Defendant's medical and pharmaceutical records as well as the sealed affidavits she provided to the trial court in 2010 because such information was not relevant and was "highly prejudicial" in nature. Specifically, Defendant contends that this line of questioning "inevitably tainted the entire trial" and that Plaintiff exceeded the bounds of permissible examination by asking about side effects discussed in affidavits submitted by Defendant's health care providers in 2010. Lastly, Defendant asserts that the trial court erred by permitting this testimony because a party must present "medical expert testimony" whenever cross-examining another party regarding "the potential side effects of medications being taken by that party." We are unpersuaded.

As a preliminary matter, we note that Defendant was called and questioned by counsel for Plaintiff as a part of Plaintiff's case in chief. The questioning Defendant refers to as impermissible occurred entirely on direct and redirect examination of Defendant, an adverse party. Therefore, pursuant to Rule 611, leading questions were permissible. N.C. Gen. Stat. § 8C-1, Rule 611(c). In addition, it is helpful to understand that this case was tried under a theory of negligence as established by the doctrine of *res ipsa loquitur*.

> Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges . . . , are introduced into the patient's body during surgical operations and left there.
>
> . . . .
>
> . . . [T]he well-settled law in this jurisdiction is and has been that a surgeon is under a duty to remove all harmful and unnecessary foreign objects at the completion of the operation. Thus the presence of a foreign object raises an inference of a lack of due care. When a surgeon relies upon nurses or other attendants for accuracy in the removal of sponges from the body of his patient, he does so at his peril. . . .
>
> . . . .
>
> . . . The application of *res ipsa loquitur* allows the issue of whether [the] defendant has complied with the statutory standard to be submitted to the jury for its determination. Although the application of the doctrine requires the submission of the issue to the jury, *the burden remains upon the plaintiff to satisfy the jury that the defendant has failed to comply with the statutory standard.* [The d]efendant's evidence that he complied with the statutory standard does not remove the case from the jury's determination. As the trier of the facts, the jury remains free to accept or reject the testimony of [the] defendant's witnesses.

Tice v. Hall, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567–68 (1984) (citations and internal quotation marks omitted; emphasis and certain italics added). Therefore, the testimony of Defendant, elicited on direct examination by Plaintiff's counsel, is relevant and admissible to the extent that it makes the existence of any fact that is of consequence

to the jury's determination more or less likely to be true and is not otherwise inadmissible.

On direct examination of Defendant, counsel for Plaintiff questioned her extensively about whether she had taken narcotic and non-narcotic pain medications leading up to and during the surgery. Defendant responded that she was taking narcotic pain medications leading up to the surgery, but that she only took non-narcotic pain medications during the surgery. Defendant also stated that side effects from the narcotic pain medications were not present at the time of the surgery.

Plaintiff questioned Defendant further about information contained in sealed affidavits that Defendant provided to the trial court in 2010. Counsel for Plaintiff did not reference the affiants or their affidavits, but used the information contained therein to question Defendant about side effects that she experienced after the surgery when taking the same narcotic medications[16] that she admitted to taking before the surgery. Though Defendant acknowledged that she took the same narcotic medications before and after the surgery, she only admitted to experiencing side effects *after* the surgery.

The questions asked by counsel for Plaintiff sought to elicit and did elicit relevant testimony. Whether Defendant was using pain medication in the period of time leading up to and during the surgery addresses whether she may have breached her duty of care during the surgery. As Defendant admitted, the side effects from some of her medications "might" have had an effect on a doctor's capabilities. Moreover, the extent to which those same medications may have caused Defendant to experience confusion and impairment of cognitive function at a later point in time is relevant to whether those admittedly appreciable side effects occurred prior to and during the surgery. Defendant's responses to Plaintiff's questions dealt with these issues. As a result, her testimony had some tendency to make consequential facts more or less likely to be true and, therefore, was relevant. In addition, given our opinion in *Nicholson I*, which concluded that certain of Defendant's medical records could be relevant, and considering Plaintiff's burden of establishing not only that the sponge was left in the decedent's body, but of satisfying the jury that Defendant failed to comply with her duty of care in allowing the sponge to be left in the decedent's body, we conclude that it was not an abuse of discretion for the trial court to decline to exclude

16. Defendant was prescribed an increased amount of one of those medications during this time.

this line of questioning under Rule 403. Accordingly, Defendant's argument is overruled to the extent that it relates to relevance and prejudice.

[7] Defendant argues further, however, that Plaintiff's questions regarding the side effects of the medications were inappropriate because (1) the questions were not supported by expert testimony as to the side effects, and (2) Plaintiff's reference to the side effects as coming from a "prescription warning that I obtained from a local pharmacist" was inadmissible hearsay. Again, we are unpersuaded.

Defendant's argument is based on the following questioning of Defendant by counsel for Plaintiff:

> Q. You said earlier as far as the Cymbalta[,] that you were taking that at the time you performed surgery on [the decedent], correct?
>
> A. I believe so.
>
> Q. Again, this is another prescription warning that I obtained from a local pharmacist.
>
> A. Uh-huh.
>
> Q. I want to read this and ask if you are familiar with this warning as it relates to the medication especially with you being a physician.
>
> A. Uh-huh.
>
> Q. This drug . . . may . . . make you dizzy or drowsy. Do not drive, use machinery, or do any activity that requires alertness.
>
> Do you agree or disagree with the warning that goes with that medication?
>
> A. I agree. If you have — if you're taking this medication and you have any dizziness or drowsiness as a side effect of that medication, then you should refrain from driving. But not everybody reacts to the medications the same way, and not everybody has the same side effects. But certainly, if you have those side effects, you should warn — you should heed those warnings. I do not have those side effects.
>
> Q. Well, the warning says that the medication can affect your alertness. Now, number one, do you need to be alert in a long and complicated surgical procedure?

A. Yes, you do.

Q. In your opinion — even though you are aware of these warnings you take the medication. In your opinion, does it affect your alertness?

A. The Cymbalta?

Q. Yes.

A. No.

Q. Has it ever affected your alertness?

A. No.

Q. Has it ever made you drowsy?

A. No.

Q. So you've not had any problem with the warnings that they give?

A. Correct.

Q. That doesn't mean that you can't have those problems. I mean, certainly, you can; is that correct?

. . . .

A. Usually, if you're going to have those side effects, you experience them early on when you're given the prescription.

Defendant first argues that the above questioning was improper because it was not supported by expert testimony as required by *Smith v. Axelbank*, __ N.C. App. __, 730 S.E.2d 840 (2012) and *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), *vacated in part and appeal dismissed on other grounds*, 356 N.C. 415, 572 S.E.2d 101 (2002). We disagree.

The plaintiff in *Axelbank*, after experiencing deleterious side effects from a drug prescribed by her doctor, brought suit for medical malpractice or, alternatively, for negligence under a theory of *res ipsa loquitur*. __ N.C. App. at __, 730 S.E.2d at 842. Her complaint did not include certification by a medical expert pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. *Id.*

> Rule 9(j) states that a complaint alleging medical malpractice shall be dismissed unless a plaintiff asserts in her

> complaint that her medical care has been reviewed by a person who is willing to testify that the medical care did not comply with the applicable standard of care, and that this person must be reasonably expected to qualify as an expert witness under . . . Rule 702 or must be a person the plaintiff will seek to have qualified as an expert . . . . Alternatively, a plaintiff must allege facts establishing negligence under the doctrine of *res ipsa loquitur*.

Id. On appeal, we held that the trial court properly dismissed the plaintiff's complaint for failure to state a claim because she did not include certification under Rule 9(j) and she failed to allege facts establishing negligence under the doctrine of *res ipsa loquitur*. __ N.C. App. at __, 730 S.E.2d at 842–43 ("Here, a layperson would not be able to determine that [the] plaintiff's injury was caused by [the drug] or be able to determine that [the doctor] was negligent in prescribing the medication to [the] plaintiff without the benefit of expert testimony.").

In *Assimos*, the plaintiff brought suit against her doctor for medical malpractice under a theory of *res ipsa loquitur* due to side effects she experienced as a result of the doctor's alleged "failure to adequately[,] properly[,] and fully inform her of the risks known to be associated with the administration of [a] drug . . . given to [her] during her treatment." 146 N.C. App. at 340, 553 S.E.2d at 65. The plaintiff's complaint did not include a Rule 9(j) certification. *Id.* at 342, 553 S.E.2d at 66. Relevant to the issues we are considering in this case, we held that the trial court did not err in dismissing the plaintiff's medical malpractice action for failure to state a claim of negligence under the doctrine of *res ipsa loquitur*. *Id.* at 343, 553 S.E.2d at 67. We noted that the side effects of the drug were not within the jury's common knowledge, and, therefore, expert testimony was necessary to establish the relevant standard of care. *Id.*

Axelbank and *Assimos* address a plaintiff's obligation to include medical expert certification with her complaint when the doctrine of *res ipsa loquitur* does not apply to establish an inference of negligence. Here, however, the parties are not at the pleading stage, and the applicability of the doctrine of *res ipsa loquitur* is not at issue. Our Supreme Court has already made clear that there is a defined standard of care in cases involving foreign objects left in the body and that the legal doctrine of *res ipsa loquitur* is applicable on the issue of breach of that standard of care. *Tice*, 310 N.C. at 592–94, 313 S.E.2d at 567–68. The questions regarding the side effects from Defendant's medications were asked to confirm the inference that Defendant was negligent while performing the surgery. Indeed, when the standard of care is established

pursuant to the doctrine of *res ipsa loquitur*, as here, our opinions in *Axelbank* and *Assimos* indicate that expert testimony is *not necessary* to establish the relevant standard of care. Accordingly, Defendant's argument is overruled as it relates to whether expert testimony was required to establish the side effects of the drugs taken by Defendant.

[8] Defendant also argues that the challenged questioning was improper because Plaintiff's reference to the warning Plaintiff's counsel obtained from the local pharmacist constitutes inadmissible hearsay with regard to the side effects of the medications she was taking. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801. Subject to a number of well-defined exceptions, hearsay is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802. In this case, Plaintiff's questions were not asked to establish the truth of the warnings obtained from the pharmacist nor to prove the particular side effects of the medications Defendant was taking. Rather, they were asked to elicit Defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery. Therefore, this line of questions did not constitute inadmissible hearsay. Accordingly, Defendant's argument is overruled.

iii. On the Issue of Defendant's Alleged Duty to Advise

[9] Defendant next argues that the trial court erred by allowing counsel for Plaintiff to ask Defendant whether she had a "legal duty" to advise the decedent regarding Defendant's use of medications prior to the surgery. Citing this Court's opinion in *Atkins v. Mortenson*, 183 N.C. App. 625, 644 S.E.2d 625 (2007), Defendant contends that such questioning should have been supported by expert testimony establishing the relevant standard of care. We disagree.

In *Atkins*, we affirmed the trial court's award of summary judgment to the defendant doctor in the plaintiff's medical malpractice action for failure of the doctor to recognize symptoms of illness and recommend appropriate treatment. *Id.* at 630, 644 S.E.2d at 628. In so holding we pointed out that, in medical malpractice cases, the standard of care "generally involves specialized knowledge" and, therefore, expert testimony is necessary to show a breach of the standard. *Id.* at 630, 644 S.E.2d at 629. *Atkins* does not, however, stand for the proposition that an attorney is obligated in a *res ipsa loquitur* case, in order to support direct examination of the defendant physician, to offer expert testimony regarding the standard of care for that physician's disclosure to her patient of information regarding the physician's use of medications.

Rather, it addresses whether the plaintiff in that particular case was able to forecast sufficient evidence to withstand summary judgment.

Here, unlike *Atkins*, an inference of a lack of due care was raised because a foreign object — the sponge — was left in the decedent's body. *See Tice*, 310 N.C. at 594, 313 S.E.2d at 568. Therefore, as discussed above, expert testimony was not necessary as "the presence of a foreign object raises an inference of a lack of due care" sufficient to submit the case to the jury for determination of whether Defendant breached her duty. *See id.* at 593, 313 S.E.2d at 567. Furthermore, the cited portions of the transcript do not indicate that counsel for Plaintiff ever used the phrase "legal duty" when examining Defendant. Rather, counsel asked Defendant, for example, whether she felt "it necessary to tell any of [her] patients or to inform any of [her] patients [about her use of medications] so they [would] have an opportunity to decide for themselves whether or not they want[ed her] doing the surgery."[17] Under the circumstances of this case, *Atkins* is unavailing. Accordingly, Defendant's argument is overruled.

II. Evidence of the Decedent's Medical Bills

[10] Defendant also argues that the trial court erred in allowing Plaintiff to present evidence of the decedent's medical bills — totaling $1,219,660.36[18] — because approximately $860,000 of that total was "written off" by the Cumberland County Hospital System and never paid by any party. "By allowing Plaintiff[] to contend [that the decedent's] medical expenses totaled [over $1,000,000.00], rather than the true amount her estate was obligated to pay," Defendant argues, "the court [erroneously] permitted Plaintiff[] to substantially inflate the value of [his] claim in the minds of the jurors." Alternatively, Defendant contends that, if the introduction of these bills was proper, she should have been allowed to introduce evidence of the fact that a substantial portion of the bills was written off by the hospital. Plaintiff responds that the medical bills were admissible, but the write-offs were not, pursuant to the collateral source rule. We conclude that the collateral source rule is not

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17. Counsel for Plaintiff later asked one of Defendant's expert witnesses whether "there is . . . [a] legal or ethical obligation on the part of the doctor, or in this case a surgeon, to inform [her] patient prior to surgery that the physician is taking pain medication [including narcotics]," but that question is not challenged on appeal.

18. In her brief, Defendant cites Plaintiff's Exhibit 3 for the fact that the medical bills totaled "$1,019,467.11." The copy of Plaintiff's Exhibit 3 submitted to this Court, however, states that the medical bills actually amounted to $1,219,660.36. Accordingly, we use the latter figure.

applicable here and, as a result, hold that the trial court erred by failing to admit evidence of the hospital system's write-offs.

For cases filed before 1 October 2011, the admissibility of evidence of medical expenses is governed by the common law collateral source rule.[19] According to that rule,

> evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to [the] defendant generally is not admissible. These benefits include payments from both public and private sources. This rule gives force to the public policy which prohibits a tortfeasor from reducing [its] own liability for damages by the amount of compensation the injured party receives from an independent source. Evidence of collateral source payments violate the rule whether admitted in the defendant's case-in-chief or on cross[-]examination of the plaintiff's witness. The erroneous admission of collateral source evidence often must result in a new trial.

Badgett v. Davis, 104 N.C. App. 760, 763, 411 S.E.2d 200, 202 (1991) (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 248 (1992).

> The purpose of the collateral source rule is to exclude evidence of payments made to the plaintiff by sources other than the defendant when the evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff. . . . The rule is punitive in nature[] and is intended to prevent the tortfeasor from a windfall when a portion of the plaintiff's damages have been paid by a collateral source.

Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 638–39, 627 S.E.2d 249, 257 (2006) (citations, internal quotation marks, and certain brackets omitted). In the context of medical malpractice, our Supreme Court has indicated that a source collateral to the defendant can include "a beneficial society, the plaintiff's family or employer, or an insurance company." *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987) (citation

19. In 2011, the collateral source rule was abrogated by Rule 414 of the North Carolina Rules of Evidence with regard to evidence of past medical expenses. N.C. Gen. Stat. § 8C-1, Rule 414. Rule 414 is not applicable in this case, however, because Plaintiff's action was commenced in 2008, before the effective date of this new rule. *See* 2011 N.C. Sess. Law 283, sec. 4.2 (stating that Rule 414 applies to actions commenced on or after 1 October 2011).

and internal quotation marks omitted). When payment comes from such a source, "an injured plaintiff is entitled to recovery for reasonable medical, hospital, or nursing services rendered [her], whether these are rendered . . . gratuitously or paid for by [her] employer." *Id.* (citations, internal quotation marks, and ellipsis omitted). "In summary, the collateral source rule excludes evidence of payments made to the plaintiff by sources *other than the defendant* when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." *Badgett*, 104 N.C. App. at 764, 411 S.E.2d at 203.

Plaintiff relies on our opinion in *Badgett* to support his argument that the collateral source rule is applicable in this case. We disagree. In *Badgett*, the plaintiff sued his doctor in negligence for knowingly prescribing a drug to which the plaintiff was allergic. *Id.* at 761, 411 S.E.2d at 201. The plaintiff became ill and was treated at a hospital. *Id.* At trial, the court admitted evidence of the plaintiff's total hospital and doctor's bills, evidence that a portion of the bills had been paid by Medicare, and evidence that, "according to the hospital's contract with Medicare, the unpaid balance was written off and could not thereafter be collected from the plaintiff." *Id.* at 762, 411 S.E.2d at 201–02. On appeal, we held that the admission of the Medicare payments and contractual write-offs, which we referred to as "gratuitous government benefits," was prejudicial and in violation of the rule. *Id.* at 764, 411 S.E.2d at 203.

In this case, unlike *Badgett*, the hospital bills were not paid by an independent third party. There is no evidence in the record that Medicare, Medicaid, some other insurance company, a beneficial society, Plaintiff's family, or Plaintiff's employer paid a portion of the decedent's medical bills and/or procured the write-offs. Rather, the bills appear to have been forgiven by the hospital of its own accord as a business loss. In an affidavit obtained by Defendant and not admitted into evidence,[20] the hospital's custodian of records characterized the unpaid medical bills as " '[r]isk [m]anagement' write-offs," which "were not paid by any source (including the patient or insurance company)." In addition, the evidence in the record indicates that the hospital was also a defendant in a separate suit brought by Plaintiff arising out of the same facts. The hospital ultimately settled that lawsuit, and the amount of that settlement was applied to reduce Plaintiff's verdict in this case.

We can find no cases in this jurisdiction directly addressing the situation in which a defendant doctor in a medical malpractice case

20. Defendant submitted the affidavit to the trial court as an offer of proof, however.

attempts to introduce evidence that a hospital, which has settled with the plaintiff in a separate action arising from the same facts, reduced the plaintiff's medical bills pursuant to "risk management" practices and not pursuant to a contract with a government entity like Medicare or with some other insurance company. Moreover, we have been unable to find any cases from other jurisdictions dealing with this particular, narrow factual scenario. Nevertheless, a number of courts have held, like *Badgett*, that the costs written off by a contract between a non-tortfeasor hospital and a government-funded assistance program like Medicare are not admissible under the collateral source rule. *See*, *e.g.*, *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255 (D.N.M. 2006) (holding thatthe collateral source rule applied to contractual Medicare write-offs made by the injured plaintiff's health care provider). When the hospital is a separate tortfeasor and writes off medical expenses pursuant to an agreement with a third party, however, other courts have concluded that the collateral source rule is not applicable. *See*, *e.g.*, *Rose v. Via Christi Health Sys.*, *Inc. / St. Francis Campus*, 279 Kan. 523, 529, 113 P.3d 241, 246 (2005) ("Under the facts of this case, the source of the $154,000 of medical services not reimbursed by Medicare was [the hospital], the tortfeasor, not an independent source."); *Williamson v. St. Francis Med. Ctr.*, *Inc.*, 559 So.2d 929, 934 (La. App. 2 Cir. 1990) (holding that the collateral source rule did not apply to allow the plaintiffs to recover medical bills cancelled by the hospital pursuant to an agreement with Medicare because "the hospital, to whom the bill was owed, was also a tort[]feasor" and, therefore, the benefit to the plaintiffs resulted from the hospital's own "procuration or contribution").

Here, the record does not indicate that the decedent's medical bills were written off pursuant to an agreement with an independent party. Rather, they were discharged by the hospital, also an alleged tortfeasor, which ultimately settled with Plaintiff. Unlike *Badgett*, the paying party in this case was not independent and not collateral to this matter. The payment was made by a separate, alleged tortfeasor and not pursuant to an agreement with a separate, collateral source. Therefore, we hold that the collateral source rule is not applicable to bar evidence of the hospital bills that were written off by the Cumberland County Hospital System. Accordingly, Plaintiff was entitled to introduce evidence of the decedent's medical bills, but Defendant was also entitled to introduce evidence that some of those bills were written off by the hospital. As a result, we hold that the trial court erred in denying Defendant's motion to introduce evidence of the write-offs and, therefore, abused its discretion in denying her Rule 60(b) motion for a new trial as it relates to the issue

of damages.[21] *See generally Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) ("[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court[,] and appellate review is limited to determining whether the court abused its discretion.").

III. Instruction on Permanent Injury

[11] Though we have already determined that Defendant is entitled to a new trial on damages, we address Defendant's argument that the trial court erred by instructing the jury on "permanent injury" in the interests of judicial economy and for the purpose of avoiding further appeal regarding the propriety of the trial court's jury instructions on damages. Defendant contends that the trial court erred by instructing on permanent injury because the purpose of the permanent injury jury instruction "is to guide the jury in how it should determine the value of *future damages* [to the injured party] at the time of trial" and the decedent was not alive at that time. (Emphasis added). In response, Plaintiff asserts that the instruction was proper because it was "abundantly clear" from the evidence that Plaintiff was only seeking damages for the decedent's personal injuries and his own loss of consortium, not for the decedent's life expectancy. We agree with Defendant.

As a preliminary matter, we note that Plaintiff brought no action for wrongful death. Therefore, the trial court's permanent injury instruction was only relevant to Plaintiff's actions seeking personal injury damages. In that context, the trial court instructed on permanent injury, in near word-for-word compliance with our pattern jury instructions, as follows:

> Damages for personal injury also include fair compensation for permanent injury incurred by the plaintiff as a proximate result of the negligence of the defendant. An injury is permanent when any of its effects continued throughout the plaintiff's life. These effects may include medical expenses, pain and suffering, scarring and disfigurement, partial loss of use of part of the body incurred or experienced by the plaintiff over her life expectancy.
>
> Once again, however, the plaintiff is not entitled to recover twice for the same element of damages; therefore, you should not include any amount you've already allowed for medical expenses, pain and suffering, and scarring

21. For the reasons discussed in the foregoing sections, we hold that the trial court did not otherwise abuse its discretion in failing to grant Plaintiffs' motions for remittitur and for a new trial.

> or disfigurement or partial loss of use of part of the body because of permanent injury.
>
> Life expectancy is the period of time the plaintiff may reasonably have been expected to live.

After its definition of life expectancy, the trial court moved on to a discussion of negligence. The trial court omitted the following additional language from our pattern jury instructions:

> [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.] They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.
>
> In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.

N.C.P.I. — Civil 810.14 (June 2012) (emphasis in original).

Beyond the alternative sentences set off in brackets, our pattern jury instructions do not indicate that the omitted text is optional. Though the charge conference does not disclose the court's rationale for omitting this text, the likely reason is that the decedent was not alive at the time of trial. It is entirely nonsensical to admit life expectancy tables and thereafter instruct the jury on the decedent's *life expectancy* when she is no longer living and no claim for wrongful death is being brought. The omitted language reveals, therefore, that the permanent injury jury instruction, in the context of Plaintiff's actions for personal injury damages, is not intended to cover past damages. Past damages can be addressed, as they were in this case, by instructions on other forms of damages. The purpose of the permanent injury instruction, however, is to compensate the plaintiff for *additional* future harm that she is expected to experience because of a permanent injury that she suffered as a proximate result of the defendant's conduct. *See generally* David A. Logan & Wayne A. Logan, North Carolina Torts 182 (1996) ("Plaintiffs are entitled to recover for the *future damages* associated with permanent injuries.") (emphasis added); William S. Haynes, North Carolina Tort Law 907–08 (1989) ("The term 'permanent injuries,' may be defined as those injuries that are reasonably certain to be followed by permanent impairment to earn money, or producing permanent and irremediable pain. . . . Damages for permanent disability are, therefore, addressed in the elements of damage referred to as loss of future earning

capacity or future pain and suffering, as opposed to being recoverable in and of themselves. It logically follows that where permanent injuries exist the proper element of damages into which such injuries fall are a permanent impairment or diminution of the plaintiff's earning ability or power."). In light of the fact that the decedent was not alive at the time of the trial and Plaintiff did not bring suit for wrongful death, we conclude that the trial court's instruction on permanent injury was erroneous.

Conclusion

For the foregoing reasons, we find no error in the trial of this case on the negligence issues. We remand for a new trial on damages.

NO ERROR in part; NEW TRIAL on damages.

Judges BRYANT and DILLON concur.

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC, PLAINTIFFS
v.
SHERIFF OF ONSLOW COUNTY, NORTH CAROLINA, ED BROWN, IN HIS OFFICIAL CAPACITY; AND DISTRICT ATTORNEY FOR THE FOURTH PROSECUTORIAL DISTRICT OF THE STATE OF NORTH CAROLINA, ERNIE LEE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA14-85

Filed 5 September 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—substantial right

The Court of Appeals had jurisdiction to determine defendant's interlocutory appeal of motions to dismiss because defendant's defense of sovereign immunity affected a substantial right warranting immediate review.

2. Immunity—sovereign immunity—jurisdiction proper

The trial court properly exercised jurisdiction in a case involving allegedly illegal video sweepstakes machines as sovereign immunity did not bar plaintiffs' claim for injunctive relief.

3. Appeal and Error—interlocutory orders and appeals—substantial right to enforce laws

Portions of a preliminary injunction order in a case involving allegedly illegal video sweepstakes machines affected defendant's

substantial right to enforce the laws of North Carolina. The Court of Appeals exercised jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the order. The Court of Appeals declined to hear defendant's challenge to the remaining portions of the trial court's order as they did not affect a substantial right.

4. Declaratory Judgments—justiciable actual controversy—jurisdiction proper

The trial court's exercise of jurisdiction over a declaratory judgment claim in a case involving allegedly illegal video sweepstakes machines was proper. A justiciable actual controversy, as required by the Declaratory Judgment Act, existed.

Judge ERVIN dissenting.

Appeal by defendant from orders entered on 4 November 2013 by Judge Jack Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 8 May 2014.

Onslow County Attorney, by Lesley F. Moxley; and Turrentine Law Firm, PLLC, by S.C. Kitchen, for Defendant-Appellant.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry; and Hyler & Lopez, P.A., by Stephen P. Agan and George B. Hyler, Jr., for Plaintiffs-Appellees.

HUNTER, JR., Robert N., Judge.

Onslow County Sheriff Ed Brown ("Sheriff Brown") appeals from orders entered on 4 November 2013 denying his motions to dismiss under Rule 12 as well as granting a preliminary injunction in favor of plaintiffs Sandhill Amusements, LLC ("Sandhill") and Gift Surplus, LLC ("Gift Surplus") (collectively "Plaintiffs").[1]

We agree with Sheriff Brown that this Court has jurisdiction to determine his interlocutory appeal of the motions to dismiss because

1. Gift Surplus is a Georgia corporation licensed to do business in North Carolina. Gift Surplus licenses the kiosks at issue in this case. Gift Surplus's kiosks are "sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business." Sandhill Amusement, Inc. ("Sandhill"), distributes the kiosks in Onslow County and surrounding areas.

his defense of sovereign immunity affects a substantial right warranting immediate review. We vacate certain portions of the preliminary injunction that affect a substantial right and dismiss Sheriff Brown's appeal from the remaining portions of that order. On the merits of the motions to dismiss, we affirm the trial court.

I. Facts & Procedural History

On 2 July 2013, Alcohol Law Enforcement ("ALE") Special Agent Kenny Simma ("Agent Simma"), Assistant Supervisor Keith Quick ("Agent Quick"), and Onslow County Sheriff's Office Sergeant John Matthews ("Sgt. Mathews"), in response to complaints that certain video gaming machines (hereinafter "kiosks") were providing money payouts, visited a business in the Rhodestown area of Onslow County. The business that Sgt. Matthews and the ALE agents visited was located in a building with blacked-out windows lacking any exterior sign displaying the name of the business. Sgt. Matthews and the ALE agents peered inside through a crack in the tint and knocked on the door. A male unlocked and opened the door and allowed Sgt. Matthews and the ALE agents inside. Agent Simma said that inside

> [t]he only things in the business was [sic] a counter with two Megatouch video poker machines on the counter, a pool table, I think a jukebox. I can't remember if it was three or four of these specific devices we're referring to, and a claw machine that -- like you see at Walmart, you put a quarter in and try to pick up a stuffed animal, and a pool table.

Later the business's proprietor arrived and showed Sgt. Matthews and the ALE agents how the machines worked.

The kiosks each include a 19" touch-screen display, an audio speaker, a control panel with "print ticket and play buttons," a receipt printer, and a currency acceptor. The kiosks allow patrons the opportunity to purchase gift certificates that may be used at Gift Surplus's online store, www.gift-surplus.com. When a patron inserts currency into the kiosk, a receipt is printed with equivalent credits ($1 is equivalent to 100 sweepstakes entries). The receipts printed also contain a "quick response code," which users may scan to enter a weekly drawing on the Gift Surplus website. Patrons may also use the kiosk to request a free entry request code, which allows for 100 free sweepstakes entries.

The kiosks contain five game themes: "Silver Bar Spin," "Truck Stop," "Lucky Shamrock 2," "Magic Tricks," and "Candy Money." Nick Farley

("Mr. Farley"), an expert in gaming machines and software, described these game as follows:

> Each of the aforementioned game themes offer several play levels which the participant may choose. A single finite pool is allocated to each play level for each game theme. Game play for these themes may be accomplished one of two ways:
>
> (1) By pressing the "REVEAL" button an entry is drawn from the corresponding theme/play level finite pool. The potential value is shown to the participant, and they are prompted to "Press SKIP or ANIMATE." Pressing either button will reveal a reel outcome. If the entry had no winning prize, a non-winning reel combination is displayed and either the play ends (if the "SKIP" button was pressed), or the participant is given the chance to nudge one of the three reels either up or down to another non-winning outcome (if the "ANIMATE" button was pressed). If the entry has a winning prize, a non-winning reel outcome is displayed and the participant must make a decision to nudge one of the three reels either up or down to align a winning combination corresponding to the prize value previous shown.
>
> (2) Alternatively, a participant may initiate the play by pressing the "ANIMATE" or "PLAY" button. A game initiated by pressing either the "ANIMATE" or "PLAY" button will not show the potential win value, but rather simply display a non-winning reel outcome which the player must then make a decision to nudge one of the three reels either up or down to align a winning combination.
>
> Regardless of the method the player uses to initiate play, the potential prize-value is determined by the entry revealed. Whether the potential prize is awarded is dependent upon the participant successfully nudging the correct reel in the correct direction to obtain a winning combination of symbols. Should a player fail to nudge the correct reel in the correct direction to obtain a winning combination, the potential prize is forfeited.

Agent Simma later told his supervisor about his visit and expressed his opinion that the kiosks were illegal video sweepstakes machines. The ALE agents later returned and took photographs and videos of the

kiosks. Agent Simma then sent the videos to Deputy Director Mark Senter at ALE headquarters, who also felt that the kiosks in Rhodestown violated the statutes regulating video sweepstakes machines. After receiving the ALE agents' report, District Attorney Ernie Lee and Sheriff Brown composed a letter to Richard W. Frye ("Mr. Frye"), President of Sandhill (hereinafter "innocent owner letter"). The letter informed Mr. Frye that the kiosks would be seized as evidence and that the person/persons in possession would be criminally charged. Mr. Frye testified that Sandhill removed kiosks from two Onslow County locations and opted not to place kiosks in five other Onslow County locations after receiving the innocent owner letter.

On 27 September 2013, Sandhill and Gift Surplus filed a joint Complaint and Motion for Preliminary Injunctive Relief against Sheriff Brown in his official capacity. The complaint alleged that Plaintiffs were suffering irreparable injury from the loss of revenues and profits resulting from the innocent owner letter issued by Sheriff Brown stating that the Plaintiffs' kiosks were illegal. Plaintiffs alleged that, since Sheriff Brown issued this letter, existing retail outlets that used Plaintiffs' products have removed the kiosks, refused to install the kiosks, or gave Plaintiffs notice that they intended to remove the kiosks. Plaintiffs also attached the affidavit and report of Mr. Farley, who opined that the kiosks operated based on skill and dexterity, rather than mere chance.

Plaintiffs' complaint sought the issuance of (i) preliminary and permanent injunctions prohibiting Defendants from removing the kiosks from any establishment in North Carolina and from issuing warnings and citations to such facilities; (ii) preliminary and permanent injunctions prohibiting Defendants from forcing or coercing a North Carolina retailer to remove Plaintiffs' kiosks; (iii) a preliminary injunction prohibiting Defendants from making or issuing statements outside of the litigation stating that the kiosks were illegal; and (iv) a declaratory judgment after a full hearing that declared the kiosks and Plaintiffs' marketing system are "not prohibited gambling, lottery or gaming products."

On 9 October 2013, Sheriff Brown filed motions to dismiss for lack of subject matter jurisdiction under N.C. R. Civ. P. 12(b)(1), lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2), failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6), and failure to bring suit on behalf of the real party in interest under N.C. Gen. Stat. § 1-57 (2013).

On 11 October 2013, the trial court held a hearing concerning Sheriff Brown's motion to dismiss and Plaintiffs' motion for injunctive relief. On

4 November 2013, Judge Jenkins entered an order relying in part on the expert witness's opinions that denied Sheriff Brown's motion to dismiss and granted Plaintiffs' motion for a preliminary injunction. In its orders, the trial court held that there was a likelihood that the Plaintiffs would prevail in that:

> (a) *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
>
> (b) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
>
> (c) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

The trial court also held that the suit was not barred by the doctrine of sovereign immunity and that Defendant had failed to show that Plaintiffs' claim should be dismissed under Rule 12(b)(1), Rule 12(b)(2), Rule 12(b)(6), or N.C. Gen. Stat. § 1-57. Accordingly, the trial court denied Defendant's motion to dismiss and granted Plaintiffs' request for the issuance of a preliminary injunction. Under the preliminary injunction, Sheriff Brown was:

> a. Restrained and enjoined from using North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and,
>
> b. Restrained and enjoined from compelling or attempting to compel, coerce[,] or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and,
>
> c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation[,]

> or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.

The trial court limited the applicability of the preliminary injunction to "those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks. . . ." Sheriff Brown filed timely written notice of appeal on 13 November 2013.

II. Appellate Jurisdiction

A judicial order is either interlocutory or the final determination of the rights of the parties. N.C. R. Civ. P. 54(a). In *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), our Supreme Court succinctly explained the difference between the two types of orders:

> 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. . . . 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.

Id. at 361–62, 57 S.E.2d at 381 (citations omitted); *see also Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty*, ___ N.C. App ___, ___, 756 S.E.2d 833, 835 (2014) (citations omitted). Final judgments are appealable under N.C. Gen. Stat. § 7A-27 (2013). "Interlocutory orders may be appealed only where there has been a final determination of at least one claim" and the trial court certifies under N.C. R. Civ. P. 54(b) that "there is no just reason to delay the appeal" or, alternatively, if "delaying the appeal would prejudice a substantial right." *White v. Carver*, 175 N.C. App. 136, 139, 622 S.E.2d 718, 720 (2005) (citations, alterations, 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."); *see also* N.C. Gen. Stat. § 1-277 (2013).

Sheriff Brown's appeal from the order denying the motions to dismiss and granting the preliminary injunction is interlocutory since the trial court's orders did not dispose of the case. Additionally, there was no Rule 54(b) certification by the trial court. Accordingly, we consider whether Sheriff Brown's asserted defense of sovereign immunity affects a substantial right.

Whether an interlocutory order affects a substantial right "is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002). The appellant bears the burden of establishing that a substantial right will be affected unless he is allowed an immediate appeal. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citations omitted). "Our Supreme Court has defined 'substantial right' as a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Royal Oak*, ___ N.C. App. at ___, 756 S.E.2d at 835.

"Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). To prove that a substantial right is affected, an appellant must first prove that the right itself is substantial. *Id.* Second, an appellant "must demonstrate *why* the order affects a substantial right. . . ." *Hoke Cnty Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Sheriff Brown asserts that the rejection of his defense of sovereign immunity affects a substantial right. Sheriff Brown also argues that the trial court's issuance of the preliminary injunction enjoins him from enforcing criminal laws and also affects a substantial right. We address each in turn.

A. Motions to Dismiss

[1] Sheriff Brown contends that the denial of his 12(b)(1), (2), and (6) motions to dismiss based on sovereign immunity affects a substantial right. We agree.

"The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). "The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011).

This Court has "repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556,

558–59, 512 S.E.2d 783, 785 (1999). "[W]hen [a] motion is made on the grounds of sovereign and qualified immunity,. . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994).

Here, we consider the denial of a motion to dismiss based on sovereign immunity and, accordingly, we must review whether Sheriff Brown is entitled to that defense. *Atl. Coast Conference v. Univ. of Maryland*, ___ N.C. App. ___, ___, 751 S.E.2d 612, 617 (2013) ("Defendants' underlying interest in asserting sovereign immunity is substantial . . . [.]"); *Richmond Cnty. Bd. of Educ. v. Cowell*, ___ N.C. App. ___, ___, 739 S.E.2d 566, 568 (2013), *review denied*, ___ N.C. ___, 747 S.E.2d 553 (2013).

However, we note that " 'a motion to dismiss based on sovereign immunity is a jurisdictional issue [and] whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.' " *Atl. Coast Conference*, ___ N.C. App. at ___, 751 S.E.2d at 617 (quoting *M Series Rebuild, LLC v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257 (2012) (alterations omitted)). "[B]ecause our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled." *Id.* As in *Atl. Coast Conference*, "we leave the type of jurisdictional challenge presented by a sovereign immunity claim for resolution by a future court" and accept jurisdiction of Sheriff Brown's appeal pursuant to the authority conferred by N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d). *Id.* Accordingly, we now address whether sovereign immunity barred Plaintiffs' action for declaratory judgment.

i. Standard of Review

The standard of review for the denial of a motion to dismiss on the basis of sovereign immunity is *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013).

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779 (2014) "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted).

ii. Merits of Sovereign Immunity Defense

[2] "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity."[2] *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Further

> when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign immunity. . . .[I]f plaintiff's complaint demonstrates that she has sued the defendants only in an official capacity, rather than as individuals, defendants would be potentially shielded from plaintiff's cause of action by governmental immunity.

Whitaker v. Clark, 109 N.C. App. 379, 381–82, 427 S.E.2d 142, 143–44 (1993) (citations omitted). Ultimately

> [t]he crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer, 347 N.C. at 110, 489 S.E.2d at 887 (quotation marks and citations omitted).

"The doctrine of sovereign immunity bars actions against public officials sued in their official capacities. Sheriffs and deputy sheriffs are

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2. Sheriff Brown does not argue that Plaintiffs failed to assert waiver of sovereign immunity in his brief. When considering a motion to dismiss based on a defense of sovereign immunity, the complaint must allege a waiver, without which the complaint fails to state a cause of action. *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002). However, Sheriff Brown does not raise this issue on appeal nor does waiver appear to be addressed by either party or considered by the trial court. Accordingly we do not address this issue on appeal. *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 47–48, 627 S.E.2d 482, 484–85 (2006).

considered public officials for purposes of sovereign immunity. Thus, sovereign immunity bars plaintiff's claims against defendants in their official capacities." *Phillips v. Gray*, 163 N.C. App. 52, 56–57, 592 S.E.2d 229, 232 (2004) (citations omitted).

Plaintiffs sued Sheriff Brown in his official capacity in accordance with *White*. 366 N.C. at 364, 736 S.E.2d at 169. Additionally, Plaintiffs seek "an injunction requiring the defendant to take an action involving the exercise of a governmental power," which means that "the defendant is named in an official capacity." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887. From the foregoing, it appears that Plaintiffs' claim should be dismissed, since sovereign immunity would typically bar claims against Sheriff Brown in his official capacity.

However, this Court's opinion in *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346 (2005), controls this case. *Am. Treasures* concerned a seller of long-distance pre-paid phone cards that included a free promotional scratch-off game piece. *Id.* at 172–73, 617 S.E.2d at 348. The plaintiff sold these cards through convenience stores and, eventually, ALE agents began "threatening to take action against the convenience stores' licenses to sell beer and alcoholic beverages . . . on the grounds that the sale of plaintiff's phone cards was illegal." *Id.* at 173–74, 617 S.E.2d at 348. The plaintiff brought an action for declaratory judgment and injunctive relief against the State. *Id.* at 174, 617 S.E.2d at 348.

In *Am. Treasures*, this Court discussed *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940). *Am. Treasures*, 173 N.C. App. at 175, 617 S.E.2d at 349–50. Specifically:

> In *McCormick*, law enforcement officers interfered with an owner's possession of certain slot machines on the grounds that such machines were illegal. Id., 217 N.C. at 24, 6 S.E.2d at 871. The trial court declined to restrain the interference on the grounds that the officers were engaged in the enforcement of criminal law and refused to hear evidence or find facts regarding the legality of the machines. *Id.* Citing the above principles, our Supreme Court reversed, holding that *equity may nevertheless be invoked as an exception to those principles and may operate to "interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons." Id.*, 217 N.C. at 29, 6 S.E.2d at 874.

Id. at 175, 617 S.E.2d at 349 (emphasis added). This Court in *Am. Treasures* also discussed *Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989):

> Moreover, this Court has previously reviewed a trial court's consideration of a prayer for declaratory and injunctive relief concerning the applicability of North Carolina's bingo statutes to a charitable sales promotion without indicating the existence of any jurisdictional bar. *Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Am. Treasures, 173 N.C. App. at 175–76, 617 S.E.2d at 349–50. Ultimately this Court relied on the two cases in holding that:

> the trial court's exercise of jurisdiction under the facts of the instant case was proper. First, we find *McCormick* and *Animal Protection Society* are *sufficiently similar to the facts of the instant case and are controlling on the issue of the trial court's jurisdiction. Second, the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores.*
>
> . . .
>
> *Accordingly, without seeking a declaratory judgment, plaintiff would be unable to effectively protect its property rights.* Defendants' jurisdictional argument is overruled.

Id. at 176, 617 S.E.2d at 350 (emphasis added).

Here, as in *Am. Treasures*, Plaintiffs face restrictions on their property rights resulting from Sheriff Brown's transmission of the innocent owner letter, which effectively barred any future sale and current placement of their kiosks. Additionally, as in *Am. Treasures*, sovereign immunity acts as a bar to Plaintiffs' ability to seek redress through monetary damages. Without such redress, Plaintiffs have no viable option for protecting their property rights during this litigation.

Accordingly, as (i) the facts at present are sufficiently similar to the controlling cases in this area and (ii) the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that the trial court properly exercised jurisdiction and that sovereign immunity did not bar Plaintiffs' claim for injunctive relief. We next address whether Sheriff

Brown's challenge to the trial court's decision to issue a preliminary injunction is interlocutory.

B. Preliminary Injunction

> The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and internal quotation marks omitted); *see also Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002); *Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) ("For a 'defendant to have a right of appeal from a mandatory preliminary injunction, 'substantial rights' of the appellant must be adversely affected.' " (quoting *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983)).

[3] A substantial right is affected when the trial court's order prohibits the State from enforcing the law. *Beason v. State Dep't of the Sec'y of State*, ___ N.C. App. ___, ___, 743 S.E.2d 41, 44–45 (2013) ("[T]he trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner's motion to dismiss."); *Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 864 (2012), *writ allowed, review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013) and *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013) and *aff'd*, ___ N.C. App. ___, 749 S.E.2d 278 (2013).

Sheriff Brown argues that his ability to enforce the law is impeded by the trial court's grant of a preliminary injunction, and points our attention to *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, ___ N.C. App. ___, 749 S.E.2d 469 (2013), which stated that "[w]hen an agent of the State that is charged with enforcing statutes chooses to appeal rulings

limiting the enforcement of those statutes, the right to enforce the statute is substantial and the rulings are immediately appealable." *Id.* at ___, 749 S.E.2d at 471.

Rockford ultimately held that, because the defendant was not a state agency or agent of the State charged with enforcing the statutes, a substantial right was not affected. *Id.* at ___, 749 S.E.2d at 472. This Court relied on *Johnston and Gilbert v. N.C. State Bar*, 363 N.C. 70, 76–77, 678 S.E.2d 602, 606 (2009) for this proposition. This Court in *Johnston* held

> that the State has a substantial right to enforce the criminal laws of North Carolina and that this right is affected by a ruling declaring a statute, duly enacted by the General Assembly, to be unconstitutional. The State has also demonstrated that the deprivation of that substantial right will potentially work injury if not addressed before appeal from a final judgment. The trial court's judgment prohibits the State from prosecuting plaintiff for possession of a firearm. Further, it casts doubt upon every prosecution by the State throughout North Carolina under Article 54A of Chapter 14 of the General Statutes.

Johnston, ___ N.C. App. at ___, 735 S.E.2d at 864.

Here, the trial court's grant of preliminary injunction violated the substantial right of Sheriff Brown in its sixth conclusion of law:

> 6. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

In essence, this conclusion of law determines that these particular kiosks fit within the statutory framework and does so unnecessarily at the preliminary injunction stage. In *Beason*, this Court held that "[t]he substantial basis of this appeal involves *the trial court's order concluding that the alleged violations respondent fined petitioner for were not actually violations*." *Beason*, ___ N.C. App. at ___, 743 S.E.2d at 45 (emphasis added). Here, the trial court does the same thing, since it declares that Plaintiffs were operating a "lawful sweepstakes" and, thus, finds that the Sheriff threatened to prosecute actions that were not actually violative of the statutes. This broad wording in the sixth conclusion of law goes much further than the equitable consideration of "likely to prevail on the merits." Instead, this conclusion of law makes a declaration concerning the lawfulness of these kiosks and would "cast doubt upon every prosecution by the State throughout North Carolina . . . ." *Johnston*, ___ N.C. App. at ___, 735 S.E.2d at 864.

Similarly, in the decretal section of the order, the trial court ordered that "[t]he Preliminary Injunction . . . is specifically enforceable in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site." The trial court's use of "validly" within the preliminary injunction, similar to its use of "lawful" in its sixth conclusion of law, exceeds the scope of a preliminary injunction, as use of the term "valid" may imply within the preliminary injunction that Plaintiff's kiosks are "legally sufficient" within the applicable statutes. Black's Law Dictionary 1690 (9th ed. 2009). Such a conclusion would also cast doubt on prosecutions undertaken by Sheriff Brown and impede his ability to enforce the law.

As these portions of the preliminary injunction go beyond maintaining the status quo by declaring that Plaintiffs' conduct was *lawful* or *valid*, these portions affect Sheriff Brown's substantial right to enforce the laws of North Carolina. Thus, we exercise jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the preliminary injunction.

The remainder of the preliminary injunction does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits. Sheriff Brown was prohibited from enforcing certain statutes listed in the decretal section of the order (N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4). Additionally, the preliminary injunction was limited in its scope: the bar against enforcement extends only to "those Onslow County places which are . . . operating four or less Gift Surplus System v1-01.1/Gift Surplus computer kiosks at one location or on one site." The order also has no effect "on any individuals or entities who are not a party hereto, or on the parties hereto upon the trial or ultimate disposition of this matter." Simply, Sheriff Brown was not enjoined from enforcing the criminal laws of North Carolina by the remainder of the trial court's preliminary injunction; Sheriff Brown was enjoined from enforcing certain criminal laws *against parties to the litigation* until the resolution of this case.[3]

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3. This Court has found that enforcing the statutes against an *individual* affects a substantial right warranting immediate review, but has done so with permanent injunctions or final orders concerning enforcement of a particular statute or regulation. *See, e.g.*, *Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605 ("Although we express no opinion as to the merits of defendant's *Gilbert III* complaint, we note that the trial court order from which defendant appeals includes a *permanent injunction* enjoining defendant from prosecuting *Gilbert III*." (emphasis added)); *Beason*, ___ N.C. App. at ___, 743 S.E.2d at 44–45 (considering an order that decided some of the petitioner's claims and made definite statements that the petitioner's actions were not violations of certain lobbying laws that respondent was responsible for enforcing).

The remainder of the preliminary injunction preserves the status quo and "all parties remain free to fully litigate the merits of the case in the correct procedural context before the trial court . . . ." *CB & I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 550, 579 S.E.2d 502, 505 (2003). The remainder of the preliminary injunction does not affect a substantial right. As the remainder does not affect a substantial right, we do not have jurisdiction to consider this interlocutory appeal, so the remainder of Sheriff Brown's appeal is dismissed.

We next turn to the justiciability argument advanced by Sheriff Brown in opposition to Plaintiffs' request for a declaratory judgment.

C. Justiciability of Declaratory Judgment Claim

[4] The North Carolina Declaratory Judgment Act provides that

> Any person interested . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2013). Further, N.C. Gen. Stat. § 1-253 (2013) provides trial courts with the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."

Our Supreme Court has "required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing" in declaratory judgment actions. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986). Without an "actual controversy between the parties," jurisdiction does not attach under the Declaratory Judgment Act. *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 44, 621 S.E.2d 19, 29 (2005). An "actual controversy" must be more than a "mere difference of opinion between the parties" and this Court lacks the authority to render an advisory opinion that "the parties might, so to speak, put on ice to be used if and when occasion might arise." *Id.* (citations and quotation marks omitted). However,

> [a]lthough a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and

> settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Goldston, 361 N.C. at 33, 637 S.E.2d at 881 (citations, quotation marks, and alterations omitted); *see also Wake Cares, Inc., et al. v. Wake Cnty. Bd. of Educ.*, 190 N.C. App. 1, 12, 660 S.E.2d 217, 224 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (holding that an actual controversy existed where plaintiffs, who were not charged with or threatened to be charged with a crime, were affected by several statutes and where a declaratory judgment "would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing"). Ultimately, plaintiffs in declaratory judgment actions are "not required to sustain actual losses in order to make a test case[,]" since that " 'requirement would thwart the remedial purpose of the Declaratory Judgment Act.' " *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994), *superseded by statute on other grounds as stated in Mehaffey v. Burger King*, ___ N.C. ___, ___, 749 S.E.2d 252, 256 (2013) (quoting *Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971)).

Plaintiffs seek to determine whether the software and kiosks they operate comply with N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 (2013), which regulate electronic sweepstakes machines. Plaintiffs do not seek to determine the criminal culpability of their potential customers, and the courts retain the ability to grant a declaratory judgment when a "questioned statute relates to penal matters." *Jernigan v. State*, 279 N.C. 556, 561, 184 S.E.2d 259, 263–64 (1971). Simply put, "[w]hen a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights." *Id.* at 561, 184 S.E.2d at 264; *see also Calcutt v. McGeachy*, 213 N.C. 1, 2, 195 S.E. 49, 49 (1938) (allowing jurisdiction for a declaratory judgment action to test the constitutionality of a criminal statute "prohibiting the manufacture, sale, possession, and use of gambling devices").

The record tends to show a conflict between Sheriff Brown's interpretation and Plaintiff's interpretation of the relevant statutes. Sheriff Brown sent an innocent owner letter declaring that the machines were illegal, while Plaintiffs countered with expert testimony asserting that the machines complied with the State's recent statutory changes. A declaratory judgment would help clarify the "legal relations at issue" and would remove uncertainty from Plaintiffs' continuing business interests.

Sheriff Brown argues that "there is no actual controversy existing at the time of the hearing[.]" This argument is premised on (a) Sheriff Brown having seized kiosks at a Rhodestown location rather than where Sandhill's owner believed the machines actually were, which was in the Town of Holly Ridge, and (b) Sheriff Brown having removed the kiosks from the Rhodestown location prior to the hearing on the motion to dismiss. Sheriff Brown cites *Fabrikant* for the proposition that the actual controversy must exist "at the time of the filing of the pleading and at the time of hearing." *Fabrikant*, 174 N.C. App. at 44, 621 S.E.2d at 29.

However, Sheriff Brown's office, through the transmission of the innocent owner letter, expressed doubts about the legality of "several video gaming machines associated with the web-site known as www.gift-Surplus.com." The hearing itself centered on the conflict concerning whether the kiosks at issue were illegal and the uncertainty concerning the legality of these kiosks ultimately impacts Plaintiffs' ability to operate a business going forward. Additionally, Plaintiffs alleged in their complaint that, since Sheriff Brown issued the innocent owner letter, existing retail outlets that used Plaintiffs' products had removed the kiosks or chosen not to use the kiosks due to the uncertainty surrounding their legality. From the foregoing, it is clear that a justiciable actual controversy, as required by the Declaratory Judgment Act, exists. Accordingly, the trial court's exercise of jurisdiction over the declaratory judgment claim was proper.

Because we (a) hold that Sheriff Brown is not entitled to the defense of sovereign immunity on the Rule 12 motions, (b) dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction in part and strike portions of the preliminary injunction in part, and (c) find an actual case or controversy existed, we do not address Sheriff Brown's remaining arguments on appeal.

III. Conclusion

In conclusion, (i) we hold that the trial court's denial of Sheriff Brown's motion to dismiss affected a substantial right; (ii) we affirm the trial court's order denying Sheriff Brown's motion to dismiss; (iii) we exercise limited jurisdiction to vacate portions of the preliminary injunction which exceed the scope of a preliminary injunction; and (iv) we dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction as interlocutory and not affecting a substantial right.

AFFIRMED in part, VACATED in part, and DISMISSED in part.

Judge ELMORE concurs.

ERVIN, Judge, dissenting.

Although I agree with my colleagues concerning the proper resolution of Defendant's challenge to the denial of his motion to dismiss based upon governmental immunity and justiciabiity grounds, I am unable to agree with their determination that a portion of Defendant's appeal from the issuance of the preliminary injunction did not affect a substantial right and is not subject to immediate appellate review in its entirety. In addition, after evaluating the validity of Defendant's challenge to the preliminary injunction on the merits, I believe that the trial court erred by issuing the preliminary injunction and that the portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities should be reversed in its entirety. As a result, I concur in the Court's opinion in part and dissent from the Court's opinion in part.

Appealability

As a general proposition, "there is no right of immediate appeal from interlocutory orders and judgments," *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)), such as the one at issue here. However, immediate appellate review of interlocutory orders is available "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay" pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), or when "the [interlocutory] order affects a substantial right under" N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(b)(3). *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), and *Oestreicher v. American Nat'l Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976)). In view of the fact that the trial court did not include, and could not properly have included, a certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), in its order, the only basis upon which this Court might have jurisdiction over Plaintiff's appeal from that portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities is in the event that that portion of the trial court's order affects a substantial right.

"The 'substantial right' test for appealability is more easily stated than applied." *Bailey v. Goode*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). An interlocutory order "affects a substantial right" for purposes of N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat.

§ 27(b)(3) in the event that it "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citing *Waters*, 294 N.C. at 207, 240 S.E.2d at 343). "Essentially a two-part test has developed--the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. A "substantial right" is " 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [litigant] is entitled to have preserved and protected by law: a material right.' " *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805 (quoting *Webster's Third New International Dictionary* 2280 (1971)). "Whether an interlocutory ruling affects a substantial right requires consideration of 'the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *N.C. Dep't. of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters*, 294 N.C. at 208, 240 S.E.2d at 343)).

In the decretal paragraphs contained in its order, the trial court stated, in pertinent part, that:

> 2. That Plaintiffs' Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:
>
> a. Restrained and enjoined from using [N.C. Gen. Stat. §§] 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1[]* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and
>
> b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and
>
> c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal

> administrative offenses or violations by reason of such party's display, sale, operation, or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.
>
> 3. The Preliminary Injunction set out in [Paragraph No. 2] above is specifically enforceable only in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site.

In other words, the clear import of the preliminary injunction provisions contained in the trial court's order was to prevent Defendant and his agents from taking any steps to enforce the provisions of N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 against the display, sale, operation, promotion of the equipment, computer programs, and websites in sites located in Onslow County at which no more than four kiosks were present. As a result, every provision of the preliminary injunction had the effect of prohibiting Defendant from enforcing certain statutory provisions as he understood them against Plaintiffs' equipment and activities as the activities in question occurred at locations in Onslow County at which no more than four kiosks were present.

As I read the relevant decisions, this Court has recognized that the entry of a preliminary injunction precluding a state or local agency from enforcing the law affects a substantial right and is immediately appealable. *Rockford-Cohen Group, LLC v. N.C. Dep't. of Ins.*, __ N.C. App. __, __, 749 S.E.2d 469, 471 (2013) (stating that, "[w]hen an agency of the State that is charged with enforcing statutes chooses to appeal rulings limiting the enforcement of those statutes, the right to enforce the statute is substantial, and the rulings are immediately appealable") (citing *Johnston v. State*, __ N.C. App. __, __, 735 S.E.2d 859, 864 (2012) (allowing an immediate appeal from an interlocutory order declaring that a statute, as applied to the plaintiff, was unconstitutional since that decision had the effect of permanently "enjoin[ing] the State from prosecuting plaintiff for violations of the" relevant statutory provisions), *disc. review concerning additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013), *aff'd*, __ N.C. App. __, 749 S.E.2d 278 (2013), and *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009) (allowing an immediate appeal from an interlocutory order that "enjoin[ed] defendant from

prosecuting" a related proceeding); *see also Beason v. N.C. Dep't. of Sec'y. of State*, __ N.C. App. __, __, 743 S.E.2d 41, 44-45 (2013) (stating that, "since respondent is charged with investigating violations of and enforcing" certain provisions of the lobbying laws, since "respondent's right to carry out these duties is substantial," and since "respondent's ability to carry out its duties requires that it be able to act timely on allegations it believes constitute violations," the respondent's appeal from an interlocutory order enjoining the enforcement of those lobbying laws against the petitioner was subject to immediate appellate review). I find no basis for departing from this well-established line of precedent, as the Court's opinion appears to do, in this case. As a result, given that the preliminary injunction issued by the trial court prohibits Defendants from taking action to enforce the relevant gaming machine statutes as he understands them, I would hold that this Court has jurisdiction over Defendant's appeal from the issuance of the preliminary injunction and proceed to address the validity of Defendant's challenge to that portion of the trial court's order on the merits.

In its opinion, the Court concludes that a portion of the trial court's preliminary injunction affects a substantial right and should be invalidated and that a portion does not affect a substantial right and should remain undisturbed. More specifically, the Court concludes that the sixth conclusion of law contained in the trial court's order should be vacated and that "validly" should be stricken from the third decretal paragraph on the grounds that these portions "go beyond maintaining the status quo." In reaching this conclusion, the Court relies on the Supreme Court's statement in *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and quotation marks omitted), to the effect that "[t]he purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits" and concludes that, because the relevant portions of the preliminary injunction order do more than serve the purpose of maintaining the status quo, they "affect Sheriff Brown's substantial right to enforce the laws of North Carolina" and should be invalidated on appeal. On the other hand, the Court appears to hold that the remainder of the preliminary injunction is so limited in scope and effect that it does not affect a substantial right and is not subject to immediate appellate review. I do not believe that the Court's approach to the resolution of this issue has any support in our "substantial right" jurisprudence as explained in decisions such as *Gilbert*, *Johnston*, and *Beason*.

As an initial matter, the Court's analysis seems to indicate that the extent to which Defendant was entitled to appeal from the issuance of

the preliminary injunction hinges upon the validity of the injunction itself.[1] In other words, the Court seems to conclude that Defendant is entitled to immediate appellate review of the preliminary injunction to the extent, and only to the extent, that the trial court exceeded its authority in issuing the injunction in the first place. I see no basis in our "substantial right" jurisprudence for equating a litigant's ability to appeal from an interlocutory order with the litigant's ability to prevail on the merits in the event that such an appeal was to be entertained. Instead, the extent to which this Court has jurisdiction to entertain an immediate appeal from an interlocutory order and the extent to which the trial court erred by entering the interlocutory order in question constitute two completely different issues that have little or no relation to each other in the preliminary injunction context.

Secondly, the Court's appealability analysis appears to hinge on the assumption that we have jurisdiction over Defendant's appeal from the trial court's order to the extent, and only to the extent, that the trial court's order disturbed the status quo. More specifically, the Court states that the portion of the preliminary injunction that it does not believe to be subject to appellate review on an interlocutory basis "does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits." Aside from the fact that the extent to which a particular order maintains or disturbs the status quo is not the sum total of the test employed for evaluating the merits of a trial court's decision to issue a preliminary injunction, I am unable to find any support in our "substantial right" jurisprudence for the use of such a standard. Simply put, I am not aware of any decision that finds or declines to find the existence of a "substantial right" sufficient to support the maintenance of an appeal from an interlocutory order based upon the extent to which the underlying order preserves or disturbs the status quo. For that reason, I do not believe that the Court's reference to the impact of the underlying preliminary injunction on the status quo has any bearing on Defendant's right to immediate appellate review of the preliminary injunction.

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1. This aspect of the Court's analysis is similar to the argument advanced in Plaintiff Sandhill Amusements' brief, which suggests that the preliminary injunction does not affect a substantial right on the theory that, since Plaintiffs' equipment and activities do not violate the applicable gambling statutes, Defendant has not been enjoined from properly enforcing the law. However, as is discussed in more detail in the text, the extent to which the substance of a party's position on the merits is correct and the extent to which that party has a right to seek immediate appellate review from an interlocutory order are two separate, and essentially unrelated, questions.

Finally, the Court appears to conclude that *Gilbert*, *Johnston*, and *Beason* only authorize interlocutory appeals from orders that permanently, rather than preliminarily, enjoin state or local agencies or officials from enforcing the law against specific litigants.[2] However, the Court's interpretation of these cases is inconsistent with our statement of the applicable legal principle in *Rockford-Cohen*, a case that involved a challenge to the issuance of a preliminary injunction; has no support in their underlying logic, which assumes that an order precluding a state or local official from enforcing the law affects a substantial right without in any way suggesting the existence of a temporal limitation on the applicability of that principle; and ultimately rests upon stray references to the permanence of the injunctions at issue in those cases that had no apparent impact upon the reasoning actually employed in holding that the orders challenged in those case were immediately appealable.[3] As a result, since the preliminary injunction at issue in this case prohibits a state or local official from enforcing the law against Plaintiffs, since

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2. As we have already noted, the Court suggests that the fact that the preliminary injunction merely affects Defendant's ability to enforce a limited number of statutory provisions against a limited number of persons in a limited geographic area militates in favor of a finding that a portion of the preliminary injunction does not affect a substantial right and appears to read *Gilbert* as distinguishing between injunctions that affect a defendant's ability to enforce the laws generally and injunctions that affect a defendant's ability to enforce the laws against specific litigants. A similar argument resting on the scope of the preliminary injunction is advanced in the briefs submitted by Plaintiff Gift Surplus and Plaintiff Sandhill Amusements. However, since the orders at issue in *Gilbert*, *Beason*, and *Johnston* all precluded the relevant agency or official from enforcing specific statutory provisions against specific litigants in specific contexts, it is clear that such scope-related arguments have no support in our "substantial right" jurisprudence and that the Court's emphasis upon these factors in declining to review a portion of the preliminary injunction rests upon our misapprehension of our "substantial right" jurisprudence.

3. To be sure, *Gilbert* notes that the order from which the defendant appealed permanently enjoined it from prosecuting a separate proceeding. *Id.* at 75, 678 S.E.2d at 605. Similarly, the orders at issue in *Beason*, __ N.C. App. at __, 743 S.E.2d at 44-45, and *Johnston*, __ N.C. App. at __, 735 S.E.2d at 864, involve permanent orders rather than preliminary injunctions. However, nothing in the opinions in question in any way suggests that the fact that the injunctions or orders at issue in those cases were permanent rather than preliminary had any bearing on the Court's appealability analysis. Instead, the Court simply held that an injunction or order that precluded a state or local official from enforcing the laws affected a substantial right and was immediately appealable without in any way suggesting that a different principle would apply to preliminary, as compared to permanent, injunctions or orders. As a result, while the Court has correctly identified a factual distinction between the relevant cases and this case, the logic upon which the Court based those decisions applies equally to permanent and preliminary injunctions or orders and nothing in the opinions in those cases in any way suggests that the outcome would have been different in the event that the bar to further enforcement had been preliminary rather than permanent in nature.

our decisions clearly allow immediate appellate review of such orders, and since the logic upon which the Court relies in reaching a different conclusion rests upon a misapprehension of our prior decisions concerning appealability issues, I would hold that this Court has jurisdiction over the entirety of Defendant's challenge to the preliminary injunction and will now, in light of that conclusion, address Defendant's challenge to the issuance of the preliminary injunction on the merits.

Validity of the Preliminary Injunction

"[A preliminary injunction] will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, 308 N.C. at 402, 302 at 754, 760 (citation omitted). Although appellate courts review orders granting or denying preliminary injunctions using a *de novo* standard of review, we have also noted that "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003) (citation omitted). For purposes of this case, the ultimate issue raised by Defendant's challenge to the validity of the preliminary injunction is whether Plaintiffs have shown a likelihood of success on the merits and whether they are likely to sustain an irreparable injury in the event that they are deprived of injunctive relief prior to the completion of a trial on the merits.[4]

According to N.C. Gen. Stat. § 14-306.4(b), "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." An "electronic machine or device" for purposes of N.C. Gen. Stat. § 14-306.4(b) is a piece of equipment "that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information

4. In view of the fact that Defendant has not argued that Plaintiffs have shown the existence of the necessary irreparable injury, we will focus our discussion in the text on the extent to which Plaintiffs have shown that they are likely to succeed on the merits at trial.

on a screen or other mechanism." N.C. Gen. Stat. § 14-306.4(a)(1). Similarly, an "entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," including "[a] video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player" and "[a]ny . . . video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." N.C. Gen. Stat. § 14-306.4(a)(3). Finally, a "sweepstakes" is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." N.C. Gen. Stat. § 14-306.4(a)(5). As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14-306.4(b) is in the event that the game or simulated game involved is "dependent on skill or dexterity."

In its order, the trial court found as a fact that:

> 19. Nick Farley . . . testified on behalf of the Plaintiffs. He was proffered and accepted as an expert witness in the field of gaming and software.[5]
>
> 20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v1-01-1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received into evidence).

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5. At this point, the trial court stated in Footnote No. 5 to its order that: "Nick Farley is the owner of Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing, based in Salon, Ohio. This is one of three firms in the country that provides technical consulting services for compliance of gaming machines with state and federal regulations. Eclipse Compliance Testing consults with and has been hired by law enforcement, tribal and government regulatory agencies in 245 jurisdictions, as well as by regulated device manufacturers, regarding device classification and regulatory compliance. The firm has been involved solely in the business of compliance and testing from 2000 to present. Mr. Farley has testified as an expert witness in these matters in federal, state and tribal courts both as a witness for the government and for the defense."

> 21. In Farley's uncontroverted opinion as evidenced by his report and testimony, the computer software program that operates the distribution of Gift Surplus sweepstakes entries and the video games used to reveal winning sweepstakes entries on the Gift Surplus Kiosk is a sweepstakes which operates in compliance with the generally accepted guidelines for operating sweepstakes in North Carolina and many other jurisdictions in the United States.
>
> 22. Farley testified that, based on his expertise honed through years of experience and his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words "skill" and "dexterity" as used by the industry in North Carolina and many other jurisdictions.[6]
>
> 23. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v1-01-1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.[7]

Based upon these and other findings, the trial court concluded as a matter of law that:

> 6. The *Gift Surplus System v1-01-1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

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6. At this point, in Footnote No. 6 to its order, the trial court stated that: "In preparation for his testimony, Nick Farley was provided by counsel the definition of 'skill or dexterity' in statutes in the United States. As noted in his testimony, Farley's testimony was based partially upon the statutory definitions used around the country."

7. At this point, in Footnote No. 7 to its order, the trial court stated that: "Farley's report found that a participant's decision can be viewed as a strategic choice or tactic which will evolve into confidence with practice and experience. Participants familiar with revealing sweepstakes entries through the game theme will develop an aptitude or ability to quickly recognize the correct reel and the correct skill moves to reveal a prize winning sweepstakes entry. Experienced participants will demonstrate fluency in the execution of the learned past of recognizing and selecting the correct reel and making the correct skill move to reveal a potential winning outcome. Further, if the participant takes no action to effectuate the outcome of the game, the participant will not be able to realize any potential prize associated with the sweepstakes entry because these systems will never display a winning sequence on the first sweepstakes entry presented. Therefore, the kiosk games, per Farley, are dependent on skill or dexterity and not the element of chance."

. . . .

8. There is a likelihood that the Plaintiffs will prevail in that:

a. *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.

b. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.

c. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

As a result, the trial court determined that Defendant should be enjoined from taking any action against Plaintiffs' equipment and activities based upon a determination that the extent to which a person received a prize for participating in the sweepstakes hinged upon that person's skill or dexterity.

The trial court's conclusion that Plaintiffs' equipment and activities involved a game whose outcome depended on skill or dexterity rested upon acceptance of Mr. Farley's testimony to the effect that the outcome of the games played utilizing Plaintiffs' equipment depended on the player's skill or dexterity. Although the term "skill or dexterity" as used in N.C. Gen. Stat. § 14-306.4 has not been statutorily defined, the meaning of the term in question, as used in Article 37 of Chapter 14 of the General Statues, a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14-306.4, has been addressed by this Court. In light of that fact, the trial court should have determined whether Plaintiffs' equipment and activities facilitated a game of "skill and dexterity" or a game of chance based upon the meaning of that term as used in North Carolina gambling-related cases rather than on the basis of the meaning of that term as used in other jurisdictions and in the gaming industry, which is the approach that the trial court found to have been adopted in Mr. Farley's testimony. Thus, in order to determine whether the trial court correctly found that Plaintiffs' equipment and

activities were lawful, we must first ascertain the difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line Plaintiffs' equipment and activities fall on.

In *Collins Coin Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 408, 451 S.E.2d 306, 308 (1994), *disc. rev. denied*, 340 N.C. 110, 456 S.E.2d 312 (1995), we stated that:

> A game of chance is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). "A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." *Id.* at 535, 192 S.E.2d at 615-16 (citation omitted). In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:
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> It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.
>
> *Id.* at 38, 76 S.E.2d at 316-317.

In light of this understanding of the meaning of the relevant statutory language, this Court considered whether a video poker game was one of skill or of chance, *id.* at 406, 451 S.E.2d at 307, and determined that the game in question was one of chance rather than one of skill because, at least in part, almost all of the skill-related elements in an in-person poker game, including the use of psychological factors such as bluffing to prevail over an opponent, were absent from video poker. *Id.* at 408, 451 S.E.2d at 308. In addition, we stated that:

> although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot

> determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.

Id. at 409, 451 S.E.2d at 308 (internal citation omitted). As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. § 14-306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill.

As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits.[8] In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays.[9] Finally, the extent to which the opportunity arises for the "nudging" activity upon which the trial court's order relies in support of its determination that the equipment in question facilitated a game of "skill or dexterity" appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs' equipment and activities depended on skill or dexterity, the only basis for this assertion was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. In light of these inherent limitations on a player's ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment

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8. As Mr. Farley indicated, "[s]hould the random distribution of entries cause the payout rate to exceed a predetermined limit, prizes selected for distribution which exceed $200 will be returned to the pool and another prize will be selected to be revealed."

9. Mr. Farley admitted on cross-examination that a number of screens will offer a "zero value prize" so that the participant cannot win anything of value regardless of his or her actions in the game and that "[w]hich entry is going to come out of the pool is determined by chance."

at issue simply does not appear to be able to "determine or influence the result over the long haul." *Id.* at 409, 451 S.E.2d at 309 (citation omitted). As a result, for all of these reasons, I am compelled by the undisputed evidence to "conclude that the element of chance dominates the element of skill in the operation" of Plaintiffs' machines, *id.*, a fact that demonstrates that Plaintiff is not likely to succeed on the merits at trial and that the trial court erred by preliminarily enjoining Defendant from enforcing the strictures of N.C. Gen. Stat. § 14-304.6(b) against Plaintiffs. Thus, I believe that the trial court's order should be reversed to the extent that it preliminarily enjoins Defendant from enforcing the provisions of N.C. Gen. Stat. § 14-306.4 against Plaintiffs.[10]

Conclusion

Thus, while I agree with my colleagues that we have jurisdiction over Defendant's challenge to the denial of his dismissal motion and that the trial court properly rejected Defendant's governmental immunity and justiciability challenges to Plaintiffs' complaint, I am unable to agree with their decision that only a portion of the trial court's preliminary injunction order is subject to immediate appellate review and would further conclude, after examining the merits of Defendant's challenge to the preliminary injunction, that, since Plaintiffs did not demonstrate a likelihood of success on the merits at trial, that portion of the trial court's order preliminarily enjoining Defendant from enforcing various statutory provisions against Plaintiffs should be reversed. As a result, I would affirm the trial court's refusal to dismiss Plaintiffs' complaint, reverse the trial court's decision to issue a preliminary injunction against Defendant, and remand this case to the Onslow County Superior Court for further proceedings not inconsistent with this opinion and dissent from the Court's decision to the extent that it reaches a contrary result.

10. As a result of the fact that our resolution of the "skill or dexterity" issue for purposes of N.C. Gen. Stat. § 14-306.4 applies equally to the other statutes that Defendant was enjoined from enforcing against Plaintiffs, we need not separately analyze the validity of the preliminary injunction under these additional statutory provisions.

SAULS v. SAULS

[236 N.C. App. 371 (2014)]

LOIS A. SAULS, PLAINTIFF
v.
ROLAND GARY SAULS, DEFENDANT

No. COA14-41

Filed 16 September 2014

1. Divorce—equitable distribution—cash and checks on date of separation—sufficient supporting evidence

The trial court did not err in an equitable distribution case by finding as fact that the parties had $350,000 in cash and checks as of the date of separation. The record contained competent evidence to support the trial court's finding regarding the value of the cash and checks.

2. Divorce—equitable distribution—cash and checks—presently owned on date of separation

The Court of Appeals found no merit in defendant's argument in an equitable distribution case that because cash and checks that had been kept in a safe during the parties' marriage were not found in the safe upon their divorce, the trial court could not find that they were "presently owned" by the parties on the date of separation. The trial court found that defendant had removed from the marital home $350,000 in cash and checks, which were marital funds, and the record was devoid of any evidence that the cash or checks were ever owned by someone other than plaintiff or defendant.

3. Divorce—equitable distribution—in-kind distribution—presumption not rebutted

The trial court did not err in an equitable distribution case by ordering an in-kind distribution of $178,667.49 without first considering whether defendant had sufficient liquid assets to satisfy such an award. Defendant did not rebut the presumption that an in-kind distribution of the cash and checks would be equitable and the trial court was not required to consider the distributive award factors enumerated under N.C.G.S. § 50-20(c).

Appeal by defendant from orders entered 15 February 2013 and 11 July 2013 by Judge Darrell B. Cayton, Jr. in Beaufort County District Court. Heard in the Court of Appeals 13 August 2014.

Attorney Jonathan McGirt, for plaintiff.

Attorney W. Gregory Duke, for defendant.

ELMORE, Judge.

Defendant timely appeals from: 1.) an equitable distribution order entered 15 February 2013 ordering defendant to pay plaintiff an in-kind distribution of $178,667.49 in cash and check proceeds and 2.) an order entered 11 July 2013 denying defendant's motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. After careful consideration, we affirm.

I. Facts

Lois A. Sauls (plaintiff) and Roland Gary Sauls (defendant) married each other on 6 October 1963. Over the years, defendant accumulated large sums of cash, which he kept inside a safe in the parties' former marital residence. Although plaintiff knew where the combination to the safe was hidden, she did not access the safe unless directed to do so by defendant. In September 2005, the parties temporarily separated. Around this time, plaintiff attempted to access the safe on her own but the combination and keys had been removed from their usual hiding place. Defendant was the only other person who knew where the combination and keys were hidden.

The parties reconciled in January 2006. At that time, defendant had four checks, each for $10,000, issued and made payable to plaintiff. On two separate occasions, defendant drove plaintiff to the bank, sent her inside to endorse and cash one of the checks, and then plaintiff gave defendant the cash proceeds, which he "needed . . . for the business." Plaintiff testified that she never cashed the two remaining checks and defendant always kept the checks in his possession. However, defendant claimed plaintiff cashed the remaining two checks in the same way as she did the first two and that plaintiff had just "forgot some things."

The parties finally separated on 13 August 2006. On 13 December 2006, plaintiff filed a complaint asserting claims for post-separation support, alimony, divorce from bed and board, equitable distribution, and attorneys' fees. Defendant filed an answer and a counterclaim for equitable distribution. In spring 2008, the safe was opened by a locksmith in the presence of the parties and their attorneys. There was no cash in the safe.

On 30 January 2009, the parties divorced. Plaintiff subsequently dismissed the complaint against defendant with the exception of her claim

for equitable distribution, which was heard in Beaufort County District Court on 29 May 2012. The trial court found that defendant had removed from the marital residence $330,000 in cash and $20,000 in certified checks, which were marital assets. The trial court entered an order for equitable distribution and, in part, ordered that defendant pay plaintiff $178,667.49 as an in-kind distribution of cash and certified checks that defendant took from the former martial estate.

II. Analysis

a.) Findings of Fact

[1] First, defendant argues that the trial court erred in finding as fact that the parties had $350,000 in cash and checks as of the date of separation. We disagree.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

It is the duty of the trial judge "to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). "It is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*, ___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

The record contains competent evidence to support the trial court's finding regarding the value of the cash and checks. Most notably, under "Schedule F" of the pre-trial order ("Property about which there is a disagreement as to classification, with each party's contentions as to the value and distribution."), neither party disputed the value of the items listed as "$330,000 cash" and "2 Certified Checks in Wife's Name." Defendant only contended that the cash should be split in half because it was marital property, and that he did not know the location of the checks.

Additionally, although plaintiff never counted how much money was in the safe, she testified that defendant told her the amount was "three-thirty." Defendant testified that, in the safe, he had "ten plus" envelopes each with "thirty or forty thousand dollars in an envelope at one time." Defendant also stated that the last time he counted the cash was late in the summer of 2006, just before the parties separated, and the safe contained $330,000.

Moreover, plaintiff testified that she only cashed two of the four $10,000 checks. Although the parties offered conflicting testimony as to whether defendant had the two remaining checks, the trial court found more credible plaintiff's testimony that she never cashed the remaining checks and that defendant had them in his possession. Thus, the trial court did not err in finding as fact that the parties had $350,000 in cash and checks as of the date of separation.

b.) "Presently Owned"

[2] Next, although defendant offers no legal authority for his argument, he maintains that because the cash and checks were not found in the safe, the trial court could not find that they were "presently owned" by the parties on the date of separation. We disagree.

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Marital property is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2013). "The spouse claiming that the property is separate bears the burden of proof, as under N.C. Gen. Stat. § 50-20(b)(1), it is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" *Allen v. Allen*, 168 N.C. App. 368, 374, 607 S.E.2d 331, 335 (2005) (citation and quotation marks omitted). This Court has interpreted "presently owned" to mean property owned by either party as of the date of separation.

See Lawrence v. Lawrence, 100 N.C. App. 1, 16-17, 394 S.E.2d 267, 275 (1990)(ruling that the trial court erred in classifying certain funds as marital property where the funds had been used to purchase assets that were not owned by either party on the date of separation).

Here, the trial court found that defendant removed from the marital home $350,000 in cash and checks, which were marital funds. It is irrelevant whether the cash and checks were actually in the safe on the date of separation, especially since the record is devoid of any evidence that the cash or checks were ever owned by someone other than plaintiff or defendant. Thus, we hold that the cash and checks were "presently owned," and defendant's argument fails.

c.) In-Kind Distribution

[3] Finally, defendant argues that the trial court erred by ordering an in-kind distribution[1] of $178,667.49 without first considering whether defendant had sufficient liquid assets to satisfy such an award. We disagree.

N.C. Gen. Stat. § 50–20(e) (2013) "creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award 'to facilitate, effectuate, or supplement' the distribution." *Allen*, 168 N.C. App. at 372–73, 607 S.E.2d at 334. "[I]f the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004). Should a party successfully rebut the equity of an in-kind distribution, a trial court may order a distributive award pursuant to N.C. Gen. Stat. § 50-20(c) (2013). This statute sets forth distributional factors that the trial court must consider before ordering a distributive award. *Id.* One of those factors is "[t]he liquid or nonliquid character of all marital property and divisible property." *Id.* In other words, "[t]he trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the *distributive award payment*." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908 (emphasis added).

Here, the trial court specifically ordered an in-kind distribution of the marital funds, but defendant did not rebut the presumption that an

1. The difference between a "distributive award" and an "in-kind distribution" is explained in 1 Lloyd T. Kelso, N.C. Family Law Practice § 6:60 (2008): "An 'in-kind distribution' refers to a distribution of the property itself as opposed to a substitute for the property such as a cash award equal to the value of the property." *Id.* § 6:60, at 447.

in-kind distribution of the cash and checks would be equitable. As such, the trial court was not required to consider the distributive award factors enumerated under N.C. Gen. Stat. § 50-20(c), including whether defendant had sufficient assets to pay the award. Furthermore, because the trial court specifically ordered defendant to pay $178,667.49 from the $350,000 in cash and check proceeds in his possession, it is clear that the same liquidity concerns raised with distributive awards are not present in this case.

III. Conclusion

In sum, the trial court did not err in finding as fact that the parties had $350,000 in cash and checks as of the date of separation, or in ordering defendant to pay plaintiff $178,667.49 in cash or check proceeds as an in-kind distribution. The trial court's findings of fact are supported by competent evidence in the record, and it was not required to make a specific finding that defendant had sufficient liquid assets to pay the in-kind distribution. Accordingly, the trial court's equitable distribution order and order denying defendant's motion for a new trial are affirmed.

Affirmed.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY DAVIS

No. COA13-1092

Filed 16 September 2014

1. Drugs—methamphetamine—manufacturing—trafficking—motion to dismiss—sufficiency of evidence—presence at the scene

The trial court did not err by denying defendant's motions to dismiss the manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges even in the absence of an acting in concert instruction. A reasonable inference of defendant's guilt could be drawn from defendant's presence with another person at the scene for the duration of the time law enforcement observed, approximately 40 minutes, along with the evidence

recovered from the scene that was consistent with the production of methamphetamine.

2. Drugs—methamphetamine—possession—trafficking—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motions to dismiss the trafficking in methamphetamine by possession and possession of drug paraphernalia charges even in the absence of an acting in concert instruction. The totality of circumstances revealed that there was sufficient evidence of constructive possession and that defendant had the capability and intent to control the items that he was near and moving around.

3. Conspiracy—manufacture of methamphetamine—motion to dismiss—sufficiency of evidence—implied agreement

The trial court did not err by denying defendant's motion to dismiss the conspiracy charge even in the absence of an acting in concert instruction. Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, the evidence is sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss.

4. Drugs—methamphetamine—trafficking—motion to dismiss—sufficiency of evidence—any mixture containing methamphetamine

The trial court did not err by denying defendant's motion to dismiss the trafficking in methamphetamine charges based on use of the weight of the liquid containing methamphetamine. The statute provided that a defendant is guilty of trafficking when he manufactures any mixture containing methamphetamine meeting the minimum 28 gram weight requirement.

Appeal by defendant from judgments entered 30 May 2013 by Judge J. Thomas Davis in Jackson County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

David L. Neal for defendant.

McCULLOUGH, Judge.

Billy Ray Davis ("defendant") appeals from judgments entered upon his convictions for trafficking in methamphetamine by possession, trafficking in methamphetamine by manufacture, conspiring to traffic in methamphetamine, manufacturing methamphetamine, possession of an immediate precursor chemical to methamphetamine, and possession of drug paraphernalia. For the following reasons, we find no error.

I. Background

On 14 December 2011, a Jackson County grand jury indicted defendant on charges of trafficking in methamphetamine by possession, trafficking in methamphetamine by manufacture, conspiring to traffic in methamphetamine by manufacture, manufacturing methamphetamine, possession of an immediate precursor chemical to methamphetamine, and possession of drug paraphernalia. Defendant's case then came on for jury trial in Jackson County Superior Court on 28 May 2013, the Honorable J. Thomas Davis, Judge presiding.

The evidence offered during the presentation of the State's case tended to show the following: On 29 July 2011, Jim Henry, a senior K-9 deputy sheriff with the Jackson County Sheriff's Office, responded to an alert of possible drug activity by subjects in a small gray Dodge pickup with a white camper cover in the Greens Creek area off the south side of Highway 441. Dep. Henry located the vehicle upon arrival to the area, observed that no one was around, and proceeded down a trail at the rear of the vehicle leading into the woods along the creek. Dep. Henry recalled that the vegetation on the trail was crushed down as if someone had recently walked over it.

Approximately 20 to 30 yards down the trail, Dep. Henry heard two individuals talking and crawled to a position where he could see what was going on. From his position on the bank, Dep. Henry observed a male and a female, later identified as defendant and Keisha Maki, on a grassy area in the middle of the creek near a blanket that was covered with bags and other various items. From his position on the bank, Dep. Henry observed Maki use tongs to lower a bottle into the creek. At that time, defendant instructed Maki to "[p]ut the glasses over [her] eyes, [because she didn't] want that stuff in [her] eyes." Maki then removed the bottle from the creek and the bottle began smoking.

After observing defendant and Maki for approximately ten minutes, Dep. Henry retreated up the trail to call his superior officer and Lee Tritt,

a Special Agent with the State Bureau of Investigation. Special Agent Tritt arrived shortly thereafter and met Dep. Henry on the trial. He and Dep. Henry then proceeded back down the trail to the area overlooking the creek to observe what was going on.

Dep. Henry and Special Agent Tritt observed defendant and Maki for approximately thirty minutes before Maki noticed them and alerted defendant. During this time, defendant and Maki were moving back and forth around the site where the blanket was laid out. Dep. Henry recalled that they were moving bottles back and forth. Special Agent Tritt testified that he became curious about a bottle sitting near the edge of the creek because it was obvious that it did not have a liquid like Coke or Sprite in it, but rather some type of solid substance.

Approximately thirty minutes after Special Agent Tritt arrived, Maki entered the creek and noticed they were being watched. At that point, Maki motioned for defendant to come over to her and alerted him of Dep. Henry and Special Agent Tritt's presence. Dep. Henry and Special Agent Tritt then came down the bank toward defendant and Maki and identified themselves as law enforcement. At that instant, Maki, who had backed out of the creek with defendant, hurriedly moved the bottle sitting at the edge of the creek into the creek near a concrete bridge support. The bottle immediately began to react with the water and started to smoke.

Special Agent Tritt was aware that the smoke from methamphetamine production was corrosive and dangerous and removed Maki from the smoky area while Dep. Henry apprehended defendant. Both defendant and Maki were taken into custody. Dep. Henry recalled that as he took defendant into custody, defendant stated several times that "[i]t wasn't me, I was at Food Lion, I wasn't making dope[,]" indicating he was aware what was going on.

After defendant and Maki were in custody, law enforcement secured the area. Among the items recovered were the following: a handbag that was found to contain a syringe and a white substance wrapped in a coffee filter, a duffle bag in which a clear two liter bottle containing white and pink granular material, gray metal pieces, and a clear liquid was found, empty boxes and blister packs of pseudoephedrine, a blister pack still containing pseudoephedrine, an empty pack of AA Energizer lithium batteries, a AA Energizer lithium battery that someone had cut the top off of and removed the lithium, iodized salt, sodium hydroxide, drain opener, funnels, tubing, coffee filters,

syringes, and various items of clothing. The plastic bottle Maki placed into the creek was also recovered. There was white and pink granular material in the burned bottle.

Testing of the white substance found wrapped in the coffee filter inside the handbag revealed the substance to be .8 grams of methamphetamine. Testing of the clear liquid removed from the bottle found inside the duffle bag revealed the liquid, weighing 73.6 grams, contained methamphetamine.

At trial, officers testified about the methamphetamine production process and explained that the remnants of packaging of four out of five ingredients – drain cleaner, sodium hydroxide, lithium batteries, and pseudoephedrine - used to manufacture methamphetamine using the "shake and bake" or "one pot" method were recovered at the scene, as well as many of the items used to manufacture methamphetamine. Testimony also explained that lithium metal is water reactive and can ignite when it is exposed to moisture. From the totality of everything found, Special Agent Michael Piwowar, a forensic scientist with the North Carolina State Crime Lab, "confirmed that it was a methamphetamine one pot reaction going on."

At the close of the State's evidence, defendant moved to dismiss all charges. Defendant focused his argument in support of dismissal on the trafficking charges, arguing the entire weight of the liquid recovered could not be considered because it was at an intermediate stage in the methamphetamine production process. After clarifying that the pseudoephedrine had already been converted to methamphetamine in the mixture and it was just a matter of extracting the methamphetamine from the liquid, the trial court denied defendant's motion to dismiss the charges.

Defendant did not call any witnesses in his defense, but submitted three exhibits that were admitted without objection. Defendant then renewed his motion to dismiss all charges, which the trial court denied.

On 30 May 2013, the jury returned verdicts finding defendant guilty on all charges. The trial court consolidated defendant's convictions between two judgments and sentenced defendant to consecutive terms totaling 153 months to 193 months imprisonment. Defendant was further ordered to pay costs, fees, restitution, and a $50,000 fine. Defendant gave notice of appeal in open court.

II. Discussion

Motion to Dismiss

In the first issue raised on appeal, defendant contends the trial court erred in denying his motion to dismiss the charges for insufficiency of the evidence made at the close of the State's evidence and renewed at the close of all the evidence. Specifically, defendant contends that absent an acting in concert instruction the State failed to offer sufficient evidence that he manufactured or possessed methamphetamine. Defendant also contends the State failed to offer sufficient evidence of a conspiracy.

"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 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

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

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation, quotation marks, and emphasis omitted).

Manufacturing Charges

[1] Defendant first argues there was insufficient evidence to support the manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges.

Crucial to defendant's argument, the sufficiency of the evidence to support defendant's conviction must be reviewed with respect to the theory of guilt presented to the jury. *See State v. Sullivan*, 216 N.C. App. 495, 503, 717 S.E.2d 581, 586-87 (2011) (citing *State v. Smith*, 65 N.C. App. 770, 310 S.E.2d 115, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984)), *disc. rev. denied*, 366 N.C. 229, 726 S.E.2d 839 (2012); *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978). In this case, the jury was not instructed on acting in concert. Consequently, defendant's convictions may be upheld only if there is evidence he committed the offenses. *See State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986) ("The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense.").

At trial, testimony was presented about the steps to produce methamphetamine using a "shake and bake" or "one pot" method. Defendant now contends the trial court erred in denying his motion to dismiss the manufacturing-related charges because there was no evidence that he performed any of the steps identified by law enforcement. We disagree.

As the State points out, this Court has previously addressed whether a defendant's presence at a place where a controlled substance is being manufactured is sufficient to withstand a motion for dismissal of manufacturing charges. In *State v. Shufford*, this Court addressed whether a defendant's presence in a house where marijuana was being manufactured was sufficient to withstand a motion for dismissal. *State v. Shufford*, 34 N.C. App. 115, 117-18, 237 S.E.2d 481, 483 (1977). Relying on *State v. Adams*, 191 N.C. 526, 132 S.E. 281 (1926), a case involving an illegal whiskey still, this Court in *Shufford* held the defendant's presence, along with other evidence that marijuana was being manufactured in the house, was sufficient to overcome a motion for dismissal. *Shufford*, 34 N.C. App. at 118, 237 S.E.2d at 483 ("It has been held that presence at a place where illegal whiskey is being manufactured, along with other supporting evidence, is sufficient to overcome a defendant's motion for nonsuit.") Furthermore, in *Shufford*, this Court noted that in possession cases, "[t]he State may overcome a motion for a nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the

same was in his possession.' " *Id.* at 119, 237 S.E.2d at 483 (quoting *State v. Allen*, 279 N.C. 406, 411-12, 183 S.E.2d 680, 684 (1971)). This Court then "perceive[d] no reason why the principle of 'close juxtaposition' should not apply to manufacturing of controlled substances as well as to their possession." *Id.* at 119, 237 S.E.2d at 483-84.

In the present case, we hold a reasonable inference of defendant's guilt can be drawn from defendant's presence with Maki at the scene for the duration of the time law enforcement observed, approximately 40 minutes, along with the evidence recovered from the scene that was consistent with the production of methamphetamine, testimony that defendant and Maki were back and forth in the area moving bottles, and testimony that defendant gave instructions to Maki to keep the smoke out of her eyes. Thus, the evidence was sufficient to withstand defendant's motion to dismiss the manufacturing-related charges and the trial court did not err.

Possession Charges

[2] Defendant next argues there was insufficient evidence to support the trafficking in methamphetamine by possession and possession of drug paraphernalia charges.

As previously mentioned, law enforcement searched the area where defendant and Maki were observed subsequent to taking them into custody. The search of items found at the scene resulted in the recovery of .8 grams of methamphetamine, a bottle of a liquid weighing 73.6 grams that tested positive for methamphetamine, and syringes. Defendant correctly contends that because none of the above items were found on his person, or in any property linked directly to him, the State was required to prove constructive possession. Defendant, however, further contends there was insufficient evidence of constructive possession. We disagree.

"Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). "As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

In this case, the evidence tended to show that the .8 grams of methamphetamine and a syringe were found in a camouflage handbag at the

scene. The handbag also contained a wallet, cosmetics, a metal spoon, and a Social Security card with Maki's name on it. The 73.6 grams of liquid containing methamphetamine was in a clear two liter bottle in a closed purple duffle bag found at the scene. Various clothing items were also in the duffle bag. Both the handbag and the duffle bag were near the other items recovered on the blanket laid out near the creek in the area where defendant and Maki were moving back and forth.

In arguing the evidence was insufficient to show constructive possession by defendant, defendant contends there is nothing indicating defendant had the intent and capability to control the methamphetamine, syringes, or liquid containing methamphetamine because the evidence tends to show that the bags belonged to Maki. While we agree that the evidence tends to show the handbag containing the .8 grams of methamphetamine and syringe belonged to Maki, there is no evidence that the duffle bag or other items were Maki's. Defendant asserts that the clothes in the purple duffle bag were women's clothes; yet, defendant's assertion is a mischaracterization of the evidence. There is no indication in the evidence that the clothes found with the liquid in the duffle bag were women's clothes. In fact, when questioned whether there was anything in the purple duffle bag that would identify who it belonged to, Special Agent Piwowar simply stated he just found clothes and the bottle.

Reviewing the totality of the circumstances, we find there was sufficient evidence of constructive possession to present the possession-related charges against defendant to the jury. First, defendant and Maki were the only persons present during the 40 minutes that law enforcement observed. Second, both defendant and Maki moved freely around the site where all the belongings and items were laid out on the blanket. It is apparent from Special Agent Piwowar's testimony that among the items were multiple syringes, not just the syringe found in the handbag with Maki's Social Security card. Moreover, the evidence suggests that not all the items of clothing recovered at the scene belonged to Maki. Namely, two pairs of shoes were recovered from the scene in addition to general items such as a hat and a belt. While Special Agent Tritt testified that one pair of the shoes appeared to be women's shoes, the second pair was a larger plain white pair.

Viewing the totality of the evidence in the light most favorable to the State, we hold the evidence was sufficient for the jury to find that defendant had the capability and intent to control the items that he was

near and moving around. Thus, the trial court did not err in denying defendant's motion to dismiss the possession-related charges.

Conspiracy Charge

[3] Defendant's final argument under the first issue on appeal is that there was insufficient evidence of a conspiracy. Specifically, defendant contends there was no direct evidence of an agreement between him and Maki to traffic in methamphetamine by manufacture and there was insufficient circumstantial evidence of an agreement to support the charge. Defendant asserts the conspiracy charge was supported only by suspicion built on conjecture. Again, we disagree.

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citing *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984)). As this Court noted in *State v. Jenkins*, 167 N.C. App. 696, 699-700, 606 S.E.2d 430, 432-33 (2005), "[a] conspiracy may be shown by circumstantial evidence, or by a defendant's behavior. Conspiracy may also be inferred from the conduct of the other parties to the conspiracy." *Id.* (citations omitted). Yet, "[w]hile conspiracy can be proved by inferences and circumstantial evidence, it 'cannot be established by a mere suspicion . . . .'" *State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (quoting *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985)).

Upon review of all the evidence in this case, we hold there was sufficient evidence to infer an implied agreement between defendant and Maki. It is undisputed that defendant was present and aware that Maki was involved in the production of methamphetamine. Moreover, as we already held, there is sufficient evidence from which a reasonable inference can be drawn that defendant was also involved in the manufacturing process. Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss.

Considering the totality of the evidence in the light most favorable to the State, we hold there was substantial evidence supporting the manufacturing, possession, and conspiracy charges against defendant, even in the absence of an acting in concert instruction. As a result, we hold the trial court did not err in denying defendant's motion to dismiss.

Trafficking Charges

[4] Based on the 73.6 grams of liquid that tested positive for methamphetamine, defendant was charged and convicted of three trafficking offenses. Now in the second issue on appeal, defendant contends that, even if there is sufficient evidence he was involved in the crimes, there is still insufficient evidence of the amounts alleged in the indictment to sustain the trafficking charges. Specifically, defendant argues the entire weight of a mixture containing methamphetamine at an intermediate stage in the manufacturing process cannot be used to support trafficking charges because the mixture is not ingestible, is unstable, and is not ready for distribution. Relying on *State v. Willis*, 61 N.C. App. 23, 300 S.E.2d 420 (1983) and *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), as well as non-controlling federal cases, defendant contends it is inconsistent with the intent of the trafficking statutes to use the total weight of such mixture to support trafficking charges.

"The purpose of the [trafficking statutes] is to prevent trafficking in controlled substances." *Perry*, 316 N.C. at 101, 340 S.E.2d at 459. With that in mind, in *Willis* and *Perry*, our State's appellate courts recognized that the tough punishment scheme in the trafficking statutes was justified to deter large scale distribution of drugs, regardless of the percentage of controlled substance in the mixture. *Willis*, 61 N.C. App. at 42, 300 S.E.2d at 431, *modified and aff'd*, 309 N.C. 451, 306 S.E.2d 779 (1983); *Perry*, 316 N.C. at 101-02, 340 S.E.2d at 459. While we are sympathetic to defendant's argument that the methamphetamine recovered in this case was not yet in a usable form, we find the purpose of the trafficking statutes is still served in the present case where defendant admitted the methamphetamine had already been formed in the liquid and it was only a matter of extracting it from the mixture.

Moreover, the trafficking statute does not specify a certain type of mixture. In *State v. Conway*, this Court addressed whether, under a prior version of N.C. Gen. Stat. § 90-95(h)(3b), "the entire weight of a liquid containing a detectable, but undetermined, amount of methamphetamine establishes a [trafficking] violation . . . ." *State v. Conway*, 194 N.C. App. 73, 78, 669 S.E.2d 40, 44 (2008). Noting the "statute [at that time was] silent on whether the weight of a liquid mixture containing detectable, but undetermined, amounts of methamphetamine is sufficient to meet the requirements set forth within the statute to constitute 'trafficking[,]' " *id.* at 79, 669 S.E.2d at 44, this Court undertook a statutory analysis and determined that if the legislature intended to include the weight of a mixture containing methamphetamine, it would have

done so as it did in other subsections of the trafficking statutes. *Id.* at 82-85, 669 S.E.2d at 46-47. This Court then held the total weight of the mixture containing methamphetamine in *Conway* did not support the trafficking charges and reversed the defendant's trafficking convictions. *Id.* at 85, 669 S.E.2d at 48.

However, in 2009 the trafficking in methamphetamine statute was amended to include the "any mixture" language that *Conway* noted was omitted. N.C. Gen. Stat. § 90-95(h)(3b) now provides "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine *or any mixture containing such substance* shall be guilty of a felony which felony shall be known as 'trafficking in methamphetamine[.]' " N.C. Gen. Stat. § 90-95(h)(3b) (2013) (emphasis added). The statute then sets forth different punishments based on the amount of methamphetamine or mixture containing methamphetamine.

Where the statute provides that a defendant is guilty of trafficking when he manufactures "any mixture containing [methamphetamine]" meeting the minimum 28 gram weight requirement, we hold the trial court did not err in using the weight of the liquid containing methamphetamine in the present case.

III. Conclusion

For the reasons discussed, we hold the defendant received a fair trial free of error.

No error.

Judges ELMORE and DAVIS concur.

STATE v. HARRIS

[236 N.C. App. 388 (2014)]

STATE OF NORTH CAROLINA
v.
LYNWOOD EUGENE HARRIS, JR.

No. COA13-1330

Filed 16 September 2014

1. Constitutional Law—effective assistance of counsel—failure to move to dismiss charge—record evidence supported conviction

Although defendant contended that he received ineffective assistance of counsel based upon his trial counsel's failure to move to have a contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence, the evidence supported defendant's conviction, thus necessitating the conclusion that defendant's ineffective assistance of counsel claim had no merit.

2. Child Abuse, Dependency, and Neglect—contributing to abuse or neglect of juvenile—jury instructions—no plain error

The trial court did not commit plain error by misstating the applicable law when instructing the jury on contributing to the abuse or neglect of a juvenile. The outcome of defendant's trial would not have been different had the trial court correctly instructed the jury concerning the issue of whether defendant had placed the victim in a place or set of circumstances under which she could be adjudicated abused or neglected.

3. Criminal Law—prosecutor's arguments—ruined victim's childhood—credibility of victim

The trial court did not err in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile case by failing to intervene ex mero motu during the prosecutor's challenged comments. The prosecutor's comment to the effect that defendant had ruined the victim's childhood represented a reasonable inference drawn from the record. Further, the comments were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing the victim because the record did not contain corroborative physical evidence.

4. Evidence—testimony—relevancy—vouching for credibility—no plain error

The trial court did not commit plain error in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile

case by failing to exclude challenged portions of the testimony of the victim's grandmother, who was also defendant's former girlfriend, on relevance grounds and for alleged impermissible vouching of the victim's credibility. The outcome of the trial would not have been different had the trial court refrained from allowing the challenged testimony.

Appeal by defendant from judgments entered 29 May 2013 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 5 June 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ERVIN, Judge.

Defendant Lynwood Eugene Harris, Jr., appeals from judgments based upon his convictions for misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile. On appeal, Defendant contends that his trial counsel provided him with constitutionally deficient representation by failing to properly preserve his challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile for the purpose of appellate review, incorrectly instructing the jury concerning the issue of his guilt of contributing to the abuse or neglect of a juvenile, failing to intervene *ex mero motu* for the purpose of addressing certain remarks made during the prosecutor's final argument, and allowing the admission of testimony that was irrelevant and improperly vouched for the prosecuting witness' credibility. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On 23 June 2012, Diane Phillips had a birthday party at her house. Among those in attendance were Defendant and J.W., Ms. Phillips' eight-year-old granddaughter.[1] As of the date of the party, Ms. Phillips and

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

Defendant had been involved in a romantic relationship for approximately 14 years. On the day of the party, Defendant came and left the house on a regular basis and consumed alcohol throughout the course of the day.

On the evening of the party, Jessica was lying in Ms. Phillips' bed when Defendant entered the room with a cup full of liquor. Defendant offered Jessica a drink from the cup and tried to hand the cup to her. Jessica claimed that Defendant played with her hair, squeezed her buttocks, and "kept on talking about if I let him suck on my chest they'll grow up really big and pretty." According to Jessica, Defendant "kept on squeezing [Jessica's] bottom and then he--he stuck his thumb in [her] mouth and said--Suck it, baby. Suck it."

During the evening, Jessica came to the screen door leading to the porch and said that she needed to tell Ms. Phillips something. Jessica told Ms. Phillips that she was scared, that she thought that Defendant had tried to rape her, and that Defendant was "feeling on [her] buttocks," "talking about sucking on [her] breasts," and asking if she would "let [him] suck on [her] breasts so they'll [be] big and pretty when [she got] big." After receiving this information, Ms. Phillips threw Defendant out of the house and threatened to kill him if he ever returned. Subsequently, Ms. Phillips laid down with Jessica and began crying, stating that she "shut down" after her conversation with Jessica because she "was in shock."

Early the next morning, Ms. Phillips called the police. When the investigating officers arrived, Ms. Phillips told them what had happened. After speaking with Ms. Phillips, Officer Tabitha Johnson of the Greenville Police Department interviewed Jessica, who stated that

> [her brother] was asleep and she was watching TV and eating Cheetos, and [Defendant] came into the room. [Defendant] asked her what she was doing. She told him she's eating Cheetos and drinking a Pepsi. He asked her if she wanted something stronger to drink, referring to his alcoholic beverage in his hand. [Jessica] told--stated that she told him no, but he tried to make her drink his beverage. She also reported to me that he said to her, while putting his finger in his mouth--Suck it, baby. Suck it. Started trying to put it in her mouth. I apologize.
>
> She reported that he then began kissing her neck and her face and rubbing and squeezing her butt. [Defendant] asked her to kiss—asked her if she could kiss his chest

> and saying--If you let me suck on your chest, your breasts will grow in nice and pretty. She said that she moved away, and he grabbed her hand and tried to put it--his hands in his pant--put her hands in his pants near his private. She snatched her hand away. [Defendant] told her--I was just trying to have a little fun with you. And this is her--me quoting what she's saying--and walked out of the room. She said he returned with another alcoholic beverage and put some in a cup and tried--and made [Jessica] drink it. She said she pushed him away but continued to rub on her hair and kiss her neck and telling her just to go to sleep. [Jessica] said she would not to go sleep, and he left out of the room.

B. Procedural History

On 24 June 2012, a warrant for arresting charging Defendant with misdemeanor sexual battery and contributing to the abuse and neglect of a juvenile was issued. On 23 January 2013, Judge David A. Leech found Defendant guilty as charged in the Pitt County District Court. On the following day, Judge Leech entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery, with this sentence being suspended and with Defendant being placed on supervised probation, subject to certain terms and conditions, for a period of 24 months, and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a juvenile, with this sentence also being suspended and Defendant being placed on supervised probation, subject to certain terms and conditions, for a period of 24 months. Defendant noted an appeal to Pitt County Superior Court for a trial *de novo*.

The charges against Defendant came on for trial before the trial court and a jury at the 28 May 2013 session of the Pitt County Superior Court. On 29 May 2013, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a minor, with this second sentence being suspended and with Defendant being placed on supervised probation for a period of 18 months, subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Sufficiency of the Evidence

[1] In his initial challenge to the trial court's judgments, Defendant contends that he received constitutionally deficient representation from his trial counsel based upon his trial counsel's failure to move to have the contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence. More specifically, Defendant contends that his trial counsel's failure to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence fell below an objective standard of reasonableness and that, had such a motion been made, it would have been allowed given that the State failed to prove that Defendant was Jessica's caretaker and that merely offering Jessica an alcoholic beverage did not constitute an act of abuse or neglect. Defendant is not entitled to relief from his conviction for contributing to the abuse or neglect of a juvenile on the basis of this claim.

As Defendant candidly concedes, he failed to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence at trial. As a general proposition, a defendant's failure to make a dismissal motion after the State's evidence precludes the defendant from challenging the sufficiency of the evidence to support his conviction on appeal. N.C. R. App. P. 10(a)(3). "However, pursuant to N.C. R. App. P. 2, we will hear the merits of [D]efendant's claim despite the rule violation because [D]efendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss." *State v. Fraley*, 202 N.C. App. 457, 461, 688 S.E.2d 778, 783 (2010) (quotation marks and citation omitted), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

"To survive a motion to dismiss in a criminal action, the State's evidence must be substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. The trial court must view all evidence in the light most favorable to the State, including evidence that was erroneously admitted." *State v. Denny*, 179 N.C. App. 822, 824, 635 S.E.2d 438, 440 (2006) (internal quotation marks and citations omitted), *aff'd in part, modified on other grounds in part, and rev'd on other grounds in part*, 361 N.C. 662, 652 S.E.2d 212 (2007). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Tabron*, 147 N.C. App. 303, 306, 556 S.E.2d 584, 585 (2001) (quotation marks and citations

omitted), *disc. review improvidently granted*, 356 N.C. 122, 564 S.E.2d 881 (2002). "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). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We will now utilize this standard of review to evaluate the validity of Defendant's challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile.

N.C. Gen. Stat. § 14-316.1 provides that:

> [a]ny person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by [N.C. Gen. Stat. §] 7B-101 and [N.C. Gen. Stat. §] 7B-1501 shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 7B-101(1) defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker" (1) inflicts or allows to be inflicted upon the juvenile a serious physical injury; (2) creates or allows to be created a substantial risk of serious physical injury to the juvenile; (3) uses or allows to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify behavior; (4) commits, permits, or encourages the commission of a variety of specific sexual assaults, acts of prostitution, and obscenity offenses by, with, or upon the juvenile; (5) creates or allows to be created serious emotional damage to the juvenile evinced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; (6) encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or (7) commits or allows to be committed acts of human trafficking, involuntary servitude or sexual servitude against the child. A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15). Finally, a caretaker, for purposes of the abuse and neglect statutes, is defined as

> [a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

N.C. Gen. Stat. § 7B-101(3).

In seeking to persuade us that the record did not support Defendant's conviction for contributing to the abuse or neglect of a juvenile, Defendant initially argues that the record does not suffice to support a determination that he was Jessica's caretaker. Defendant's argument is, however, simply inconsistent with our recent decision in *State v. Stevens*, __ N.C. App. __, __, 745 S.E.2d 64, 67, *disc. review dismissed*, 367 N.C. 256, 749 S.E.2d 885, *disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013), in which this Court explicitly held that a finding of guilt for violating N.C. Gen. Stat. § 14-316.1 "does not require a parental or caretaker relationship between a defendant and a juvenile" and stated, instead, that "[d]efendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care." *See also State v. Cousart*, 182 N.C. App. 150, 153, 641 S.E.2d 372, 374-75 (2007) (stating that the gravamen of the act of contributing to the delinquency, abuse, or neglect of a minor is "conduct on the part of the accused" in willfully "caus[ing], encourag[ing], or aid[ing]") (alterations in original). As a result, as long as Defendant's conduct placed Jessica in a position in which she did "not receive proper care from a caretaker or is not provided necessary medical care," *Stevens*, __ N.C. App. at __, 745 S.E.2d at 67, he is subject to the criminal sanction for violating N.C. Gen. Stat. § 14-316.1.

In apparent recognition of the problems with his initial argument, Defendant also contends that the record did not suffice to support a determination that his actions placed Jessica in a position in which she

could be found to be abused or neglected. As the record clearly establishes, however, Defendant entered the bedroom in which Jessica was attempting to go to sleep, tried to get her to take a drink from the cup of liquor that he was carrying, played with her hair, and squeezed her buttocks. As Defendant squeezed Jessica's buttocks, he asked her to suck his thumb and requested that she allow him to suck on her chest so "they'll grow up really big and pretty." In view of the fact that a juvenile who found herself in the position that Jessica occupied and was subject to the attentions that Defendant attempted to pay to her was clearly placed in a location in which and subject to conditions under which she could not and did not receive proper care from her caretakers, the State's evidence clearly sufficed, given the test enunciated in *Stevens*, to support Defendant's conviction for contributing to the abuse or neglect of a juvenile.[2] As a result, the record evidence clearly sufficed to support Defendant's conviction for contributing to the abuse or neglect of a juvenile, a fact that necessitates the conclusion that Defendant's ineffective assistance of counsel claim has no merit.[3]

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2. As the State notes in its brief, Defendant's conduct as described in Jessica's testimony clearly constituted the taking of an indecent liberty with a minor in violation of N.C. Gen. Stat. § 14-202.1, which is one of the offenses that can underlie an abuse adjudication. N.C. Gen. Stat. § 7B-101(1)(d). In addition, this Court has held that a father's decision to offer marijuana and beer to a child, while not rising to the level of abuse, constituted neglect. *In re M.G.*, 187 N.C. App. 536, 551, 653 S.E.2d 581, 590 (2007), *rev'd on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009). Thus, given the absence of any requirement that Defendant be Jessica's parent, guardian, or caretaker and the fact that Defendant's conduct placed Jessica in a position and subject to conditions under which she could be found to be abused or neglected, the relevant statutory provisions and decisions of this Court clearly support Defendant's conviction for contributing to the abuse or neglect of a juvenile.

3. The warrant charging Defendant with contributing to the abuse or neglect of a juvenile alleged, in pertinent part, that "the defendant named above unlawfully and willfully did knowingly, while at least 16 years of age, cause[], encourage, and aid [Jessica], age 8 years, a juvenile, to commit an act, consume alcoholic beverage, whereby that juvenile could be adjudicated abused and neglected." In his brief, Defendant argues, in reliance upon *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890 894 (stating that "[i]t has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment"), *cert. denied*, 444 U.S. 874, 100 S. Ct. 156, 62 L. Ed. 2d 102 (1979), that the only basis upon which Defendant could lawfully have been convicted of contributing to the abuse or neglect of a juvenile was by encouraging her to consume alcohol. We do not find this argument persuasive for two reasons. First, as this Court held in *Stevens*, __ N.C. App. at __, 745 S.E.2d at 66, an indictment that fails to allege the exact manner in which the defendant allegedly contributed to the delinquency, abuse, or neglect of a minor is not fatally defective. Unlike the situation at issue in *Faircloth*, in which the State sought to convict the defendant of a completely different offense from the one alleged in the indictment, the State did, in fact, proceed against Defendant on the grounds that he committed the offense of contributing to the abuse or

B. Jury Instructions

[2] After the completion of the evidence and the arguments of counsel, the trial court instructed the jury with respect to the issue of Defendant's guilt of contributing to the abuse or neglect of a juvenile as follows:

> The defendant has also been charged with contributing to the abuse and neglect of a juvenile. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant was at least 16 years old.
>
> Second, that the defendant caused, encouraged, and aided the juvenile to commit an act whereby the juvenile could be adjudicated abused and neglected.
>
> Third, that [Jessica] was a juvenile. An abused and neglected juvenile is a person who has not reached her 18th birthday, and is not married, emancipated, or a member of the armed forces of the United States.
>
> And [f]ourth, that the defendant acted knowingly or willfully.

As Defendant candidly concedes, he failed to object to the trial court's contributing to the abuse or neglect of a minor instruction at or before the time that the jury retired to begin its deliberations, so that our review is limited to determining whether plain error occurred. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334, (2012). A plain error is an error that is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. As a result, in order to establish the existence of plain error, a "defendant must convince this Court not only that there was error, but

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neglect, rather than the delinquency, of a juvenile. *State v. Tollison*, 190 N.C. App. 552, 557, 660 S.E.2d 647, 651 (2008) (stating that, since "a victim's age is not an essential element of first degree kidnapping," "the variance in the indictment was not fatal"). Secondly, and more importantly, Defendant's argument relies upon an unduly narrow reading of the contributing to the abuse or neglect of a juvenile warrant that completely overlooks the context in which Defendant attempted to persuade Jessica to consume alcohol. As a result, Defendant's argument in reliance upon the language of the contributing warrant is not persuasive.

that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

As Defendant correctly asserts in his brief, the trial court's instructions misstated the applicable law by instructing the jury that it should find that Jessica was an abused or neglected juvenile in the event that it found beyond a reasonable doubt that she had not reached her 18th birthday and had not been married, emancipated, or entered military service.[4] For that reason, the only issue that remains for our consideration is whether Defendant is entitled to relief from his contributing to the abuse or neglect of a juvenile conviction based upon this erroneous instruction. As a result, the ultimate question raised by Defendant's challenge to the trial court's instructions concerning the issue of his guilt of contributing to the abuse or neglect of a minor is the extent to which it is probable that the outcome of Defendant's trial would have been different had the trial court correctly instructed the jury concerning the issue of whether Defendant had placed Jessica in a place or set of circumstances under which she could be adjudicated abused or neglected.

The only evidence before the jury concerning the issue of Defendant's guilt of contributing to the abuse or neglect of a minor consisted of Jessica's testimony and evidence concerning statements that Jessica had made to other persons that was offered for corroborative purposes. As we read the record, the argument that Defendant advanced before the jury in support of his request for an acquittal on both the contributing to the abuse or neglect of a minor charge and the misdemeanor sexual battery charge rested on a contention that Defendant had no motivation for engaging in the conduct described in Jessica's testimony, an assertion that Jessica was biased against him, a description of certain inconsistencies in the accounts concerning Defendant's conduct that Jessica provided on different occasions, and a claim that certain statements that Jessica had made were unlikely to be true given other surrounding circumstances. Thus, the ultimate issue presented for the

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4. As we have already noted, in order to convict Defendant of the offense made punishable by N.C. Gen. Stat. § 14-316.1 in light of the allegations set out in the warrant that had been issued against him, the jury had to find beyond a reasonable doubt that Defendant caused, encouraged, or aided Jessica to be placed in a location or situation in which she could be adjudicated abused or neglected. A cursory reading of the trial court's instructions establishes that the trial court totally failed to instruct the jury concerning the meaning of the statutory references to abuse or neglect and, in essence, told the jury to find the existence of those prerequisites for a conviction on the sole basis of Jessica's age and the fact that she had not been married, emancipated, or entered military service. Thus, the trial court's instructions, which are consistent with the applicable pattern jury instruction, clearly misstated the applicable law.

jury's consideration at trial was whether Jessica was a credible witness, an issue that the jury clearly answered in the affirmative.

A careful review of the record satisfies us that, even though the trial court's instructions rested on a clear misstatement of the applicable law, it is not probable that the outcome at trial would have been different in the event that the jury had been correctly instructed. The description of Defendant's conduct contained in Jessica's testimony, which the jury obviously believed, sufficed to support a determination that he contributed to the abuse or neglect of a minor. We are unable to see how the trial court's erroneous instruction in any way enhanced the likelihood that the jury would have resolved the underlying credibility contest in Defendant's favor. Having determined, contrary to the arguments vigorously advanced by Defendant's trial counsel, that Jessica's testimony was credible, the jury would necessarily have determined that Defendant placed her in a location or set of circumstances under which she "[did] not receive proper care from a caretaker or [was] not provided necessary medical care." *Stevens*, __ N.C. App. at __, 745 S.E.2d at 67. As a result, given that "the term 'plain error' does not simply mean obvious or apparent error, but rather has the meaning given by the court in" *Lawrence*, *Odom*, 307 N.C. 660, 300 S.E.2d 378 (holding that the failure to instruct on the issue of the defendant's guilt of a lesser included offense did not rise to the level of plain error), *see also Lawrence*, 365 N.C. at 519, 723 S.E.2d at 334-35 (holding that the omission of an element from the trial court's instruction to the jury concerning the issue of Defendant's guilt of conspiracy to commit robbery with a dangerous weapon did not rise to the level of plain error), we conclude that the trial court's instructional error did not constitute plain error and that Defendant is not, for that reason, entitled to relief from his conviction for contributing to the abuse or neglect of a minor based upon the trial court's erroneous instruction.

C. Prosecutor's Final Argument

[3] Thirdly, Defendant contends that he is entitled to relief from his convictions based upon remarks that the prosecutor made during his closing argument. More specifically, Defendant contends that the prosecutor's comments to the effect that Defendant had ruined Jessica's childhood and that, in the event that the jury failed to find Jessica's testimony to be credible, it would be sending a message that Jessica would need to be hurt, raped, or murdered before an alleged abuser could be convicted, were improper. Defendant is not entitled to relief from his convictions based upon this set of contentions.

Statements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference. *State v. Jaynes*, 353 N.C. 534, 559, 549 S.E.2d 179, 198 (2001) (citation omitted), *cert. denied*, 535 U.S. 934, 122 S. Ct. 1310, 152 L. Ed 2d 220 (2002). As a general proposition, counsel are allowed wide latitude in closing arguments, *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted), so that a prosecutor is entitled to argue all reasonable inferences drawn from the facts contained in the record. *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citations omitted), *cert. denied*, __ U.S. __, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). "Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted). As a result, given that Defendant did not object to the prosecutorial comments that are addressed in his brief, the ultimate issue raised by Defendant's challenge to the prosecutor's closing argument is the extent, if any, to which the challenged comments were so egregiously improper as to necessitate judicial intervention despite the absence of an objection.

In the course of his closing argument, the prosecutor asserted that:

> [The Defendant] has no right to ruin [Jessica's] childhood, because how--what memories is she going to have as--of her eight-year old time? What's going to be the dominant thing in her life when she thinks back to being eight and nine? It's going to be this man groping her, having to come in and testify and face him.
>
> . . . .
>
> So it comes down to is it sufficient to listen to an eight-year-old girl--convict somebody of this crime? And if it's not, then this case is never going to be--we'll never prove it. Never. So why shouldn't we believe her? Because she's eight? Is that why? Do we say that no eight-year-old is ever going to be believable? . . . Now, if you don't believe her because she's eight or because there's no forensic evidence, then what you're saying is --Well, maybe we should let it go a little further so we can get more evidence. Is it fair to tell an eight-year-old--Well, you know, honey, we'd like to help you, but you got to get hurt first. You got to

> get hurt first. Now, we've got some evidence then. You get hurt, get raped or murdered, we got some evidence then. But just your word, just your word, nah.

We do not believe that either of the challenged comments necessitated *ex mero motu* intervention on the part of the trial court.

1. Ruining Jessica's Childhood

In arguing that Defendant had ruined Jessica's childhood, the prosecutor simply made a reasonable inference, based upon the record evidence, that Jessica would be traumatized by the events in question. According to the record, Jessica was eight years old at the time of the incident underlying this case. In addition, Jessica told Ms. Phillips that she believed that Defendant, whom she had known for her entire life, was attempting to rape her. Under that set of circumstances, the prosecutor's inference that Jessica had been traumatized by Defendant's actions was a reasonable one. As a result, since the prosecutor's comment to the effect that Defendant had ruined Jessica's childhood represented a reasonable inference drawn from the record, the trial court did not err by failing to intervene *ex mero motu* to address the challenged prosecutorial argument.

Although the Supreme Court has held that an argument that undermines reason and is designed to viscerally appeal to the jurors' passions or prejudices is improper, *see State v. Jones*, 355 N.C. 117, 132-33, 558 S.E.2d 97, 107 (2002) (holding that references to the Columbine school shooting and Oklahoma City bombing during a murder trial was improper, in part, because it attempted to lead jurors away from the evidence by appealing to their sense of passion and prejudice), a prosecutor may argue that the jury should use its verdict to "send a message" to the community. *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L. Ed. 2d 1074 (2003); *State v. Nicholson*, 355 N.C. 1, 43-44, 558 S.E.2d 109, 138 (citations omitted), *cert. denied*, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002). Finally, a prosecutor is entitled to argue that the jury should or should not believe a witness and explain the reasons that the prosecutor believes should cause the jury to reach such a credibility-related conclusion in his or her final argument. *See State v. Wilkerson*, 363 N.C. 382, 425, 683 S.E.2d 174, 200 (2009) (citation omitted), *cert. denied*, 559 U.S. 1074, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010); *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006); *State v. Scott*, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996) (citation omitted).

2. Jessica's Credibility

As we have already noted, the ultimate issue before the jury in this case was Jessica's credibility. The obvious purpose of the second set of challenged prosecutorial comments was to urge the jury to find Jessica's testimony to be credible despite the fact that the record did not contain physical evidence that supported her description of Defendant's conduct. Admittedly words like "murder" and "rape" are, without doubt, emotionally charged. Although Defendant attempts to analogize the prosecutor's second set of challenged remarks to those at issue in *Jones*, that analogy is unpersuasive given that the remarks under consideration in *Jones* referred to information outside the record and compared the defendant's conduct with infamous acts committed by others, neither of which is true of the prosecutorial comments at issue here. As a result of the fact that the prosecutorial comments at issue here were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing Jessica because the record did not contain corroborative physical evidence, we conclude that the trial court did not err by failing to intervene *ex mero motu* to address the second set of prosecutorial comments that Defendant has challenged in his brief. Thus, Defendant is not entitled to relief from his convictions based on allegedly improper comments by the prosecutor.

D. Ms. Phillips' Testimony

[4] Finally, Defendant contends that the trial court committed plain error by allowing Ms. Phillips to deliver testimony that, in Defendant's opinion, improperly appealed to the jury's sympathy and impermissibly vouched for Jessica's credibility. According to Defendant, the trial court should have excluded this evidence despite the fact that he failed to object to its admission at trial on the grounds that the evidence in question was irrelevant and constituted impermissible lay opinion testimony. We do not find Defendant's argument persuasive.

1. Relevance

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citations omitted), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Evidence that is "not part of the crime charged but pertain[s] to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if

linked in time and circumstances with the charged crime, or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *U.S. v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)) (internal brackets omitted). A trial court's ruling with respect to relevance issues is "technically . . . not discretionary and therefore is not reviewed under the abuse of discretion standard[,]" but is, nevertheless, entitled to great deference on appeal. *Sherrod v. Nash General Hosp. Inc.*, 126 N.C. App. 755, 762, 487 S.E.2d 151, 155 (1997) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)) (internal quotation marks and brackets omitted), *aff'd in part and rev'd in part on other grounds*, 348 N.C. 526, 500 S.E.2d 708 (1998). As a result of the fact that Defendant failed to object to the admission of the challenged evidence at trial, we review Defendant's challenge to the admission of this evidence using a plain error standard of review.

At trial, Ms. Phillips testified that, after Jessica told her about Defendant's conduct, Ms. Phillips "got scared and shut down," "was in shock," laid down with Jessica, and "started crying." Subsequently, Ms. Phillips saw Defendant coming out of the bathroom, "grabbed him by the shirt," "threw him out the screen door," and "told him if he ever come back to [her] house again," she "would kill him, because [she] was mad and scared at the time." Finally, Ms. Phillips also stated that she told Jessica's father about Defendant's actions and "he got up raging."

The challenged portion of Ms. Phillips' testimony was relevant to show what occurred immediately after Defendant's alleged assault upon Jessica. The fact that Jessica reported the incident to Ms. Phillips immediately after it occurred, rather than waiting until a later time to make her accusation, tends to bolster the credibility of her testimony and was relevant for that reason. Similarly, the challenged portion of Ms. Phillips' testimony tends to show that Jessica had given a consistent account of her interaction with Defendant from the time of her first conversation with Ms. Phillips immediately after the incident occurred until she testified at trial. Finally, the challenged portion of Ms. Phillips' testimony, which details her reaction to Jessica's allegations and the events that led up to Defendant's arrest, helped complete the story of Defendant's assault upon Jessica for the jury. As a result, the trial court did not err by failing to exclude the challenged portion of Ms. Phillips' testimony on relevance grounds.

2. Vouching for Jessica's Credibility

According to N.C. Gen. Stat. § 8C-1, Rule 701, the testimony of a non-expert witness "in the form of opinions or inferences is limited to . . . opinions or inferences [that] are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his [or her] testimony or the determination of a fact in issue." The admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates N.C. Gen. Stat. § 8C-1, Rule 701. *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 123 S. Ct. 488, 154 L. Ed. 2d 404 (2002). "As long as the lay witness has a basis of personal knowledge for his [or her] opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991).

In addition to questioning its relevance, Defendant contends that the challenged portion of Ms. Phillips' testimony impermissibly vouched for Jessica's credibility. However, Ms. Phillips never directly commented on the issue of Jessica's credibility. Put another way, Ms. Phillips never specifically stated whether she believed Jessica or not. Although Defendant argues that the challenged portion of Ms. Phillips' testimony contained an implicit expression of confidence in Jessica's veracity, we are unable to read such an implication into what Ms. Phillips actually said. Finally, even if Ms. Phillips' testimony did, in some manner, amount to an impermissible comment concerning Jessica's credibility, any error that the trial court may have committed by allowing the admission of that testimony did not rise to the level of plain error. In view of the relatively incidental nature of any vouching for Jessica's credibility that might have occurred and the fact that most jurors are likely to assume that a grandmother would believe an accusation of sexual abuse made by one of her own grandchildren, *see State v. Freeland*, 316 N.C. 13, 18, 340 S.E.2d 35, 37 (1986) (stating that a jury would naturally assume that a mother would believe that her daughter was telling the truth concerning a sexual assault allegation); *State v. Dew*, __ N.C. App. __, __, 738 S.E.2d 215, 219 (stating that "most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children."), *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013) we are simply unable to conclude that the outcome at Defendant's trial would probably have been different had the trial court refrained from allowing the admission of the challenged portion of Ms. Phillips' testimony. As a result, the trial court did not commit plain error by allowing the admission of the challenged portion of Ms. Phillips' testimony.[5]

5. In his brief, Defendant contends that, even if he is not entitled to relief from his convictions based on a single error, the cumulative effect of the errors that he contends

III. Conclusion

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

NO ERROR.

Judge ROBERT N. HUNTER, JR., concurring in the result only prior to 6 September 2014.

Judge DAVIS concurs.

STATE OF NORTH CAROLINA
v.
MONTICE TERRILL HARVELL

No. COA14-228

Filed 5 September 2014

1. Identification of Defendants—show-up identification—motion to suppress—suggestive—no plain error

The trial court did not commit plain error in a felony breaking and entering and felony larceny case by denying defendant's motion to suppress a victim's show-up identification of defendant. Although it was suggestive, under the totality of the circumstances it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process.

2. Criminal Law—instructions—flight

The trial court did not err in a felony breaking and entering and felony larceny case by instructing the jury regarding flight. The State presented evidence that reasonably supported the theory that

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that the trial court committed deprived him of a fair trial. However, given that "the plain error rule may not be applied on a cumulative basis," *State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009), and given that none of Defendant's challenges to the trial court's judgments were properly preserved for purposes of appellate review, we conclude that Defendant is not entitled to relief from the trial court's judgments on the basis of the cumulative error doctrine.

defendant fled after breaking and entering into the victim's home. Further, the instruction was not prejudicial given the victim's identification of defendant.

3. Larceny—felony larceny—taking—carrying away—jury request for clarification

The trial court did not violate N.C.G.S. § 15A-1234 by responding to a jury question regarding the distinction between "taking" and "carrying away" after receiving a request from the jury on the clarification of the terms for felony larceny. Neither party objected to the instructions after they were given, and the trial court specifically asked both parties if there were any objections. Further, the parties were given an opportunity to be heard and defendant was not prejudiced by the additional instructions.

Appeal by defendant from judgment entered 30 August 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Josephine Tetteh, for the State.

Sharon L. Smith, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Montice Terrill Harvell ("Defendant") appeals from a judgment sentencing him as a habitual felon for felony breaking and entering and felony larceny. Defendant argues that the trial court erred by denying his motion to suppress the show-up identification and by giving a flight instruction to the jury. Defendant also argues that the trial court violated statutory mandate by responding to a jury question regarding the distinction between "taking" and "carrying away" without affording counsel an opportunity to be heard before answering the jury's inquiry. For the following reasons, we find no error.

I. Facts and Procedural History

On 11 June 2012, Defendant was indicted on one count of felony breaking and entering and one count of felony larceny. Defendant was also indicted on attaining habitual felon status on 30 July 2012. On 19 March 2013, Defendant filed a motion to suppress the in-court and out-of-court identification by Maurice Perdue ("Mr. Perdue"). Defendant's case came before the Mecklenburg County Superior Court on 28 August

2013. After a hearing, the trial court denied Defendant's motion to suppress. The jury found Defendant guilty of felony breaking and entering and felony larceny and Defendant pled guilty to attaining habitual felon status. The record and trial transcript tended to show the following facts.

On 21 May 2012, around 2:15 p.m., Army veteran Mr. Perdue left his Charlotte home on Panglemont Drive to pick up a sandwich for lunch. Before leaving, Mr. Perdue locked his doors and set his house alarm. Thirty minutes later, Mr. Perdue returned home to find an unfamiliar Ford Explorer parked in his driveway with the back door open. He also noticed that his front door was wide open. He parked his car, unholstered his pistol, and approached the open front door of his residence. Mr. Perdue looked in through the open front door and saw a black male standing in front of his TV stand with Mr. Perdue's television and XBOX on the floor in front of the stand. At the time, Mr. Perdue was approximately twenty feet from the man. He ordered the black male to "freeze," but the man turned and ran out the open back door. Mr. Perdue ran after the man.

When Mr. Perdue got to his back door, the black male was running diagonally across his neighbor's yard. He then turned and looked over his shoulder at Mr. Perdue. Mr. Perdue fired a shot from his pistol at the black male. The black male turned and cut in between two neighboring homes. Mr. Perdue ran in between his house and his neighbor's house toward his front yard in order to cut the man off. When Mr. Perdue reached his front yard, the black male ran out from in between the houses and toward Mr. Perdue. Mr. Perdue was only twenty feet from the man and was able to observe his full face as the man ran toward him. Mr. Perdue fired two shots at the man who took off running around the neighbor's house and up the street. Mr. Perdue continued to chase after the man yelling, "Stop running. I'm going to catch you, I'm going to get you." Mr. Perdue fired three more shots at the ground near the man intending to warn him not to return to Mr. Perdue's home. The black male ran up a hill in the neighborhood and turned to look back at Mr. Perdue. Mr. Perdue ran back to his house to call 911.

During Mr. Perdue's encounter with the black male, Mr. Perdue was able to observe the man's face three different times. While on the phone with the 911 operator, Mr. Perdue described the man as a black male in his mid-twenties with dreadlocks and a goatee wearing a white T-shirt and dark jeans.

That same day, Officer Robert Roberts ("Officer Roberts") with the Mecklenburg Police Department was on patrol in a marked patrol

car near Mr. Perdue's neighborhood. Officer Roberts received the dispatch call and responded to Mr. Perdue's neighborhood. In an attempt to cut off a fleeing suspect, Officer Roberts drove past the neighborhood entrance and turned down a small dirt road not normally used by traffic that backed up to the houses in Mr. Perdue's neighborhood.

As he was driving, Officer Roberts saw Defendant walk out of the woods behind the houses. Defendant matched the description Mr. Perdue gave to the 911 operator; he was a black male in his mid-twenties with a goatee and dreadlocks and wearing a white T-shirt. Defendant walked up to the window of a white Dodge Charger and appeared to briefly talk with the driver before the car drove away. Officer Roberts pulled his marked patrol car up to Defendant and asked him to "wait a minute[.]" Officer Roberts then stepped out of his vehicle and approached Defendant on foot.

Upon approaching Defendant, Officer Roberts observed that Defendant "was hot . . . [and] sweating. He had . . . little berry-like things that attach to your clothing after you run through the woods. He had them all over his pants, [and Officer Roberts] saw he had sandals on." Officer Roberts advised Defendant that there had been a crime in the area and that Defendant matched the description of the suspect. Officer Roberts asked Defendant if he would mind waiting for a few minutes and asked to perform a pat down of Defendant to check for weapons. Defendant agreed to wait and to the pat down. During the pat down, Officer Roberts found a pair of winter gloves in Defendant's right pocket which Officer Roberts thought was odd because "[i]t was hot out that day, [and there was] no reason to have winter gloves."

Officer Andrew Weisner ("Officer Weisner") with the Mecklenburg Police Department also responded to the dispatch call and arrived at Mr. Perdue's house within 15 minutes. When Officer Weisner arrived at the house, Officer Roberts radioed that he had a suspect in custody matching the description Mr. Perdue gave to the 911 operator. Mr. Perdue testified that officers informed him "they had detained an individual and wanted me to go and identify him to see if that was the person that was in my house."

Officer Weisner took Mr. Perdue two streets over to where Officer Roberts was waiting with Defendant. At the time, Defendant was handcuffed and seated in the back seat of Officer Roberts' patrol car with the back door open. When Mr. Perdue arrived, Officer Roberts had Defendant step out of the patrol car and face Officer Weisner's vehicle. When he saw Defendant, Mr. Perdue leaned out the window and

immediately identified Defendant as the person who had been inside his house and who he subsequently chased.

After Officer Weisner's testimony, the State rested. Defendant moved to dismiss both charges, which the trial court denied. Defendant rested without presenting any evidence.

The jury found Defendant guilty of felony breaking and entering and felony larceny. Defendant pled guilty to habitual felon status and the trial court sentenced Defendant to a term of 72 to 99 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Defendant's appeal from the superior court's final judgment lies of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013).

III. Analysis

A. Show-up Identification

[1] Defendant contends that the trial court erred in denying his motion to suppress Mr. Perdue's show-up identification of Defendant. Specifically, Defendant argues the trial court erred because Mr. Perdue's mindset and other circumstances surrounding the "inherently suggestive" show-up identification gave rise to a substantial likelihood of irreparable misidentification. We disagree.

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

Here, Defendant made a pretrial motion to suppress Mr. Perdue's identification of Defendant as the individual who he saw in his home on 21 May 2012. Defendant, however, did not object to the admission of the in-court identification by Mr. Perdue. This Court has held that "a pretrial motion to suppress . . . is not sufficient to preserve for appeal the issue of admissibility of evidence." *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000); *see also State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on

the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (internal quotation marks and citation omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted). "Under the plain error rule, 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. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Our Supreme Court has recognized show-up identifications, whereby a single suspect is shown to a witness shortly after the crime, as inherently suggestive "because the witness would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties." *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194 (1981) (internal quotation marks and citation omitted) (alterations in original). However, "suggestive pretrial show-up identifications are not *per se* violative of a defendant's due process rights." *State v. Watkins*, 218 N.C. App. 94, 105, 720 S.E.2d 844, 851 (2012) (internal quotation marks and citation omitted). "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 57 (2013).

In determining the likelihood of irreparable misidentification, we consider five factors: (1) the witness' opportunity to view the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the defendant, (4) the witness' level of certainty at the time of confrontation, and (5) the length of time between the crime and the confrontation. *State v. Rawls*, 207 N.C. App. 415, 424, 700 S.E.2d 112, 118–19 (2010); *Harris*, 308 N.C. at 164, S.E.2d at 95. In evaluating these factors, we consider whether "under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 58 (2013); *see also State v. Breeze*, 130 N.C. App. 344, 352, 503 S.E.2d 141, 147 (1998).

Here, Mr. Perdue was able to view Defendant's face three separate times during the encounter. During two of those observations, Mr. Perdue was only twenty feet from Defendant. At the time of the incident, Mr. Perdue's senses were in a heightened state. Mr. Perdue testified that

the incident took him "back into a combative mind state as if [he] was back in Iraq again" and that "[w]hen you're in combat, it's all – it's game on, all senses are on . . . ."

Defendant argues that Mr. Perdue's description was inaccurate because he initially told officers that the suspect was "tall" and Defendant is only 5'7". Mr. Perdue accurately described the suspect as being a "black male in his mid twenties with dreadlocks and a goatee wearing a white T-shirt and dark colored jeans." Mr. Perdue testified that he did not remember describing the suspect as "tall" and that "[h]e was not tall to my understanding of it."

Mr. Perdue was "very certain" about his identification stating that he was "[o]ne hundred percent" certain that Defendant was the man he had seen inside his living room. Officer Weisner also testified that Mr. Perdue did not struggle in identifying Defendant, but rather "[h]e actually leaned out the window when he saw [Defendant] and immediately identified him."

Mr. Perdue's identification of Defendant occurred within fifteen to twenty minutes of Mr. Perdue finding the suspect in his home. Officers arrived at Mr. Perdue's house in fifteen to twenty minutes of the 911 call and within minutes Mr. Perdue was taken two streets over to identify the suspect.

Although the show-up identification was suggestive, under the totality of the circumstances the show-up identification was not so impermissibly suggestive as to cause irreparable mistaken identification and violate Defendant's constitutional right to due process. Accordingly, we hold that the trial court did not plainly err in denying Defendant's motion to suppress.

B. Flight Instruction to the Jury

[2] Defendant contends that the trial court erred in instructing the jury regarding flight where there was no evidence that Defendant fled after committing the crime. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.*

Our Supreme Court has held that

> an instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Blakeney, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (internal quotation marks and citations omitted). Further, we have also held that "an action that was not part of Defendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319, 657 S.E.2d 909, 915 (2008) (quotation marks and citation omitted).

In *State v. Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325 (2005), this Court upheld the flight instruction to the jury where the State presented some evidence of flight. In *Ethridge*, the defendant was charged with breaking and entering, larceny after breaking and entering, and possession of stolen goods. *Id.* at 361, 607 S.E.2d at 327. The defendant broke into a vacant home and removed more than thirty items from the home, including furniture and air conditioners. *Id.* at 361, 607 S.E.2d at 326–27. A neighbor noticed a car that was backed into the driveway of the vacant home with the tailgate open and with what appeared to be a coffee table hanging out the back. *Id.* at 361, 607 S.E.2d at 327. The neighbor recognized one of the men and recognized the car, which the neighbor saw drive away from the house, as belonging to the defendant. *Id.* Police officers quickly located the defendant's car but were unable to locate the defendant until about a month later. *Id.* This Court held that

> the State provided some evidence of flight. Defendant left the crime scene shortly after [the neighbor] arrived home. Furniture that had been in the house was found scattered in the backyard. While the police found [the defendant's] vehicle, they were not able to locate [the defendant] for several weeks. This evidence reasonably supports the

> theory that [the defendant] fled after commission of the crimes charged. We therefore find no error with the trial court's instructing the jury on flight.

Id. at 363, 607 S.E.2d at 328.

Here, similar to *Ethridge*, the State presented evidence that reasonably supports the theory that Defendant fled after breaking and entering into Mr. Perdue's home. Defendant argues that he ran out the back door after Mr. Perdue pulled his firearm and that Defendant fled to avoid being shot. Mr. Perdue, however, testified that when he approached his front door and saw Defendant standing in his living room, Defendant looked at Mr. Perdue and then took off running out the back door. It was not until Defendant was already outside the home and running across the neighbor's yard that Mr. Perdue fired the first shot. Thus, Defendant was already fleeing from the scene before Mr. Perdue fired any shots at Defendant.

Officer Roberts testified that not more than fifteen minutes after the 911 call, he saw Defendant on a dirt road that was "on the back side of [Mr. Perdue's] neighborhood" and was "not a road that people use for traffic." He also testified that he saw Defendant coming from behind a row of houses that backed up to the dirt road "which [was] rare" because it was "through high grass." Defendant also had "hitchhikers, little berry-like things that attach to your clothing after you run through the woods. . . . all over his pants[.]" Although Defendant in this case was located shortly after the crime, unlike in *Ethridge* where the defendant was not located for weeks, the evidence still reasonably supports the theory that Defendant fled after the commission of the crime.

Defendant also argues that the flight instruction was prejudicial to Defendant because the only evidence against Defendant was Mr. Perdue's identification, and cites *State v. Lee*, 287 N.C. 536, 541, 215 S.E.2d 146, 149 (1975) ("Evidence of flight is not only competent but often considered *material* . . . where there is a dispute or doubt as to the identity . . . [of] the perpetrator of the crime.") (internal quotation marks and citations omitted). In *Lee*, evidence tended to show that the witness did not consistently identify the defendant as one of the assailants. *Id.* In this case, however, we held above that Mr. Perdue's identification contained sufficient aspects of reliability and he has consistently identified Defendant as the person he saw in his home. Mr. Perdue provided an accurate description of the suspect and was "very certain" Defendant was the man he saw inside his house and had "no doubt about it." Thus, Defendant's reliance on *Lee* is misplaced. Accordingly, the flight

instruction was not prejudicial and we hold that the trial court did not err in instructing the jury on flight.

C. Clarifying Terms for the Jury

[3] Defendant also contends that the trial court violated statutory mandate by responding to a jury question regarding the distinction between "taking" and "carrying away" without affording counsel an opportunity to be heard. Defendant argues further that he was prejudiced by the trial court's error as the court's impromptu demonstration improperly assisted the State in proving the elements of the case. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1234 (2013),

> [a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

Further,

> [b]efore the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

N.C. Gen. Stat. § 15A-1234(c).

Here, after receiving a request from the jury on the clarification of the terms "taking" and "carrying away," the trial court informed the parties that it was "going to tell [the jury] the definition of taking is to lay hold of something with one's hands." Neither party objected at that time to the proposed instructions. The trial court then instructed the jury on this definition and further demonstrated the difference between the two terms with a coffee cup. The trial court also repeated the elements of felony larceny.

Under N.C. Gen. Stat. § 15A-1234, the judge "must inform the parties *generally* of the instructions he intends to give . . . ." N.C. Gen. Stat. § 15A-1234(c) (emphasis added). Here, the trial court informed the parties of the additional instructions it intended to give and provided that exact definition to the jury. The trial court also provided further clarification of the two terms by visual demonstration. Although the trial court did not inform the parties of its visual demonstration, the statute only requires that the trial court inform the parties *generally*. The trial court provided the definition as stated and the demonstration was consistent with the provided definition, only providing further clarification of the two terms.

Additionally, neither party objected to the instructions after they were given. The trial court specifically asked both parties if there were "[a]ny objections to the instructions given by the [c]ourt." Defendant's counsel responded "[n]o, your Honor." Therefore, the trial court did not violate N.C. Gen. Stat. § 15A-1234 in making its additional instructions.

Defendant also argues that the trial court's failure to include the language that the State had the burden of proving all of the elements beyond a reasonable doubt after repeating the elements of felony larceny improperly aided the State in proving its case. The jury previously submitted two inquiries to the trial court regarding which elements it was required to find. At 10:05 a.m., the jury entered the courtroom and the trial court further instructed the jury that the State was required to prove beyond a reasonable doubt all elements of the underlying offenses and repeated the required elements. Just over thirty minutes later, at 10:42 a.m., the jury was brought back into the courtroom for the additional instructions on "taking" and "carrying away." Since only thirty-seven minutes had passed since the trial court had reinstructed the jury on the elements and the State's burden of proving all elements beyond a reasonable doubt, Defendant was not prejudiced by the trial court omitting the language pertaining to the State's burden at this time.

Since the parties were given an opportunity to be heard and Defendant was not prejudiced by the additional instructions, we hold the trial court did not err in clarifying the elements of the underlying offenses and the distinction between "taking" and "carrying away."

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE v. HULL

[236 N.C. App. 415 (2014)]

STATE OF NORTH CAROLINA
v.
DELUNTA ALUNDUS HULL AND SHARRELLE LYNN DAVIS

No. COA14-251

Filed 16 September 2014

1. Larceny—from the person—sufficient evidence—jury instruction not erroneous

The trial court did not err by denying defendants' motions to dismiss the charge of larceny from the person. The State presented sufficient evidence of all elements of the crime, including that a computer was within the victim's protection and presence at the time it was taken. Moreover, the trial court did not commit plain error when it instructed the jury on the offense of larceny from the person. There is no substantial difference between the holdings in *State v. Buckom*, 328 N.C. 313 (1991) and *State v. Barnes*, 345 N.C. 146 (1996), with regard to the element that the taking be "from the person" and North Carolina Pattern Jury Instruction Criminal 216.20 sufficiently instructs on this cause of action.

2. Sentencing—larceny from the person—statutory mitigating factors—presumptive range—no findings required

The trial court did not abuse its discretion in a larceny from the person case by failing to find a statutory mitigating factor and by failing to consider mitigating evidence. The trial court was not required to make findings of aggravating or mitigating factors, or to impose a mitigated range sentence, as defendant was sentenced in the presumptive range.

3. Larceny—from the person—misdemeanor larceny—no instruction necessary

The trial court did not err in a larceny from the person case by denying defendant's request to instruct the jury on the lesser-included offense of misdemeanor larceny. The evidence supported both elements of proximity and control of the crime of larceny from the person.

Appeal by defendants from judgments entered 6 August 2013 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2014.

Roy Cooper, *Attorney General*, *by Anne J. Brown and Richard H. Bradford*, *Special Deputy Attorneys General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Charlesena Elliott Walker*, *Assistant Appellate Defender*, *for defendant-appellant Hull.*

Amanda S. Zimmer for defendant-appellant Davis.

STEELMAN, Judge.

Where there was evidence of all of the elements of the charge of larceny from the person, the trial court did not err in denying defendants' motions to dismiss. The trial court did not commit plain error in its jury instructions on that charge. Where defendant was sentenced from the presumptive range, the trial court did not err by failing to make findings in mitigation or aggravation, or in not sentencing defendant from the mitigated range. Where the State presented evidence that Stuart's computer was in proximity to her and under her control, the trial court did not err in declining to submit the lesser charge of misdemeanor larceny to the jury.

I. Factual and Procedural Background

On 8 May 2012, Rashad Perry, Robert Hawkins, David Williams, Gabrielle Stuart, Braielyn Peoples and Emory Matthews were gathered at Hawkins' apartment in Greensboro for "study and fellowship" in preparation for exam week. Perry and Hawkins stepped outside, and were approached by a man armed with a handgun, who robbed them of their cellular telephones. Two more people, Delunta Alandis Hull (Hull) and Sharrelle Lynn Davis (Davis), then approached, and the five people – Perry, Hawkins, Hull, Davis, and the gunman – entered Hawkins' apartment.

Davis pulled Perry into the kitchen while Hull and the gunman went through the apartment. Two laptop computers and another cellular telephone were taken. One of the computers belonged to Stuart.

Prior to the time of the theft, Stuart had been working on her physics homework. While studying, Stuart, along with Peoples, Hawkins, Matthews, and Perry, was playing a computer game called "Dance Central" on the television. Each would take turns playing the game. At the time of the theft, it was Stuart's turn to play. Shortly after her turn started, Stuart was "knocked [] out of the game and [] realized something was out of order." She saw that Hull and the gunman had possession of

her laptop, which had been on a table three feet away from her, with her homework still visible on the screen.

Davis and Hull were each indicted on four counts of robbery with a dangerous weapon, and one count of first-degree burglary. At the close of the State's evidence, defendants moved to dismiss the charges. The trial court granted these motions with respect to the robbery with a dangerous weapon of Stuart, and denied them as to the other charges. With respect to the robbery of Stuart, the trial court submitted the lesser included offense of larceny from the person to the jury.

Defendants were found guilty of all charges. Hull was sentenced to consecutive active prison terms of 51-74 months for the robbery of Hawkins, 51-74 months for the robbery of Williams, and 5-15 months for the larceny from Stuart. He was also sentenced to concurrent active prison terms of 51-74 months for the robbery of Perry and 51-74 months for first-degree burglary. Davis was sentenced to consecutive active prison terms of 57-81 months for the robbery of Hawkins, 57-81 months for the robbery of Williams, and 6-17 months for the larceny from Stuart. She was also sentenced to concurrent active prison terms of 57-81 months for the robbery of Perry, and 57-81 months for first-degree burglary.

Defendants appeal.

II. Larceny from the Person

[1] In defendants' first and second arguments, they contend that the trial court erred by denying their motions to dismiss the charge of larceny from the person as to Stuart, or alternatively that the trial court committed plain error when it instructed the jury on that offense. We disagree.

A. 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).

We review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [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) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

At the close of State's evidence, defendants moved to dismiss the charge of robbery as to Stuart. The trial court dismissed that charge, but submitted to the jury the lesser offense of larceny from the person. On appeal, defendants first contend that the trial court erred in denying their motions to dismiss the charge of larceny from the person.

The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property. *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). It is larceny from the person if the property is taken from the victim's person or "within the victim's protection and presence at the time of the taking." *Id.* at 691, 573 S.E.2d at 196 (quoting *State v. Barnes*, 121 N.C. App. 503, 505, 466 S.E.2d 294, 296, *aff'd*, 345 N.C. 146, 478 S.E.2d 188 (1996)).

In the instant case, the State presented evidence that Stuart was using her computer to do her physics homework and, while studying, was also playing a computer game called "Dance Central." The game was operated by a Kinect video game system connected to Hawkins' television. A participant of the game was to duplicate dance moves on the television display. The participant's dance moves were captured by a video camera and the game then compared the displayed moves with the participant's moves in a side by side display.

When defendants and the gunman entered the apartment, it was Stuart's turn to play the game. She had just started her turn – Stuart testified that it was "shortly after I got like maybe like a verse – like a couple of sentences into the song" – when Stuart was "bumped" by someone, which caused her to be "kicked out" of the game. At that point, she saw defendants absconding with her laptop.

Defendants contend that Stuart was unaware of the taking until after it occurred; however, the evidence suggests that Stuart became aware of the taking as it occurred. Specifically, Matthews testified:

> I was pretty much oblivious to what was happening, so I was just like who was this person picking up [Stuart]'s laptop, and so I asked [Stuart], I said, "Do you know this person?" and she said, "No." I was like, "Well, she took your laptop."

Stuart saw the laptop among the items that defendants were stealing, and which were in the possession of defendants as they exited the apartment.

The test set forth in *Barnes* was whether the property stolen was taken from the victim's person or within the victim's protection and presence when the property was stolen. *Barnes*, 121 N.C. App. at 505, 466 S.E.2d at 296. In the instant case, the laptop computer was not on Stuart's person when it was taken. However, it was about three feet from Stuart, and the homework, from which she was taking a momentary break, was still on the computer screen. The computer was therefore within her protection and presence at the time it was taken. The brief break from her studies did not remove the laptop from her protection or presence.

The trial court did not err in denying the motions of the defendants to dismiss the charge of larceny from the person at the close of all of the evidence.

Defendants next argue, in the alternative, that the trial court erred in its instructions to the jury with regard to the charge of larceny from the person. Since defendants failed to object to the trial court's jury instruction at trial, we review this issue only for plain error.

The trial court charged the jury in accordance with North Carolina Pattern Jury Instruction Criminal 216.20 as follows: "Property is stolen from the person if it was under the protection of the person at the time. Property may be under the protection of the person although not actually attached to her, for that which is taken in her presence is, in law, taken from her person." *See* N.C.P.I., Crim. 216.20, fn. 1 (2011). Defendants contend that this instruction was based upon the Supreme Court case of *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991), and that since *Buckom* was decided, the Supreme Court narrowed the definition of that element of larceny from the person. Defendants cite to the case

of *State v. Barnes*, in which our Supreme Court held that "for larceny to be 'from the person,' the property stolen must be in the immediate presence of and under the protection or control of the victim *at the time the property is taken*." *Barnes*, 345 N.C. at 149, 478 S.E.2d at 190 (emphasis in original).

Defendants contend that *Barnes* abrogated the holding in *Buckom*. We hold that there is no substantial difference between the holdings of *Buckom* and *Barnes*. In *Buckom*, the Court observed that:

> Taken in the context of the foregoing common law principles, "[p]roperty is stolen 'from the person,' if it was under the protection of the person at the time.... [P]roperty may be under the protection of the person although not actually 'attached' to him." R. Perkins & R. Boyce, *Criminal Law* 342 (3d ed. 1982) (footnotes omitted). For example, if a jeweler places diamonds on a counter for inspection by a customer, under the jeweler's eye, the diamonds remain under the protection of the jeweler. *Id.* It has not been the general interpretation that larceny from the person "requires an actual taking from the person, and is not committed by a taking from the immediate presence and actual control of the person.... As said by Coke in the 1600's: 'for that which is taken in his presence, is in law taken from his person.' " *Id.* at 342-43 (quoting 3 Coke, *Institutes* *69).

Buckom, 328 N.C. at 317-18, 401 S.E.2d at 365. In *Barnes*, the Court did not disagree with this analysis; in fact, it relied upon *Buckom*:

> The crime of larceny from the person is regularly understood to include the taking of property "from one's presence and control." Thus, for larceny to be "from the person," the property stolen must be in the immediate presence of and under the protection or control of the victim *at the time the property is taken*.

State v. Barnes, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (citing, *inter alia*, *Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365) (citations omitted) (emphasis in original). *Barnes* ultimately distinguished *Buckom* based upon the facts of the case, but in terms of the law the two opinions were in agreement. The addition of the words "at the time the property is taken" adds nothing to the legal analysis of the elements of the crime. The only temporally relevant time is the time of the theft itself.

Even assuming *arguendo* that *Barnes* superseded the holding in *Buckom*, defendants have failed to show how this impacts the outcome of their case. Whether we rely upon *Buckom* or *Barnes*, there was substantial evidence that the property was taken from Stuart's presence, that she was using the computer to perform her physics homework, and that the computer was under her control or protection at the time it was taken. Even had the jury been instructed as defendants suggest, we hold that it would not have had a "probable impact on the jury's finding that the defendant was guilty." Defendants have failed to show that the trial court committed plain error in its jury instruction concerning the charge of larceny from the person.

This argument is without merit.

III. Mitigating Factor

[2] In her third argument, Davis contends that the trial court abused its discretion by failing to find a statutory mitigating factor, and by failing to consider mitigating evidence. We disagree.

A. Standard of Review

> The standard of review for application of mitigating factors is an abuse of discretion. The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence as appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A–1340. 17(c)(2).

State v. Hagans, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785 (2006) (citations and quotations omitted).

B. Analysis

We have previously held that the trial court is required to make findings of aggravating and mitigating factors "only if, in its discretion, it departs from the presumptive range of sentences[.]" *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 785. Davis was sentenced from the presumptive range. Accordingly, we hold that the trial court was not required to make findings of aggravating or mitigating factors, or to impose a mitigated range sentence.

This argument is without merit.

IV. Lesser Included Offense

[3] In his third argument, Hull contends that the trial court erred in denying defendant's request to instruct the jury on the lesser included offense of misdemeanor larceny with regard to the theft of Stuart's laptop computer. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

Hull contends that Stuart's lack of awareness of the theft as it happened did not support a conviction of larceny from the person, but rather supported a conviction for the lesser offense of misdemeanor larceny. Hull cites to our decision in *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 646 (1988), in which we held that the theft of a woman's purse from a shopping cart while she was several steps away and unaware of the theft did not constitute larceny from the person, but rather constituted misdemeanor larceny.

Hull, in his argument on appeal, challenges only the element of proximity and control. As he does not challenge the other elements of larceny from the person, we limit our review only to proximity and control. *See State v. Lucas*, ___ N.C. App. ___, ___, 758 S.E.2d 672, 676 (2014).

We note first that *Lee* was decided prior to both *Buckom* and *Barnes*, and that these later Supreme Court cases clarified the law of larceny from the person. We further note that, in contrast with the victim in *Lee*, who did not realize that the theft had occurred until sometime later, the evidence in the instant case was that Stuart became aware of the theft immediately, as it was occurring. We hold that the instant case is distinguishable from *Lee*.

The crucial elements of larceny from the person are proximity and control. The evidence in the instant case supports both elements. Stuart's awareness, although not one of the elements of the offense, is a factor to be considered in analyzing her control. As stated in section

II B of this opinion, Stuart was sufficiently aware of the larceny as it occurred to have been in control of her property.

Because the evidence satisfied the element of proximity and control, and Hull challenges no other elements of larceny from the person, we hold that the evidence satisfied all of the requirements of the greater offense. The trial court did not err in declining to instruct the jury upon the lesser offense of misdemeanor larceny. This argument is without merit.

NO ERROR.

Judge GEER concurs.

Judge HUNTER, Robert N., Jr. concurring prior to 6 September 2014.

STATE OF NORTH CAROLINA
v.
JOSEPH OVEROCKER, DEFENDANT

No. COA14-270

Filed 16 September 2014

1. Motor Vehicles—driving while impaired—unsafe movement—findings of fact—sufficiency

The trial court did not err in an impaired driving and unsafe movement case by making its findings of fact numbers 6, 10, and 19. Each of the findings was supported by competent evidence or was a reasonable inference drawn from the evidence.

2. Search and Seizure—motion to suppress—lack of probable cause—impaired driving—unsafe movement

The trial court did not err by granting defendant's motion to suppress evidence based on a lack of probable cause to arrest defendant for impaired driving and unsafe movement. The findings of fact supported the conclusions of law that the reasons relied upon by the officer for the arrest did not provide the officer with probable cause that defendant was either impaired or had engaged in unsafe movement.

3. Civil Procedure—motion to dismiss erroneously granted—failure to make written or oral motion to dismiss

The trial court erred by dismissing the charges of impaired driving and unsafe movement against defendant. Defendant did not make a written or oral motion to dismiss, and thus, controlling precedent required the Court of Appeals to reverse the trial court's dismissal of the charges.

Appeal by the State from order entered 4 October 2013 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 28 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellee.

GEER, Judge.

The State appeals the trial court's order granting defendant Joseph Overocker's motion to suppress and dismissing the charges against him based on a lack of probable cause to arrest defendant for impaired driving and unsafe movement. We hold that the trial court's findings of fact are supported by the evidence and in turn support the court's conclusion of law that the reasons relied upon by the officer for the arrest did not provide the officer with probable cause that defendant was either impaired or had engaged in unsafe movement. We, therefore, affirm the order to the extent it grants the motion to suppress. Because, however, defendant did not make a written or oral motion to dismiss, controlling precedent requires that we reverse the trial court's dismissal of the charges.

Facts

On 11 October 2012, defendant arrived at about 4:00 p.m. at a sports bar called Time Out Bar & Grill in Durham, North Carolina. Defendant parked his Porsche Cayenne SUV directly in front of the bar and met up with several friends, including Claude "Chip" Teeter. While defendant was inside the bar, a group of motorcyclists pulled into the Time Out parking lot, and one of them parked her motorcycle behind defendant's SUV. When defendant left the bar and started backing out of his parking spot, he collided with the motorcycle.

Officer Everette Jefferies, an off-duty police officer with the Durham Police Department, had ridden his motorcycle to Time Out and noticed defendant when he first arrived. Officer Jefferies was outside in the parking lot when defendant was leaving, and he witnessed the collision.

Officer Mark Lalumiere, who was on duty with the Durham Police Department, was dispatched to the scene. After talking with defendant and Officer Jefferies, Officer Lalumiere had defendant perform standardized field sobriety tests ("FSTs"). Another Durham Police Department officer, Officer Marvin Hembrick, performed two portable breath tests ("PBTs") on defendant. Officer Lalumiere then arrested defendant for impaired driving and unsafe movement.

On 11 April 2013, a district court judge found defendant guilty of both charges, and defendant timely appealed to superior court. On 11 July 2013, defendant filed a motion to suppress, asking the superior court to suppress (1) all evidence gathered after the stop of defendant's vehicle or the first interview of defendant for lack of reasonable suspicion and (2) all evidence based on a lack of probable cause to arrest defendant. After hearing testimony from defendant, Mr. Teeter, and Officers Jefferies, Lalumiere, and Hembrick, the superior court entered an order granting defendant's motion to suppress. Additionally, in the same order, the court dismissed the charges against defendant.

In the suppression order, the court made the following findings of fact. Defendant and Mr. Teeter arrived at Time Out at around 4:00 or 4:30 p.m. Mr. Teeter testified that he and defendant were sitting at a table outside on Time Out's patio. Defendant and Mr. Teeter left Time Out at around 8:00 or 8:30 p.m. Over the course of the evening, Mr. Teeter consumed four beers, and defendant consumed four bourbons on the rocks.

Officer Jefferies noticed defendant and Mr. Teeter and because "they were talking loudly, . . . Officer Jeffries [sic] believed the Defendant was impaired." Apart from talking loudly, "there was nothing unusual about the Defendant's behavior or conversation in the bar."

While defendant and Mr. Teeter were in the restaurant, a group of motorcyclists parked their vehicles in Time Out's parking lot. One of these, "a pink, ninja sport motorcycle," parked "three to four feet behind the Defendant's Porsche sport utility vehicle on the passenger side." The trial court found that the pink motorcycle was "illegally parked."

At around 8:15 p.m., when it was dark outside, Officer Jefferies saw defendant and Mr. Teeter walk out of the restaurant, and he noticed that defendant and Mr. Teeter were still talking loudly. The trial court

found that "[w]hen the Defendant left with his friend, [Officer Jefferies] saw the Defendant and thought the Defendant should not be driving because he continued to talk loudly. He did not observe anything unusual about the Defendant's appearance, smell, walking, balance, eyes, or speech, other than he was talking loudly, upon which he based his opinion that the Defendant was impaired and should not be driving."

Defendant got into his vehicle with the radio playing and the air conditioning on. When defendant began to back up, a motorcyclist ran toward the illegally parked motorcycle, and, together with other motorcyclists, started yelling at defendant's SUV. One motorcyclist got onto the motorcycle, but was unable to move it in time. He jumped off, and defendant's SUV "backed over it, or struck it." The motorcycle fell over and it was dragged along the pavement for a short distance.

When defendant "heard something," he stopped and got out of his vehicle. One person was slapping his vehicle, while two others were holding the motorcycle he had struck. Defendant's SUV had a small scratch on the bumper.

The trial court found that "[b]ecause the motorcycle stood lower than the rear window of the Defendant's vehicle and there were other motorcycles parked in the parking space next to the passenger side of the Defendant's vehicle, there is no evidence the Defendant saw, or could even see the pink motorcycle parked behind his vehicle which was in a parking space, or was otherwise aware of its presence."

After defendant's collision with the pink motorcycle, the police were called, and Officer Lalumiere was dispatched to Time Out at around 8:15 p.m. When he arrived, Officer Lalumiere "found a Porsche Cayenne sport utility vehicle and a pink motorcycle behind the parking spaces in the lane between parking spaces in the parking lot of the establishment. The motorcycle had scratches on it and there were gouge marks in the pavement from the kick stand of the motorcycle."

Officer Lalumiere spoke with defendant, and defendant said that "he came out of the restaurant and backed up striking the motorcycle." Defendant told the officer that he "had been at the bar for four hours" and initially claimed he had two drinks. When Officer Lalumiere asked him again about the drinks, defendant said he might have had three. The trial court found that "[t]he Defendant had an odor of alcohol which Officer Lalumiere described as 'not real strong, light.' "

Defendant then consented to Officer Lalumiere's conducting two FSTs. The first test Officer Lalumiere asked defendant to perform was

the "Walk and Turn Test." After Officer Lalumiere instructed him how to perform the test, defendant "took nine steps heel-to-toe down one of the lines for a parking space while counting aloud without a problem." Defendant then asked Officer Lalumiere what he was supposed to do next. Officer Lalumiere reminded defendant to follow the instructions, and defendant "walked back nine steps heel-to-toe down on the line while counting aloud without a problem."

Officer Lalumiere then asked defendant to perform the "One-Legged Stand Test." He explained the directions for that test, and when defendant was told to start, defendant "raised his foot more than six inches above the pavement, stopped after fifteen seconds, [and] put his foot down[.]" Defendant then looked at Officer Lalumiere and asked what he was supposed to do next. After Officer Lalumiere told defendant to complete the test, defendant "picked up his foot and continued for at least fifteen more seconds until he was stopped by Officer Lalumiere."

Mr. Teeter watched defendant while he performed the FSTs. According to the trial court, "Mr. Teeter did not see anything wrong with the Defendant's standardized field sobriety tests and he did not believe the Defendant was impaired, or unfit to drive on this occasion." The trial court noted that Mr. Teeter had no prior criminal convictions and that he "has a severe and very noticeable stutter when he talks and neither Officer Jeffries [sic] nor Officer Lalumiere recalled Mr. Teeter spoke with a stutter when he was interviewed after the accident."

Officer Lalumiere had requested an officer who was certified to administer PBTs. Officer Hembrick responded and, once at the scene, noticed that defendant had "a faint odor of alcohol on his person and red, glassy eyes." Defendant submitted to two PBTs, both of which indicated the presence of alcohol in defendant.

Overall, Officer Lalumiere observed defendant for about an hour and concluded that defendant "'had consumed alcohol.'" However, defendant "was not slurring his speech and he walked without stumbling." While in the presence of the three officers -- Officers Lalumiere, Jefferies, and Hembrick -- "[d]efendant's speech was not slurred and he never staggered when he walked . . . ." Nonetheless, "[b]ased upon the fact that the Defendant had been at a bar, he was involved in a traffic accident, his performance tests and the odor of alcohol, Officer Lalumiere believed the Defendant 'was impaired and it was more probable than not that he would blow over the legal limit.' Therefore, he placed the Defendant under arrest for Impaired Driving."

Based on these findings, Judge Fox concluded,

> 3. The facts and circumstances known to Officer Lalumiere as a result of his observations and testing of the Defendant were insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe that the offenses of Impaired Driving and Unsafe Movement had been committed and the Defendant was the person who committed those offenses.
>
> 4. The arrest of the Defendant for Impaired Driving and Unsafe Movement on this occasion violated the Fourth Amendment of the United States Constitution and the North Carolina Constitution.

The trial court, therefore, allowed defendant's motion to suppress and ordered that "[t]he charges of Impaired Driving and Unsafe Movement against the Defendant" be dismissed. The State timely appealed to this Court.

Standard of Review

"'[T]he scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court]'s ultimate conclusions of law.'" *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Findings of fact that are not challenged "are presumed to be supported by competent evidence and are binding on appeal." *Tinkham v. Hall*, 47 N.C. App. 651, 652-53, 267 S.E.2d 588, 590 (1980).

Further, "'[i]f there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.'" *State v. Veazey*, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (quoting *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses. . . . '[B]y reason of his more favorable position, [the trial judge] is given the responsibility of discovering the truth.'" *State v. Hughes*, 353 N.C. 200, 207-08, 539 S.E.2d 625, 631 (2000) (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)).

The State's Challenges to Findings of Fact

[1] The State challenges a number of the trial court's findings of fact. Based on our review of the record, we hold that each of the findings is supported by competent evidence or is a reasonable inference drawn from the evidence.

The State first points to the part of the trial court's finding of fact number 6 that the pink motorcycle "stood lower than the rear window of the Defendant's vehicle." At the hearing, Officer Jefferies stated that the height of the motorcycle was "[c]lose -- right at" defendant's rear window and that the motorcycle "probably would come up . . . to that line right there." Officer Jefferies demonstrated where he was referring to on a photo of the rear of defendant's SUV, although the record does not indicate the location of the line on the photo where Officer Jefferies was pointing.

Because of the failure of counsel to memorialize in the record where Officer Jefferies pointed, the State contends that "close" "could mean above or below the [rear] window level," and this ambiguity renders the evidence incompetent. The trial court, however, was able to observe precisely where the officer was pointing.

In addition, Officer Jefferies explained that the pink motorcycle's "fairing is on the bottom," the windshield was part of the fairing, the windshield is "exposed . . . maybe about a [sic] inch" over the handlebars, and "the windshield is approximately 3 to 4 feet tall from the fairing." Later in the hearing, after all the evidence was presented, Judge Fox indicated his own familiarity with the same or similar type of motorcycle as the pink motorcycle defendant struck:

> I'm wondering how in the world any idiot would park a motorcycle behind an SUV. I mean, I'm quite familiar with those ninja bikes. They are not very tall. They're shorter than the average motorcycle, which is not very tall. . . . [I]t's unfathomable to me how you could do that. I mean, how you could do that and leave your motorcycle and not expect to come back and find it creamed. I just don't understand that.

"[I]t is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal[,]" *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994), and the State has failed to show that Officer Jefferies' reference to the photo of the SUV supported a finding contrary to the finding that "the motorcycle stood lower than the rear

window of the Defendant's vehicle." Further, the finding that the motorcycle "stood lower than the rear window of the Defendant's vehicle," along with Judge Fox's remark that "it's unfathomable . . . how you could . . . leave your motorcycle [behind an SUV] and not expect to come back and find it creamed," indicate that Judge Fox dismissed any suggestion that the top of the motorcycle stood at or above the bottom of defendant's rear windshield. To the extent that any of the evidence offered as to the height of the pink motorcycle was conflicting, it was the duty of the trial court to resolve the conflict.

The State also challenges the portion of finding of fact number 6 that "there is no evidence the Defendant saw, or could even see the pink motorcycle parked behind his vehicle which was in a parking space, or was otherwise aware of its presence." Defendant testified that when he was walking to his SUV he did not see the motorcycle, and when he got to the SUV he did not walk around it "to check . . . if anything was parked behind it." Moreover, the trial court found that the motorcycle stood lower than defendant's rear windshield, suggesting that defendant would not have been able to see the motorcycle from inside the SUV.

In arguing that the finding incorrectly stated that "no evidence" existed that defendant saw or could see the motorcycle, the State chiefly contends that Officer Jefferies testified "that a reasonable person would be able to see the motorcycle parked four to five feet behind the defendant's car." This assertion is not a fair representation of Officer Jefferies' testimony. When Judge Fox asked Officer Jefferies whether defendant "[w]as . . . in a position to see the motorcycle parked [behind his SUV] [,]" Officer Jefferies responded, "I think a reasonable person probably could have seen it *because there were several motorcycles out there*." (Emphasis added.) The trial court could reasonably have concluded that the mere fact (1) that Officer Jefferies thought defendant "could have seen it" or (2) that there were other motorcycles parked elsewhere in the parking lot was not evidence that defendant did see or should have seen the motorcycle parked directly behind his SUV.

The State also suggests that there was actual evidence that defendant could see the motorcycle because it "was only partially behind the defendant's car" and "there was [sic] at least three people that saw the motorcycle[,]" including Officer Jefferies, the individual who tried to move the motorcycle, and Mr. Teeter. With respect to the position of the motorcycle, while Officer Jefferies testified that "[t]he front wheel -- the forks, the front tire and part of the front fender was behind part of the vehicle," the trial court's unchallenged finding of fact that there were motorcycles parked in the parking space on defendant's passenger

side suggests that defendant's view of the rest of the pink motorcycle was obfuscated.

As for the ability of others to see the motorcycle, the State disregards the fact that it did not show that any of the people who saw the motorcycle were in a location with similar visibility to that of defendant at the time they noticed the motorcycle. Indeed, the record shows that these three individuals had very different vantage points than defendant when he walked to his car, got into his car, and backed up.

Moreover, although the record indicates that Officer Jefferies and Mr. Teeter witnessed one to three individuals trying to move the pink motorcycle before defendant hit it, there is no actual testimony from Officer Jefferies or Mr. Teeter that either one of them noticed that the pink motorcycle was parked behind defendant's SUV before the frenzied efforts to try to move it. At most, Officer Jefferies testified that, prior to defendant's backing up, he was aware that there were motorcycles in the parking lot. Based on our review of the evidence, the trial court could reasonably conclude that even though others may have been aware of the pink motorcycle before defendant backed into it, none of the evidence showed that defendant did see or could have seen the pink motorcycle parked behind his SUV.

The State next challenges the portion of finding of fact 10 that the pink motorcycle was "illegally parked" behind defendant's SUV. The State presented evidence -- including testimony from Officers Jefferies and Lalumiere -- that the pink motorcycle was not parked within the lines of any parking space and that it was parked directly behind defendant's SUV in the area of the parking lot where vehicles were intended to drive.

We fail to see any basis for objecting to the trial court's finding given the undisputed evidence regarding the location of the motorcycle. Indeed, the State during the motion to suppress hearing essentially conceded that point, although arguing that the fact was immaterial: "Maybe the motorcycle being behind the defendant's car led to an incident that wasn't the defendant's fault. That's not the issue. The issue is: Was the defendant impaired at the time that this incident happened?"

Finally, the State challenges finding of fact 19:

> 19. Mr. Teeter did not see anything wrong with the Defendant's standardized field sobriety tests and he did not believe the Defendant was impaired, or unfit to drive on this occasion. He has no prior criminal convictions.

> Mr. Teeter also has a severe and very noticeable stutter when he talks and neither Officer Jeffries [sic] nor Officer Lalumiere recalled Mr. Teeter spoke with a stutter when he was interviewed after the accident.

First, the State argues that there was no competent evidence to support a finding that Mr. Teeter "did not believe the Defendant was impaired, or unfit to drive on this occasion." However, Mr. Teeter's testimony indicated that he was with defendant throughout the entire evening and that he did not "notice [defendant] acting unusually . . . in the restaurant at all" or "being unusually loud or boisterous." Mr. Teeter also stated that he "did not see anything wrong" with defendant's performance on the FSTs that Officer Lalumiere conducted. This testimony was competent and supported the trial court's finding -- a reasonable inference from that testimony -- that Mr. Teeter did not believe defendant was impaired or unfit to drive.

The State also contends there is no evidence that "Mr. Teeter . . . has a severe and very noticeable stutter when he talks[.]" However, as the trial court was able to "see[] the witnesses, [and] observe[] their demeanor as they testif[ied]," he was in the best position to determine that Mr. Teeter spoke with a stutter. *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. The State does not point to any evidence that Mr. Teeter did not have a stutter. Indeed, defense counsel noted that stutter on the record. Accordingly, we conclude that competent evidence supports finding of fact 19.

The State's Challenges to the Conclusions of Law

[2] The State argues that the trial court's findings of fact do not support the conclusion that Officer Lalumiere lacked probable cause to arrest defendant for impaired driving.[1] Initially, we note that the trial court determined Officer Lalumiere lacked probable cause based on "[t]he facts and circumstances known to Officer Lalumiere as a result of his observations and testing of the Defendant . . . ." Additionally, the trial court also stated in finding of fact 23 that Officer Lalumiere concluded there was probable cause based on "the fact that the Defendant had been at a bar, he was involved in a traffic accident, his performance tests[,] and the odor of alcohol[.]" Because the State does not challenge this finding, it is binding on appeal.

In reviewing the determination that probable cause was lacking, therefore, we consider only those "facts and circumstances known to

1. The State does not challenge the trial court's conclusion that probable cause was lacking for defendant's unsafe movement violation.

Officer Lalumiere as a result of his observations," which include the fact that defendant had been at a bar, was involved in a collision with the pink motorcycle, performed sobriety tests, and had an odor of alcohol.

Probable cause "deals with probabilities and depends on the totality of the circumstances" and " '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.' " *Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775, 124 S. Ct. 795, 800 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302, 1310 (1949)). " 'The test for whether probable cause exists is an objective one -- whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another.' " *Thomas v. Sellers*, 142 N.C. App. 310, 315, 542 S.E.2d 283, 287 (2001) (quoting *Moore v. Evans*, 124 N.C. App. 35, 43, 476 S.E.2d 415, 422 (1996)).

With regard to what Officer Lalumiere knew when he arrested defendant, the trial court found that when he arrived at Time Out, Officer Lalumiere knew that defendant had been inside Time Out drinking up to three drinks over the course of approximately four hours (although in actuality defendant had had four drinks). Defendant "came out of the restaurant and backed up striking the motorcycle[,]" which was illegally parked behind defendant's SUV. There was no evidence that defendant saw the motorcycle or should have seen it before he backed up.

The State argues that other findings of fact related to the collision with the motorcycle support a conclusion that defendant was impaired. The State points to the trial court's finding that defendant dragged the motorcycle for a short distance before stopping, that there were gouge marks in the pavement as a result, and that defendant did not react to the individuals yelling at him to stop. The State argues that these findings constitute "evidence of the defendant's failure to recognize his surroundings . . . and . . . defendant had a delayed reaction time after he hit the motorcycle."

The trial court, however, made no finding -- and the record contains no evidence -- regarding whether defendant's reaction time was delayed in light of the "short distance" defendant traveled after hitting the motorcycle. Moreover, the trial court found that defendant's SUV suffered only a small scratch and the motorcycle's only reported damage was that it had "scratches on it." Further, the trial court's findings explained why defendant did not hear individuals yelling: he had the radio and air conditioning on. The State's argument regarding defendant's recognition of his surroundings and any delayed reaction asks this Court to weigh the

evidence and assess its credibility in a manner different from that of the trial court. We are not allowed to do so.

In short, the trial court's findings of fact support its conclusion that there was no probable cause to believe that defendant had engaged in unsafe movement. The State, at the trial level, essentially conceded that point, but argued there was still evidence of impairment.

The trial court's findings proceed to establish the lack of any other reasonable basis for concluding that defendant was impaired. The trial court found that apart from the traffic accident, Officer Lalumiere relied for probable cause on the fact that defendant had been at a bar, his performance tests, and the odor of alcohol on defendant. Yet, the trial court found that Officer Lalumiere testified that the strength of the alcohol odor was " 'not real strong, light.' " In addition, none of the three officers on the scene observed defendant staggering or stumbling when he walked, and his speech was not slurred. Further, the only error defendant committed when performing the two field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, defendant did so.

The State points to Officer Lalumiere's testimony that defendant "didn't do terrible" on the FSTs as "additional evidence . . . that defendant had committed an implied consent offense." However, this testimony conflicts with Mr. Teeter's testimony that he saw nothing wrong with defendant's performance on the FSTs. Further, the trial judge remarked that "these tests do not even begin to . . . come to the level . . . that I would view as being failed." The court, therefore, resolved any conflict in the evidence as to defendant's performance on the FSTs in favor of defendant.

The State argues on appeal that because Officer Lalumiere testified he spoke with Officer Jefferies, necessarily, Officer Jefferies' observations of defendant and his belief about his impairment provided part of Officer Lalumiere's probable cause. The trial court, however, in finding of fact 23, set out the circumstances upon which Officer Lalumiere relied in determining that he had probable cause to arrest defendant. That finding, which is binding on appeal, does not mention Officer Jefferies. It is apparent from other findings of fact that the trial court did not find Officer Jefferies completely credible. After weighing the evidence and assessing credibility, the trial court apparently determined that Officer Jefferies' claimed observations of defendant's prior behavior were not part of the basis for defendant's arrest. The State presents no grounds for us to revisit that determination on appeal.

In sum, the trial court found that while defendant had had four drinks in a bar over a four-hour time frame, the traffic accident in which he was involved was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The State contends that the facts of this case are similar to those in *Steinkrause v. Tatum*, 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010), in which this Court found probable cause to arrest the driver for impaired driving when (1) the driver was involved in a one-car accident that resulted in the car being found upside down in a ditch after rolling several times, (2) one officer noted an odor of alcohol on the driver, and (3) a second officer observed that the driver looked dirty and sleepy. The Court specifically found probable cause based on the "fact and severity of the one-car accident coupled with some indication of alcohol consumption." *Id.*

The Court emphasized that a "car accident alone does not support a finding of probable cause." *Id.* at 294, 689 S.E.2d at 382. In this case, the accident was minor and determined by the trial court to not be defendant's fault. Nothing in *Steinkrause* or any of the other cases cited by the State suggest that such an accident combined with evidence of alcohol consumption and a light odor of alcohol is sufficient to give rise to probable cause with no evidence of actual impairment.

Finally, the State argues that "while the numerical reading on the portable breath test was not admissible at the probable cause hearing, that number was before the officer in his consideration of whether defendant had operated a motor vehicle with a certain alcohol concentration." The State represents that finding of fact 23 finds that "Officer Lalumiere had a portable breath test reading that indicated to him that defendant 'was impaired and it was more probable than not that he would blow over the legal limit.' " However, contrary to the State's implication that Officer Lalumiere used a specific alcohol concentration reading from one of the PBTs to form probable cause, the evidence and the order only indicate that the PBTs returned "positive" results for alcohol in defendant's bloodstream.

Notwithstanding the absence of any numerical reading from an alcohol screening test in the evidence before us, the State cites

State v. Rogers, 124 N.C. App. 364, 370, 477 S.E.2d 221, 224 (1996), for support. In *Rogers*, the trial court admitted the numerical reading of an Alco-sensor test, in accordance with N.C. Gen. Stat. § 20-16.3 (1995), to help establish whether the arresting officer had probable cause for the defendant's driving impaired. 124 N.C. App. at 370, 477 S.E.2d at 224. However, the pertinent language of N.C. Gen. Stat. § 20-16.3 that allowed the arresting officer in *Rogers* to consider the numerical reading of the Alco-sensor test was supplanted in 2006 by the current version of the statute. 2006 N.C. Sess. Laws ch. 253, § 7. The plain language of N.C. Gen. Stat. § 20-16.3(d) (2013) prohibits "the actual alcohol concentration result" of an "alcohol screening test" from being used "by a law-enforcement officer . . . in determining if there are reasonable grounds for believing . . . [t]hat the driver has committed an implied-consent offense under G.S. 20-16.2[,]" such as driving while impaired.

Moreover, in light of the absence of any numerical reading in the evidentiary record before us, the State's argument would effectively allow law enforcement to evade review when arresting individuals for impaired driving after conducting alcohol screening tests. This argument, therefore, is wholly without merit.

Motion to Dismiss

[3] We lastly address the issue whether the trial court erred in dismissing the charges against defendant. We note that the State, in support of its position, merely repeats its arguments that the trial court erred in concluding that Officer Lalumiere lacked probable cause to arrest defendant. The State does not, however, cite any authority suggesting that the trial court erred in dismissing the charges.

However, pursuant to her ethical duty of candor to this Court, defendant's appellate counsel properly referred the Court to *State v. Jo*e, 365 N.C. 538, 723 S.E.2d 339 (2012) (per curiam). In *Joe*, the Supreme Court reversed this Court for affirming a trial court's dismissal of the State's charge of felony possession of cocaine with intent to sell or deliver because the defendant made no written or oral motion to dismiss that charge. *Id.* at 539, 723 S.E.2d at 340. Here, defendant made no written or oral motion to dismiss the charges, and, therefore, we must reverse the trial court's dismissal.

Affirmed in part; reversed and remanded in part.

Judge STEELMAN concurs.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

STATE v. RAWLINGS

[236 N.C. App. 437 (2014)]

STATE OF NORTH CAROLINA
v.
BOBBY LEE RAWLINGS, DEFENDANT

No. COA14-242

Filed 16 September 2014

1. Homicide—first-degree murder—self-defense—defensive force in commission of a felony—applicable to offenses after certain date—jury instruction not prejudicial

The Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to review the issue of whether the trial court erred an attempted first-degree murder case by instructing the jury that self-defense is not available to a person who used defensive force in the commission of a felony under N.C.G.S. § 14-51.4. That statute only applies to offenses committed on or after 1 December 2011 and the offense at issue in this case happened in 2006. The State, defendant, and the trial court all operated under the erroneous assumption that the law applied to defendant's offense. The instruction did not amount to plain error because defendant failed to show that the instruction had a probable impact on the verdict, as opposed to possibly influencing a single juror.

2. Appeal and Error—preservation of issues—double jeopardy—issue not raised at trial

Defendant failed to persevere for appellate review his argument that his sentences for offenses arising out of the shooting of a police officer violated the prohibition on double jeopardy. Defendant did not raise the double jeopardy issue below and constitutional issues not raised and ruled on at trial cannot be raised for the first time on appeal. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to review the issue.

3. Assault—with deadly weapon with intent to kill—assault with deadly weapon—clerical error

The trial court erred by entering judgment on the offense of assault with a deadly weapon with intent to kill where the trial court instructed the jury and accepted a verdict of guilty on the lesser-included offense of assault with a deadly weapon. The error was merely clerical. Furthermore, defendant failed to preserve for appellate review his argument that convictions for both assault with a deadly weapon and assault with a firearm on a law enforcement officer, when based upon the same conduct, violate double jeopardy.

Judge STEELMAN, concurring in the result in a separate opinion.

Appeal by defendant from judgments entered 16 August 2013 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 28 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

John R. Mills for defendant-appellant.

GEER, Judge.

Defendant Bobby Lee Rawlings appeals his convictions of attempted first degree murder, two counts of assault with a firearm on a law enforcement officer, assault with a deadly weapon with intent to kill ("AWDWIK"), and assault with a deadly weapon. On appeal, defendant primarily argues that the trial court erred in instructing the jury pursuant to N.C. Gen. Stat. § 14-51.4 (2013) that self-defense is not available to a person who used defensive force in the commission of a felony. Defendant asserts that the General Assembly did not intend N.C. Gen. Stat. § 14-51.4 to apply when the defendant was committing a non-violent felony and was not an aggressor.

We do not address defendant's statutory construction argument because N.C. Gen. Stat. § 14-51.4 only applies to offenses occurring on or after 1 December 2011 and is, therefore, inapplicable to the 15 March 2006 offenses charged in this case. Although defendant did not recognize the inapplicability of the provision and, as a result, did not raise the issue at trial or on appeal, we have elected, in our discretion, to invoke Rule 2 of the Rules of Appellate Procedure and review the instruction for plain error. We hold that while the trial court erred in instructing the jury regarding a statutory amendment to the law of self-defense that had an effective date after the date of the offenses in this case, defendant has failed to meet his burden of showing that he was prejudiced by the instruction.

Defendant additionally argues that his convictions violate double jeopardy and that the trial court erred in entering judgment on AWDWIK when the jury returned a verdict of assault with a deadly weapon. We hold that defendant waived the double jeopardy argument and remand for correction of the judgment.

Facts

The State's evidence tended to show the following facts. On 15 March 2006, at about 9:40 a.m., 11 officers from the Goldsboro Police Department ("GPD") and the Drug Enforcement Agency assembled at defendant's residence to execute a search warrant. Officer Daniel Peters of the GPD knocked on the back door and yelled, "Police, search warrant." He then struck the door with a ram three or four times but was unable to open it because there were two-by-fours propped up against the door from the inside to keep it shut. Eventually one of the officers was able to break the door off its hinges, and the officers entered the house.

Once inside, Officer Peters proceeded upstairs with Sergeant Max Staps of the Wayne County Sheriff's Office and Captain Brady Thompson of the GPD, announcing, again, "Police, search warrant," as they did so. Once upstairs, Sergeant Staps found defendant's roommate, Rico Lewis, asleep on a mattress in a room directly across from the stairs and apprehended him. Officer Peters and Captain Thompson proceeded down the hall to check the rest of the rooms. Officer Peters opened the door to defendant's room and saw defendant standing 10 to 15 feet away from him with a pistol in his hand. As soon as the door opened, defendant fired three shots. Officer Peters felt the first bullet go past his arm, and retreated. Captain Thompson was hit in his bullet proof vest by one of the bullets.

After the shots were fired, Sergeant Staps left the room where he had Mr. Lewis handcuffed and went to the room across the hall from defendant's room, where he found Captain Thompson lying on the ground. Sergeant Staps checked Captain Thompson's pulse and checked to see if there was any blood. As he was checking on Captain Thompson, the door to defendant's room began to open. Sergeant Staps drew his weapon, announced that he was the police, and told defendant to put his gun down and give up. When the door opened, defendant had put down his gun and was sitting on the floor with his hands over his head. Defendant did not resist arrest.

When officers searched defendant, they found a significant amount of cocaine on his person. Additionally, officers found a marijuana cigarette, a police scanner, digital scales, and sandwich bags in defendant's house, as well as cocaine residue and bullets in defendant's vehicle. Testimony was presented that in the drug trade, digital scales are used to weigh controlled substances for sale, and sandwich bags are used for packaging.

On 3 July 2006, defendant was indicted, with respect to the shooting of Captain Thompson, for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a firearm on a law enforcement officer. With respect to Officer Peters, defendant was indicted for assault with a firearm on a law enforcement officer and AWDWIK. Defendant pleaded guilty and was sentenced to a term of 133 to 169 months imprisonment. On 10 April 2012, the superior court granted defendant's motion for appropriate relief and vacated his convictions. Defendant subsequently entered a plea of not guilty and was tried from 13 to 16 August 2013.

At trial, defendant testified in his own defense that he is a Vietnam War veteran who suffers from post-traumatic stress disorder. He lived at the residence on East Elm Street with a series of roommates. Five days before the officers executed their search warrant, defendant's roommate, Mr. Lewis, was robbed after an intruder entered through the back door of the house. After the robbery, defendant braced the back door with two-by-fours to keep the door closed. Defendant also bought a handgun, which he kept in his nightstand, because Mr. Lewis told defendant that he thought that the robbers were coming back.

On the morning of 15 March 2006, defendant was asleep in his bedroom when he was awakened by a boom. He then heard running up the stairs that panicked him "because nobody came up [his] stairs." He pulled out the handgun from his nightstand, locked and loaded it, and laid back down to listen. The television in his bedroom was turned on, but he could hear "creeping" up the stairs and expected a robbery. He never heard anyone say "police" or "search warrant."

Defendant heard another boom as his bedroom door was kicked in, and he saw a black man wearing dark clothes with a gun pointed at him whom he thought was a "stickup kid." Defendant immediately fired two shots as the door flung open -- the door hit a file cabinet and bounced back shut again. After the door shut, defendant fired a clearance shot to make a noise so that he could crawl out of the bed onto the floor. When he then heard a lot of people running up the stairs, he asked, "[W]ho the hell is out there?" Several of the officers responded that it was law enforcement, and defendant realized, for the first time, that he was not being robbed. When he found out it was the police, he automatically put the gun down and lay down with his hands straight out in front of him until the officers arrested him.

The jury found defendant guilty of attempted first degree murder, AWDWIK, and assault with a firearm on a law enforcement officer for

shooting Captain Thompson. The trial court sentenced defendant to presumptive-range terms of 251 to 311 months imprisonment for attempted first degree murder, 46 to 65 months imprisonment for assault with a firearm on a law enforcement officer, and 46 to 65 months imprisonment for AWDWIK. With respect to Officer Peters, the jury found defendant guilty of assault with a deadly weapon and assault with a firearm on a law enforcement officer. The trial court consolidated the two convictions and sentenced defendant on the more serious conviction to a presumptive-range term of 46 to 65 months imprisonment. All of the sentences ran concurrently. Defendant timely appealed to this Court.

Discussion

[1] Defendant first contends that the trial court erred in instructing the jury that "[s]elf-defense is not available to a person who used defensive force in the commission of a felony." Defendant argues that N.C. Gen. Stat. § 14-51.4, the statute upon which the instruction was based, should only be read to apply to the commission of violent offenses or where the defendant is the aggressor.

North Carolina has long recognized the common law right to use defensive force in one's home. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002) (examining rules governing common law defense of habitation and common law right to self defense while in one's home). However, in this case, the trial court instructed the jury pursuant to the statutory right to use defensive force as provided by N.C. Gen. Stat. § 14-51.2 (2013) and N.C. Gen. Stat. § 14-51.3 (2013). Under the statutes, self-defense "is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4. Here, the trial court, over defendant's objection, granted the State's request to give this limiting instruction because the State presented evidence that at the time that defendant shot at the officers, he was committing the felonies of possession of cocaine and maintaining a dwelling for the purpose of using and selling controlled substances.

Defendant argues that the General Assembly did not intend N.C. Gen. Stat. § 14-51.4 to apply to the commission of non-violent felonies because that would deprive a non-aggressor of the ability to defend himself, with the result that "[t]he interpretation endorsed by the trial court would prevent a claim of self-defense during credit card fraud, tax evasion, possession of marijuana, or any other of the many non-violent felonies proscribed by North Carolina law." To avoid absurd consequences,

defendant asserts, N.C. Gen. Stat. § 14-51.4 should be applied only to commission of violent felonies or where the defendant is the aggressor.

Apparently, neither defendant, the State, nor the trial court realized that N.C. Gen. Stat. § 14-51.4 only applies to offenses committed on or after 1 December 2011. *See* 2011 N.C. Sess. Laws ch. 268, § 26 ("Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."). Because defendant was charged based on acts committed on 15 March 2006, defendant is not subject to the self-defense statutes enacted by the General Assembly in 2011.

Defendant failed to raise this argument to the trial court or on appeal. Even if defendant had raised this argument on appeal, " 'the law does not permit parties to swap horses between courts in order to get a better mount,' . . . meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

This Court has recognized, however, that "[i]n cases where a party has failed to preserve an argument for appellate review, 'Rule 2 permits the appellate courts to excuse a party's default . . . when necessary to prevent manifest injustice to a party or to expedite decision in the public interest.' " *In re Hayes*, 199 N.C. App. 69, 76, 681 S.E.2d 395, 400 (2009) (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008)). North Carolina courts have invoked Rule 2 when all the parties and the trial court operated under an erroneous assumption of law. *Id.*

In this case, the record reflects that the trial court prepared the proposed jury instructions "relying exclusively on the North Carolina Pattern Jury Instructions including the footnotes therein." The Pattern Jury Instruction Committee revised the criminal pattern instructions in June 2012 to incorporate the changes made to the common law by the new self-defense statutes enacted in 2011. It is evident from the record that the defendant, the State, and the trial court were all operating under the erroneous assumption that the Pattern Jury instructions correctly reflected the law applicable to defendant's offenses.

Defendant did, however, preserve at the trial level the statutory construction argument that he makes on appeal regarding the 2011 statute.

We are reluctant to decide, as a case of first impression, how this addition to the self-defense law should be interpreted and applied in a case in which the statute does not apply. Under these unique circumstances, we have decided, in the interest of justice, to invoke Rule 2 of the Rules of Appellate Procedure and to review the jury instructions for plain error.

In order to establish plain error, defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation and quotation marks omitted).

In arguing that the trial court erred in instructing the jury that self-defense did not apply if defendant was committing a felony, defendant argued that he was prejudiced because "[h]ad the jurors been properly instructed, there is a reasonable probability that at least one juror would have reached a different result. Without any reference to the 'in commission of a felony' limitation, at least one juror might have credited [defendant's] account and found him not guilty." This argument is insufficient to meet defendant's burden of showing that there is a reasonable possibility that *the jury* would have reached a different verdict in the absence of the instruction. *See* N.C. Gen. Stat. § 15A-1443(a) (2013) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, *a different result would have been reached* at the trial out of which the appeal arises." (emphasis added)). Certainly, defendant has not shown and, given the evidence, we cannot find, that the instruction had a *probable impact* on the verdict, as opposed to possibly influencing a single juror.

We, therefore hold that the trial court did not commit plain error when it instructed the jury using the 2012 version of the pattern jury instructions. We express no opinion regarding the proper construction of N.C. Gen. Stat. § 14-51.4.

[2] Defendant next argues that his sentences for the offenses arising out of the shooting of Captain Thompson violate the prohibition on double jeopardy. Defendant concedes that he did not raise the double jeopardy issue below. "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Our Supreme Court has held that the issue of double jeopardy cannot be raised for the first time on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67

(2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved[.]"); *see also State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (holding that defendant waived double jeopardy argument for failure to raise issue in trial court). Therefore, we hold that defendant has failed to preserve this issue for appellate review and do not address it.

Defendant, nevertheless, requests that we apply Rule 2 and address the issue of double jeopardy, citing *State v. Dudley*, 319 N.C. 656, 659-60, 356 S.E.2d 361, 364 (1987) (invoking Rule 2 to address double jeopardy issue), and *State v. Mulder*, ___ N.C. App. ___, ___, 755 S.E.2d 98, 101 (2014) (same). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary." *Id.* at ___, 755 S.E.2d at 101. Here, even assuming, without deciding, that sentencing defendant on all three convictions violated double jeopardy, arresting judgment on one of the convictions would not alter the total time defendant is required to serve because the trial court ordered the sentences to run concurrently. Under these circumstances, the extraordinary relief of invoking Rule 2 is not necessary to prevent manifest injustice. In our discretion, we decline to address this issue.

[3] Finally, defendant argues that, with respect to the charges related to Officer Peters, the trial court erred in entering judgment on the offense of AWDWIK because the trial court instructed the jury and accepted a verdict of guilty on the lesser-included offense of assault with a deadly weapon.

The State concedes that defendant was convicted of assault with a deadly weapon, and that the trial court erred and entered judgment on the greater offense of AWDWIK. It is, however, apparent that this error was merely a clerical one. The two offenses for which defendant was originally indicted regarding Officer Peters were AWDWIK (in Count IV) and assault with a firearm on a law enforcement officer (Count V). Both of those offenses are class E felonies. Assault with a deadly weapon is, however, punished as a class A1 misdemeanor. At sentencing, the trial court announced: "And then the last two, Count IV and Count V, the Court is going to consolidate these two, and the most serious of those two is the Count V, which is the Class E . . . ." Thus, because the trial court was aware that defendant's conviction under Count IV did not involve a class E felony, the court necessarily recognized that defendant had not been convicted of AWDWIK. Accordingly, any error on the judgment amounts to a clerical error. We, therefore, remand for correction of the judgment.

Defendant, however, citing *State v. Dickens*, 162 N.C. App. 632, 640, 592 S.E.2d 567, 573 (2004), also correctly notes that convictions for both assault with a deadly weapon and assault with a firearm on a law enforcement officer, when based upon the same conduct, violate double jeopardy. Defendant, however, failed to preserve this issue and, based on our review of the record, we cannot conclude that review is necessary to prevent manifest injustice since the trial court ordered that all of the sentences run concurrently.

No error in part; remanded in part.

Judge ROBERT N. HUNTER, JR. concurring prior to 6 September 2014.

Judge STEELMAN, concurring in the result in a separate opinion.

I concur in the result reached by the majority in this case, but write separately because it is inappropriate to invoke Rule 2 of the Rules of Appellate Procedure as to defendant's first argument. It cannot be a "manifest injustice" or the expediting of a "decision in the public interest" to consider an argument made by defendant under a statute that was inapplicable to the offenses for which defendant was tried. *See* N.C. R. App. P. 2; *see also* S.L. 2011-268 § 26, eff. Dec. 1, 2011.

STATE OF NORTH CAROLINA
v.
STILLOAN DEVORAY ROBINSON

No. COA14-224

Filed 16 September 2014

1. Constitutional Law—effective assistance of counsel—testimony of guilt not elicited by defense counsel

Defendant did not receive ineffective assistance of counsel in a possession of a stolen vehicle case. Contrary to defendant's argument on appeal, defense counsel did not elicit testimony at trial from defendant which conceded his guilt of any crime for which he was charged.

2. Possession of stolen property—possession of stolen vehicle—unauthorized use of a motor vehicle—lesser-included offense

The trial court did not err in a possession of a stolen vehicle case by denying defendant's request for a jury instruction on the unauthorized use of a motor vehicle. The Court of Appeals was bound by its decision in *State v. Oliver*, 217 N.C. App. 369 (2011), which relied on *State v. Nickerson*, 365 N.C. 279 (2011), even though the Court of Appeals in *Oliver* mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case. The Court of Appeals urged the Supreme Court to take the opportunity to clarify the case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle.

Appeal by Defendant from judgment entered 30 August 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Hugh Harris, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant.

STEPHENS, Judge.

Procedural and Factual Background

On 6 February 2012, Defendant Stilloan Devoray Robinson was indicted for possession of a stolen motor vehicle, breaking and entering a motor vehicle, and larceny of a motor vehicle.[1] On 2 April 2012, Defendant was indicted for having attained the status of an habitual felon. The evidence at Defendant's August 2013 trial tended to show the following:

On 13 January 2012, Defendant was arrested just after parking and exiting a car belonging to William Markham which Markham had reported stolen. At the time, Markham and Defendant were roommates at the McCloud Federal Halfway House[2] in Charlotte. Markham testified that, on 10 January 2012, he returned to the house after work, parking his car in a back parking lot. Markham checked in with staff and went to his room. Defendant and Markham's other roommates were present. After changing out of his work clothes, Markham hid his car keys in his shoe and left the room to make a phone call. When Markham returned, he discovered that Defendant and the car keys were both gone. Markham checked the parking lot and saw that his car was missing. Markham testified that he had not given Defendant permission to take his car. A staff member at the halfway house testified that she saw Defendant drive away in Markham's car and called the Charlotte-Mecklenburg Police Department.

Defendant's theory of the case was that Markham had given him permission to use the car on a limited basis. Specifically, Defendant testified that Markham had agreed to loan Defendant the car for one day in exchange for crack cocaine.[3] After being unable to obtain actual crack cocaine, Defendant gave Markham some counterfeit crack cocaine on \10 January 2012. In exchange, Markham gave Defendant his car keys with the understanding that Defendant would return the car by leaving it at a local McDonald's the following day. However, on direct examination, Defendant acknowledged that he kept Markham's car for three days:

> Q. About how long would you have used the car?
>
> A. He wanted it the next day.

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1. In two superseding indictments in May 2013, Defendant was indicted for the same three offenses.

2. The facility is also referred to as the "McCloud Center" at certain points in the trial transcript.

3. Markham testified that he had never used any form of cocaine.

Q. So the understanding was that you were going to use it one day.

A. Yes, sir.

Q. You were only supposed to only have it one day.

A. Yes, sir.

Q. And you wound up keeping it longer?

A. Longer than that.

At the charge conference following completion of the evidence, Defendant requested that the jury be instructed on the crime of unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle. The trial court denied the request.

The jury found Defendant guilty of possession of a stolen motor vehicle, but not guilty of the other two substantive criminal charges. Defendant admitted to having attained habitual felon status. The trial court sentenced Defendant to an active term of 84-113 months in prison. Defendant's trial counsel gave notice of appeal in open court following the jury's verdict, but failed to give notice of appeal following entry of the trial court's final judgment. Instead, trial counsel asked the court whether the appeal would be assigned to the Office of the Appellate Defender. The trial court responded by appointing the Office of the Appellate Defender to represent Defendant in his appeal, and stated, "I'll note your appeal for the record."

By failing to give timely notice of appeal, Defendant has lost his right of appeal. *See* N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). Recognizing this deficiency, Defendant's appellate counsel has filed, along with the record on appeal and Defendant's brief, a petition for writ of *certiorari* pursuant to Appellate Rule 21. "Rule 21 provides that a writ of *certiorari* may be issued to permit review of trial court orders . . . when[, *inter alia*] the right to an appeal has been lost by failure to take timely action . . . ." *Bailey v. North Carolina Dep't of Revenue*, 353 N.C. 142, 157, 540 S.E.2d 313, 322 (2000) (citing N.C.R. App. P. 21(a)) (italics added). The State did not oppose Defendant's petition, and we allowed Defendant's petition for writ of *certiorari* by order entered 23 July 2014.

Discussion

[1] Defendant argues that he received ineffective assistance of counsel ("IAC") in that "his trial attorney, on direct examination, asked him

questions to which the answers conceded his guilt to the only crime for which he was convicted[,]" to wit, possession of a stolen motor vehicle.

"An IAC claim must establish both that the professional assistance [the] defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

> IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated.

Id. at 166, 557 S.E.2d at 524-25 (citations and internal quotation marks omitted). Defendant contends that the record before us is sufficient for this matter to be resolved without further investigation, and we agree. Accordingly, we address the merits of his argument.

The only elements of the offense of possession of a stolen motor vehicle under N.C. Gen. Stat. § 20-106 are that (1) the defendant possessed a motor vehicle which (2) he knew or had reason to believe was stolen. *State v. Baker*, 65 N.C. App. 430, 437, 310 S.E.2d 101, 108 (1983), *cert. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). Property is stolen when it has been carried away without the owner's consent and *with the intent to permanently deprive the owner of the property. See, e.g.*, *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010).

As noted *supra* in the recap of the evidence presented at trial, Defendant never disputed that he possessed Markham's car. Rather, Defendant contended that he possessed the car with Markham's permission and that he intended to return it to Markham per their alleged agreement. On direct examination, defense counsel's questions only induced Defendant to admit that he had kept the car longer than the alleged agreement with Markham had permitted. Defense counsel's questions did not require Defendant to admit to believing the car was stolen, and indeed, Defendant never gave any testimony indicating that he knew or had reason to know that the car was stolen. To the contrary,

Defendant's testimony was that he knew the car was *not* stolen at the time he possessed it, in that Markham had given Defendant permission to use it. Although Defendant did admit to keeping Markham's car longer than permitted by the alleged agreement, he never suggested that he had the intent to permanently deprive Markham of the car. In sum, defense counsel did not elicit testimony from Defendant which conceded his guilt of any crime for which he was charged,[4] and thus, Defendant cannot show that he received ineffective assistance in this regard. Accordingly, Defendant's IAC argument is overruled.

Defendant's Motion to File Supplemental Brief

[2] On 30 June 2014, Defendant filed with this Court a "motion to file supplemental brief." In the motion, appellate counsel for Defendant states the following: That he intended to argue on direct appeal that the trial court committed reversible error in denying the defense request to instruct the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle. While researching the issue, however, appellate counsel reviewed this Court's opinion in *State v. Oliver*, __ N.C. App. __, 718 S.E.2d 731 (2011). In *Oliver*, the defendant had alleged error in the trial court's refusal to instruct on unauthorized use of a motor vehicle, contending that "all the essential elements of unauthorized use of a stolen vehicle are essential elements of possession of a stolen vehicle." *Id.* at __, 718 S.E.2d at 734. This Court rejected the defendant's contention on the following basis:

> During the pendency of [the] defendant's appeal, our Supreme Court addressed this very issue of whether unauthorized use of a motor vehicle is a lesser[-]included offense of possession of a stolen vehicle. *See State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). Due to our Supreme Court's recent decision, we see no need

4. Defendant's testimony would have supported his conviction of a charge of unauthorized use of a motor vehicle (the current version of statute is titled "[u]nauthorized use of a motor-propelled conveyance"). "A person is guilty of [unauthorized use of a motor vehicle] if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C. Gen. Stat. § 14-72.2(a) (2013). "One of the essential elements of unauthorized use of a motor vehicle is the taking or operating of a motor vehicle without having formed an intent to permanently deprive the owner thereof." *State v. McCullough*, 76 N.C. App. 516, 518, 333 S.E.2d 537, 538 (1985) (contrasting this offense with that of common law robbery). This offense occurs, *inter alia*, where one initially has permission for the use of a vehicle, but keeps the vehicle after its owner has withdrawn his permission or requested that the vehicle be returned. *See, e.g.*, *State v. Milligan*, 192 N.C. App. 677, 666 S.E.2d 183 (2008).

> to further discuss this issue. *Id.* Consequently, the trial court did not err in not instructing the jury on the crime of unauthorized use of a stolen vehicle as it is not a lesser[-] included offense of possession of a stolen vehicle.

Id. However, as appellate counsel now notes, in *Nickerson* "the principal question [wa]s whether the crime of unauthorized use of a motor vehicle is a lesser[-]included offense of *possession of stolen goods*." *Nickerson*, 365 N.C. at 281, 715 S.E.2d at 846 (emphasis added). The Supreme Court reasoned that

> [b]oth offenses concern personal property. However, the specific definitional requirement that the property be a "motor-propelled conveyance" is an essential element unique to the offense of unauthorized use of a motor vehicle. For the offense of possession of stolen goods, the State need not prove that [the] defendant had a "motor-propelled conveyance" but rather that the property in [the] defendant's possession is any type of personal property. As such, unauthorized use of a motor vehicle has an essential element not found in the definition of possession of stolen goods. Because we conclude that this element of the lesser crime is not an essential element of the greater crime, we need not address the other elements.

Id. at 282, 715 S.E.2d at 847 (citation omitted). Thus, in *Oliver*, this Court mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case.

To compound that error, appellate counsel concedes that he relied solely on our opinion in *Oliver* in determining that the law on whether unauthorized use of a stolen vehicle is a lesser-included offense of possession of a stolen vehicle was settled contrary to Defendant's prospective argument on this issue. Appellate counsel did not read *Nickerson* at that time, and thus did not discover the discrepancy in the opinions. Instead, appellate counsel filed Defendant's brief and petition for writ of *certiorari* with this Court without including the jury instruction issue.

In June 2014, appellate counsel read *Nickerson* and realized the discrepancy between that opinion's actual holding and the holding as described in and relied upon by this Court in *Oliver*. In Defendant's "motion to file supplemental brief[,]" he asks this Court to exercise our discretion under Rule 2 of our Rules of Appellate Procedure to prevent manifest injustice to Defendant. *See* N.C.R. App. P. 2. In its response filed

8 July 2014, the State did not object to Defendant's motion. By order entered 24 July 2014, we allowed Defendant's motion and instructed the State to file its own supplemental brief on the jury instruction issue no later than 8 August 2014. The following day, the State filed a motion for an extension of time until and including 20 August 2014 to file its supplemental brief which we allowed by order entered 1 August 2014.

As for the merits of this argument, as Defendant concedes in his supplemental brief, we are bound by this Court's decision in *Oliver*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") (citations omitted). However, we hope that by noting the clear discrepancy between *Oliver* and *Nickerson*, the Supreme Court may take this opportunity to clarify our case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court."). In light of *Oliver*, we must conclude that the trial court did not err in denying Defendant's request for an instruction on unauthorized use of a motor vehicle.

NO ERROR.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
SUSAN DENISE SHAW

No. COA14-125

Filed 16 September 2014

Appeal and Error—appeal after guilty plea—driving while impaired—no statutory right

Defendant's appeal from judgment entered after pleading guilty to driving while impaired was dismissed because she had no statutory right to appeal.

Appeal by defendant from judgment entered 25 February 2013 by Judge Sharon Tracey Barrett in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant.

ELMORE, Judge.

Defendant appeals from judgment entered 25 February 2013 after she pled guilty to driving while impaired (DWI). The trial court sentenced defendant to imprisonment for 12 months minimum, 12 months maximum, which was suspended for 18 months on various conditions including an active sentence of 14 days imprisonment. After careful consideration, we dismiss defendant's appeal.

I. Facts

On 25 October 2011, Susan Denise Shaw (defendant) was convicted of misdemeanor DWI in Mecklenburg County District Court. She appealed the conviction to Mecklenburg County Superior Court and pled guilty to the same charge on 25 February 2013. The trial court found one grossly aggravating factor, a prior DWI conviction within seven years before the current conviction's offense date, and imposed a Level Two punishment. Defendant timely appeals to this Court.

II. Analysis

a.) Right to Appeal

The State argues for this Court to dismiss defendant's appeal because defendant has no statutory right to appeal. We agree.

N.C. Gen. Stat. § 15A-1444(e) (2013), in relevant part, states:

> Except as provided in subsections (a1) and (a2) of this section . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Thus, a defendant can appeal as a matter of statutory right pursuant to a guilty plea, in pertinent part, if she satisfies either N.C. Gen. Stat. §§ 15A-1444 (a1) or (a2). Under subsection (a1):

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2013).

The provision of (a1) does not apply to the case at bar because defendant did not enter a plea of guilty to a felony. *See id.* Moreover, defendant's argument on appeal solely relates to the State's failure to give timely notice of its intent to seek a grossly aggravating factor at sentencing, not whether her sentence was supported by evidence introduced at the sentencing hearing. We also note that while defendant requests, in the alternative, that we "review the case under [our] certiorari jurisdiction[,]" we do not have the authority to do so under these circumstances. *See* N.C. R. App. P. 21(a)(1) (providing that this Court may issue a writ of certiorari to "permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been

lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review . . . of an order of the trial court denying a motion for appropriate relief"). Even if we had such authority, defendant nevertheless fails to satisfy the filing and content requirements of a petition for writ of certiorari pursuant to Appellate Rule 21(c). *See* N.C. R. App. P. 21(c).

Under subsection (a2), the specific enumerated statutory avenues of appeal fall under Article 81B (Structured Sentencing), which is expressly inapplicable to a defendant convicted of DWI. *See* N.C. Gen. Stat. § 15A-1444(a2); *see also* N.C. Gen. Stat. § 15A-1340.10 (2013) ("[Article 81B] applies to criminal offenses in North Carolina, *other than impaired driving* under G.S. 20-138.1[.]") (emphasis added).

Defendant cites *State v. Parisi* in support of her assertion that she has a statutory right to appeal her DWI guilty plea. 135 N.C. App. 222, 519 S.E.2d 531 (1999). We are unpersuaded. In *Parisi*, the defendant pled guilty to DWI in superior court, and the sentencing judge determined that the defendant's prior conviction for "driving while ability impaired" in New York constituted a grossly aggravating factor. *Id.* at 222, 519 S.E.2d at 532. Defendant appealed, and this Court ruled on the merits of the defendant's argument. *Id.* at 223, 519 S.E.2d at 532. Unlike the case at bar, there is no indication that the State raised the issue of the defendant's statutory right to appeal through a motion to dismiss, and the *Parisi* court's opinion indicates that it did not consider or rule on that issue. This Court only addressed whether the prior New York conviction was a grossly aggravating factor. *Id.* at 223-27, 519 S.E.2d at 532-34.

However, in *State v. Absher*, our Supreme Court addressed the very issue presented to us in this appeal. 329 N.C. 264, 265, 404 S.E.2d 848, 849 (1991). In *Absher*, the defendant pled guilty to DWI in superior court, and he attempted to appeal the sentencing court's judgment to this Court. *Id.* at 265, 404 S.E.2d at 849. The State filed a motion to dismiss on appeal, arguing that the defendant "had no right to appellate review from the judgment and sentence imposed pursuant to his plea of guilty." *Id.* Our Supreme Court ruled that dismissal of the defendant's appeal was necessary because "[n]one of the exceptions mentioned in [N.C. Gen. Stat. § 15A-1444(e)] apply in this case, and defendant is therefore not entitled to appeal as a matter of right from the judgment entered on his plea of guilty." *Id.* Similarly, no provision in N.C. Gen. Stat. § 15A-1444(e) gives defendant in this case a statutory right to appeal. Thus, we dismiss defendant's appeal.

III. Conclusion

In sum, we dismiss the appeal because defendant does not have a statutory right to appeal.

Dismissed.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
BRUCE ALLEN TOWNSEND, JR., DEFENDANT

No. COA14-129

Filed 16 September 2014

1. Motor Vehicles—Knoll motion—secured bond—no written findings—not prejudicial

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to dismiss based on the magistrate's alleged failure to inform defendant of the charges; his right to communicate with counsel, family, and friends; and of the general circumstances for his release (a *Knoll* motion). Defendant had several opportunities to call counsel and friends but did not do so and, while the magistrate did not make the required written findings for the secured bond option, defendant was released to his wife on an unsecured bond and suffered no prejudice.

2. Evidence—intoxication—motion to suppress—probable cause—driving while impaired

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress for lack of probable cause to arrest. Although defendant argued that he did not exhibit signs of intoxication such as slurred speech or glassy eyes, defendant had bloodshot eyes, an odor of alcohol, showed signs of intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests.

3. Evidence—alco-sensor test—not redacted—not introduced at trial

The trial court did not abuse its discretion in a driving while impaired prosecution by allowing into evidence at a pretrial hearing

the numerical results of an alco-sensor test. Although the admission of the numerical results was error, the numerical results of the test were never admitted before the jury and there was sufficient other evidence to survive defendant's motion to dismiss for lack of probable cause.

4. Evidence—driving while impaired—checkpoint—motion to suppress—legitimate purpose—requirements satisfied

The trial court did not err during a driving while impaired prosecution by denying defendant's motion to suppress evidence resulting from a checkpoint. The trial court determined that the checkpoint had a legitimate primary purpose and that the requirements of *Brown v. Texas*, 443 U.S. 47 (1979), were met.

Appeal by defendant from judgment entered 1 August 2013 by Judge Susan E. Bray in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Arnold & Smith, PLLC, by Laura M. Cobb, for defendant-appellant.

BRYANT, Judge.

Defendant's *Knoll* motion was properly dismissed where the magistrate followed N.C. Gen. Stat. § 15A-511(b) in informing defendant of his rights and in setting an option bond such that any technical statutory violation committed by the magistrate was not prejudicial to defendant. Where the State presented sufficient evidence such that a reasonable person could believe defendant committed the offense of driving while impaired, the trial court properly denied defendant's motion to suppress for lack of probable cause. A technical statutory violation committed by the trial court during a pre-trial hearing but not at trial did not result in error that would entitle defendant to a new trial. Where the trial court determined that a driving while impaired checkpoint was established for a legitimate primary purpose and that the *Brown* factors were met, defendant's motion to suppress evidence of the checkpoint was properly denied.

On 21 October 2010, defendant Bruce Allen Townsend, Jr., was arrested for driving while impaired. On 24 August 2011, defendant was convicted in Mecklenburg County District Court of driving while

impaired and sentenced to thirty days imprisonment. The District Court suspended defendant's sentence and placed him on unsupervised probation for twelve months. Defendant was further ordered to obtain a substance abuse assessment, comply with recommended treatment, complete twenty-four hours of community service, and pay courts costs, a $100.00 fine, and a $250.00 community service fee.

Defendant appealed to Superior Court, and on 30 August 2012, was tried before a jury during the criminal session of Mecklenburg County Superior Court, the Honorable Susan E. Bray, Judge presiding. At trial, the State's evidence tended to show the following.

On the evening of 21 October 2010, a checkpoint was established in the 7200 block of Providence Road in Charlotte by the Charlotte-Mecklenburg Police Department to check for impaired drivers and other vehicular infractions. At approximately 11:28 p.m., defendant drove up to the checkpoint where he encountered Officer Todd Davis. Officer Davis engaged defendant in conversation and noticed that defendant emitted an odor of alcohol and had red, bloodshot eyes. When asked by Officer Davis whether he had had anything to drink that evening, defendant responded that he had consumed several beers earlier. Officer Davis administered two alco-sensor tests to defendant; both tests were positive for alcohol.

Officer Davis then asked defendant to perform several field sobriety tests. Officer Davis testified that when he administered a horizontal gaze nystagmus test to defendant, he noticed three signs of intoxication. On a "walk and turn" test, defendant exhibited two signs of intoxication, and on a "one leg stand" test, defendant showed one sign of intoxication. Officer Davis also requested that defendant recite the alphabet from J to V, which defendant did without incident. Officer Davis subsequently arrested defendant for driving while impaired.

Defendant was taken to a Breath Alcohol Testing vehicle located at the checkpoint where he blew a 0.10 on his first test and a 0.09 on his second test. Officer Davis then drove defendant to the Mecklenburg County jail. Defendant was admitted to the jail at 12:56 a.m., appeared before the magistrate at 2:54 a.m., and was released to his wife's custody at 4:45 a.m.

Defendant was convicted by a jury of driving while impaired and sentenced by the trial court to sixty days imprisonment. Defendant's sentence was suspended and he was placed on unsupervised probation for twenty-four months. Defendant was also ordered to pay court costs, a $100.00 fine, and a $250.00 community service fee; perform

twenty-four hours of community service; surrender his driver's license to the clerk; not operate a motor vehicle until his license is restored; and to complete all treatments recommended by his alcohol assessment. Defendant appeals.

On appeal, defendant raises four issues as to whether the trial court: (I) erred in denying defendant's motion to dismiss pursuant to defendant's *Knoll* motion; (II) erred in denying defendant's motion to suppress for lack of probable cause; (III) abused its discretion in denying defendant's motion to redact evidence of the alco-sensor test; and (IV) erred in denying defendant's motion to suppress evidence resulting from the checkpoint.

I.

Knoll Motion

[1] Defendant first argues that the trial court erred in denying his *Knoll* motion to dismiss. We disagree.

A *Knoll* motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and of the general circumstances under which he may secure his release pursuant to N.C. Gen. Stat. § 15A-511. *See* N.C.G.S. § 15A-511(b) (2013); *Knoll*, 322 N.C. at 536, 369 S.E.2d at 559 ("Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release." (citation omitted)). If a defendant is denied these rights, the charges are subject to being dismissed. *Knoll*, 322 N.C. at 544-45, 369 S.E.2d at 564. "[I]n those cases arising under N.C.G.S. § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.* at 545, 369 S.E.2d at 564. On appeal, the standard of review is whether there is competent evidence to support the trial court's findings of fact and its conclusions of law. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982) (citation omitted). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.* (citation omitted).

Defendant raised his *Knoll* motion during his pre-trial hearing, contending he was denied his right to communicate with counsel and

friends, and that this denial to have others observe him resulted in substantial prejudice.

In its order denying defendant's motion to dismiss pursuant to *Knoll*, the trial court made the following findings of fact:

> 1. Officer Davis stopped [defendant] at a checkpoint on Providence Road at approximately 11:28pm on Thursday, October 21, 2010.
>
> 2. Defendant submitted to portable breath tests and had a positive reading for alcohol.
>
> 3. Officer Davis took Defendant to [the Blood Alcohol Testing] mobile unit for [an] intoxilyzer test. Defendant signed [a] rights [form] at 11:55pm, acknowledging his right to call an attorney or witness.
>
> 4. Defendant blew 0.09 on Intox EC/IR-II.
>
> 5. Defendant did not at any time call a witness or ask for a witness.
>
> 6. Defendant did call his wife . . . to let her know he had been arrested, [and] told her he or someone would call her later to come pick him up.
>
> 7. Officer Davis transported Defendant to [the] Mecklenburg County Jail, where he was received at approximately 12:56 am on October 22, 2010.
>
> 8. At the jail, Defendant had his property checked, was booked, saw the nurse, [and] was fingerprinted [and] photographed.
>
> 9. Officer Davis submitted his arrest paper work and charging affidavit to the magistrate.
>
> 10. Defendant signed [an] implied consent offense notice (AOC-CR-271) in front of [the] magistrate at 2:34am, giving his [wife's] name and phone number as a contact person.
>
> 11. [The] [m]agistrate had [Officer Davis's] information about the charge, BAC results, information from Defendant about address, length of employment, etc. and set conditions of release. Those conditions were a $1000 secured bond or a $1000 unsecured release to a sober

responsible adult with ID or any terms or conditions of pretrial services if accepted by the program.

12. Some official from the jail called [defendant's wife] to inform her that she could come pick up Defendant. She left her home around 3am and arrived at the jail around 3:15 or 3:20am to pick up Defendant.

13. [Defendant's wife] waited for about 20 minutes in the wrong area of the jail, then went to another area, spoke with appropriate personnel around 3:52am, [and] signed Defendant out at 4:21am (after jailers verified he had no outstanding criminal warrants, was medically cleared, retrieved his property, etc.).

The trial court then made the following conclusions of law:

In accordance with NCGS 15A-534(a), a judicial official, in determining conditions of pretrial release, must impose [at least] one of the following conditions:

1. Release the defendant on his written promise to appear.

2. Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.

3. Place the defendant in the custody of a designated person or organization agreeing to supervise him.

4. Require the execution of an appearance bond in a specified amount secured by a cash deposit in the full amount of the bond, by a mortgage pursuant to NCGS 58-74-5, or by at least one solvent surety.

Further, in accordance with NCGS 15A[-]534(b), the judicial official, in granting pretrial release, must impose condition (1), (2) or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3) and must record the reasons for doing so in writing to the

> extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to NCGS 15A-535(a).
>
> In this matter, the magistrate's terms and conditions of release for [defendant] included a combination of conditions (2) and (3), an unsecured bond and release to a sober responsible adult with ID, that person being [defendant's wife]. Defendant never asked for witnesses; in fact [defendant] only asked his wife to come pick him up.

North Carolina General Statutes, section 15A-534, provides that:

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2013). "If the provisions of the . . . pretrial release statutes are not complied with by the magistrate, *and* the defendant can show irreparable prejudice directly resulting from [this noncompliance], the DWI charge must be dismissed." *State v. Labinski*, 188 N.C. App. 120, 126, 654 S.E.2d 740, 744 (2008) (citation omitted).

In its findings of fact and conclusions of law, the trial court noted that defendant had the opportunity to contact counsel and friends to observe him. A review of the record shows that defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but that defendant failed to do so. In fact, the record shows that defendant asked that his wife be called, but only for the purpose of telling her that he had been arrested. As such, defendant was not denied his rights pursuant to *Knoll*.

Defendant further contends his rights were violated because the magistrate ordered defendant held under a $1,000.00 secured bond without justification and prior to meeting with him. Defendant cites *State v. Labinski* in support of his argument.

In *Labinski*, the defendant was arrested for driving while impaired. *Id.* at 122, 654 S.E.2d at 741. The defendant did not request that she be observed by witnesses, nor did she seek to have an independent chemical analysis conducted, even though her friends were at the detention center to help her. *Id.* at 122, 654 S.E.2d at 741-42. The magistrate gave the defendant a $500.00 secured bond without making any findings of fact as to why a secured bond was required. *Id.* at 122-23, 654 S.E.2d at 742. On appeal, this Court determined that the magistrate's failure to make findings as to why a secured bond was necessary amounted to a statutory violation. *Id.* at 126-27, 654 S.E.2d at 744-45. However, this Court affirmed the trial court, finding that despite the magistrate's commission of a statutory violation, the defendant failed to show how that violation was prejudicial to her. *Id.* at 127-28, 654 S.E.2d at 745.

Here, the conditions of the release order did not, as defendant contends, strictly impose a $1,000.00 secured bond on him. Rather, as noted by the trial court in its findings of fact, the magistrate set an option bond that gave defendant a choice between paying a $1,000.00 secured bond or a $1,000.00 unsecured bond and being released to a sober, responsible adult; defendant was eventually released to his wife. Defendant now challenges the secured bond option, arguing that the magistrate was required to make written findings of fact as to the terms of defendant's option bond.

Pursuant to N.C. Gen. Stat. § 15A-534(a), a magistrate is not required to make written findings of fact when setting conditions of release unless the terms of defendant's release require a secured bond. N.C.G.S. § 15A-534(a) (2013). As such, although the magistrate was not required to make any written findings of facts in the option bond when imposing the condition of allowing defendant to pay an unsecured bond and be released to a sober, responsible adult, the magistrate was required to make written findings as to the option bond's other potential condition for release — a secured bond.

However, even though the magistrate may have committed a technical statutory violation, defendant has failed to demonstrate how he was prejudiced as a result. Defendant was not released on a secured bond — he was instead released on an unsecured bond to the custody of his wife. Therefore, even had the magistrate been required to make findings of fact as to the secured bond option, no secured bond was imposed, and defendant cannot show prejudice. *See Labinski*, 188 N.C. App. at 127-28, 654 S.E.2d at 745 (holding that even though the magistrate committed a technical statutory violation by failing to make findings of fact regarding a secured bond, the defendant was unable to

show how such a violation prejudiced her). Moreover, here, defendant was afforded his statutory right to pretrial release and his right to communicate with counsel and friends. Accordingly, defendant's argument is overruled.

II.

Probable Cause

[2] Next, defendant contends the trial court erred in denying defendant's motion to suppress for lack of probable cause. We disagree.

We note at the outset that defendant has not assigned error to the trial court's findings of fact, and those findings are therefore binding on appeal. *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006) (citation omitted). Our review is thus limited to considering whether the trial court erred by concluding, as a matter of law, that there was probable cause to arrest defendant for driving while impaired. This Court reviews conclusions of law *de novo*. *State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006) (citations omitted).

> Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. The existence of such grounds is determined by the practical and factual considerations of everyday life on which reasonable and prudent people act. If there is no probable cause to arrest, evidence obtained as a result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed.

State v. Tappe, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000) (citations and quotation omitted).

Defendant argues the trial court erred in denying his motion to suppress for lack of probable cause because "there was no set of facts in the case at hand that would lead a reasonable, cautious person to believe that [defendant] was driving while impaired." Defendant's argument lacks merit, as the evidence supports the trial court's determination that Officer Davis had probable cause to arrest defendant.

In its order denying defendant's motion to suppress for lack of probable cause, the trial court noted that when Officer Davis stopped defendant at the checkpoint, he immediately noticed that defendant had "bloodshot eyes and a moderate odor of alcohol about his breath." Defendant admitted to "drinking a couple of beers earlier" and had "stopped drinking about an hour" prior to being stopped at the checkpoint. Two alco-sensor tests administered to defendant yielded positive results, and defendant exhibited clues indicating impairment on three field sobriety tests. Officer Davis determined that defendant was "under the influence of some impairing substance," regardless of the positive alco-sensor test results. The trial court further acknowledged Officer Davis' twenty-two years' experience as a police officer.

Defendant argues that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause for Officer Davis to arrest defendant for driving while impaired. We are not persuaded; as this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired. *See State v. Rogers*, 124 N.C. App. 364, 369-70, 477 S.E.2d 221, 224 (1996); *see also State v. Fuller*, 176 N.C. App. 104, 109, 626 S.E.2d 655, 658 (2006) ("The results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied-consent offense[.]" (citations and quotation omitted)).

Here, Officer Davis noted that defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues as to intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests. As such, there was sufficient probable cause for Officer Davis to arrest defendant for driving while impaired.

III.

[3] Defendant next argues that the trial court abused its discretion in denying his request to redact evidence of the alco-sensor test. Specifically, defendant contends the trial court's admission of the alco-sensor test's numerical results was an abuse of discretion, thus entitling him to a new trial. We disagree.

On appellate review, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *State v. Rasmussen*, 158 N.C. App. 544, 555, 582 S.E.2d 44, 53 (2003) (citation omitted).

Although the results of a defendant's alco-sensor test are not admissible as substantive evidence, *State v. Bartlett*, 130 N.C. App. 79, 82, 502 S.E.2d 53, 55 (1998), an officer who arrests a defendant for driving while impaired may testify that a defendant's alco-sensor test indicated the presence of alcohol. *Fuller*, 176 N.C. App. at 109, 626 S.E.2d at 658.

Defendant contends the trial court abused its discretion during the pre-trial hearing by allowing into evidence the numerical results of defendant's alco-sensor test. During the pre-trial hearing, the results of the alco-sensor test were offered to the trial court as part of Officer Davis's paperwork which was submitted to the magistrate; the paperwork was proffered by the State to show that Officer Davis had probable cause to arrest defendant for driving while impaired. Specifically, Officer Davis' arrest affidavit described how he encountered defendant, his observations of defendant, defendant's performance on the field sobriety tests, and the numerical results of defendant's alco-sensor test. This admission of the actual numerical results of defendant's alco-sensor test was error, as only "a positive or negative result on an alcohol screen test" may be admissible in court. *See* N.C. Gen. Stat. § 20-16.3 (2013) ("The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result . . . is admissible in a court[.]").

However, while we note the technical violation of the statute, we do not agree with defendant that this violation entitles him to a new trial. "A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985) (citation omitted).

Here, the numerical results of defendant's alco-sensor test were admitted into evidence *only* during the trial court's pre-trial hearing on defendant's motions to suppress and dismiss; the results were never introduced into evidence before the jury. Moreover, even without the results of the alco-sensor test, the State presented sufficient evidence, via the testimony of Officer Davis, to survive defendant's motion to dismiss for lack of probable cause. As such, despite committing a technical statutory violation by admitting the numerical results of defendant's alco-sensor test, the trial court did not err in denying defendant's motion to dismiss for lack of probable cause.

Further, when Officer Davis testified at trial before the jury as to the circumstances under which he encountered and eventually arrested defendant for driving while impaired, Officer Davis did not discuss

defendant's alco-sensor test other than to state that defendant was administered a preliminary breath test along with field sobriety tests as part of Officer Davis' investigation. When asked at trial about how he came to form an opinion as to defendant's state of being on the evening of 21 October 2010, Officer Davis did not mention the alco-sensor test at all:

> Based on my conversation with [defendant], with the physical observations of [defendant] when I was talking to him at the car, based on [defendant's] standardized field sobriety tests, I did form the conclusion or the opinion that [defendant] had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental and/or physical faculties.

Indeed, despite defendant's contentions to the contrary, the actual numerical results of his alco-sensor test were never admitted into evidence at trial before the jury. Therefore, because this evidence was never admitted before the jury, it could not and did not cause defendant to receive an unfair verdict that would entitle him to a new trial. Defendant's argument is therefore overruled.

IV.

[4] Finally, defendant contends the trial court erred in denying his motion to suppress evidence resulting from the checkpoint. We disagree.

> When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . .
>
> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

State v. Veazey, 191 N.C. App. 181, 185-86, 662 S.E.2d 683, 686-87 (2008) (citations and quotations omitted).

Defendant argues the trial court erred in denying his motion to suppress evidence resulting from the checkpoint because the checkpoint lacked an acceptable primary purpose and was, therefore,

unconstitutional. In its order denying defendant's motion to suppress, the trial court made the following findings of fact:

> The Court considered all evidence presented, as well as the arguments and contentions of counsel, and makes the following findings of fact by a preponderance of the evidence:
>
> 1. The Charlotte Mecklenburg Police Department, under supervision of Sgt. David Sloan, set up a DWI check point near [the] 7200 block of Providence Road between 11pm October 21, 2010 and 3am October 22, 2010.
>
> 2. Sgt. Sloan chose the location because over 30 traffic fatalities had occurred in the vicinity since 2006, with about half of those involving impaired driving.
>
> 3. The area is near the Arboretum Shopping Center, which houses several restaurants and other businesses which serve or sell alcohol.
>
> 4. The check point was set up in compliance with NCGS 20-16.3A: there was a written plan; Sgt. Sloan briefed the 25 officers from 6 different agencies who were operating the checkpoint; every vehicle was to be stopped and was stopped; signs notifying approaching motorists of a DWI check point ahead were placed approximately 200 yards from [the] check point; [and] non-impaired drivers were only delayed about 15 seconds each.

The trial court then concluded that the checkpoint was proper and denied defendant's motion to suppress.

Defendant contends the trial court erred in denying his motion to suppress because the State failed to meet its burden of demonstrating the checkpoint was set-up for anything other than the improper purpose of general crime detection. Defendant's argument lacks merit, as during the pre-trial hearing on defendant's motion to suppress, the State presented testimony by Sergeant Sloan regarding the checkpoint. Sergeant Sloan testified that the checkpoint was administered according to a written plan, and that the date for the checkpoint had been selected almost a year prior to that date based on when the Blood Alcohol Testing mobile lab would be available. Sergeant Sloan further testified that the location of the checkpoint, in the 7200 block of Providence Road, was chosen because of the statistically high number of impaired driving offenses and fatalities that had occurred in the Providence Road and Highway

55 corridor. Further, Sergeant Sloan stated that the main purpose of the checkpoint was to check for DWIs.

We agree with the trial court's findings that the checkpoint was conducted for a legitimate primary purpose, as the record indicates the checkpoint was established, pursuant to N.C. Gen. Stat. § 20-16.3, to check all passing drivers for DWI violations. *See* N.C.G.S. § 20-16.3 (2013) (permitting law enforcement agencies to set-up DWI checkpoints provided such checkpoints are administered according to established, written plans, are well-marked for drivers, and detain all passing drivers only to the extent necessary to determine if reasonable suspicion exists that a driver has committed a DWI violation).

Defendant further contends the trial court erred in denying his motion to suppress because the checkpoint was unreasonable and therefore unconstitutional. After finding a legitimate programmatic purpose, the trial court must determine whether the roadblock was reasonable and, thus, constitutional. "To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest." *State v. Rose*, 170 N.C. App. 284, 293, 612 S.E.2d 336, 342 (2005) (citation omitted). "In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texa*s, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979)." *State v. Jarrett*, 203 N.C. App. 675, 679, 692 S.E.2d 420, 424-25 (2010) (citation omitted). "Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty." *Id.* at 679, 692 S.E.2d at 425 (citation and quotation omitted).

"The first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342 (citation omitted).

Here, the State presented evidence that the checkpoint was intended to screen all passing drivers for DWI violations. When Officer Davis stopped defendant at the checkpoint, Officer Davis noticed defendant had red, bloodshot eyes and emitted a "moderate odor of alcohol." When Officer Davis asked defendant if defendant had been drinking that evening, defendant responded that he had consumed several beers.

Officer Davis then asked defendant to take an alco-sensor test and perform several field sobriety tests. As such, the first *Brown* factor was met. *See State v. Kostick*, ___ N.C. App. ___, ___, 755 S.E.2d 411, 420 (2014) (finding the first *Brown* factor was met where an officer stopped the defendant at a checkpoint and noticed the defendant had red, bloodshot eyes, emitted an odor of alcohol, and admitted to drinking that evening); *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 ("Both the United States Supreme Court as well as our Courts have suggested that license and registration checkpoints advance an important purpose[.]" (citation and quotation omitted)).

The second *Brown* prong examines "the degree to which the seizure advance[s] the public interest," and requires the trial court to determine whether "[t]he police appropriately tailored their checkpoint stops to fit their primary purpose." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citations and quotations omitted).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id. (citation omitted).

In its findings of fact, the trial court found that the checkpoint had fixed starting and ending times; the checkpoint was located in the 7200 block of Providence Road, an area located within a mile of a major shopping area where there are businesses which serve or sell alcohol; the checkpoint's location was selected based on impaired driving statistics; and the checkpoint was conducted according to a written plan, was properly marked, and was intended to stop all passing drivers to check for impaired driving violations. These findings of fact are supported by the evidence and "indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong." *Jarrett*, 203 N.C. App. at 680-81, 692 S.E.2d at 425.

"The final *Brown* factor to be considered is the severity of the interference with individual liberty." *Id.* at 681, 692 S.E.2d at 425. "[C]ourts

have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192-93, 662 S.E.2d at 690-91 (citations omitted).

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic[]; whether police took steps to put drivers on notice of an approaching checkpoint[]; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field[]; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern[]; whether drivers could see visible signs of the officers' authority[]; whether police operated the checkpoint pursuant to any oral or written guidelines[]; whether the officers were subject to any form of supervision[]; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691 (citations omitted). "Our Court has held that these and other factors are not 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint." *Id.* (citation and quotation omitted).

As previously discussed, in its findings of fact the trial court noted the following:

> 4. The check point was set up in compliance with NCGS 20-16.3A: there was a written plan; Sgt. Sloan briefed the 25 officers from 6 different agencies who were operating the checkpoint; every vehicle was to be stopped and was stopped; signs notifying approaching motorists of a DWI check point ahead were placed approximately 200 yards from [the] check point; [and] non-impaired drivers were only delayed about 15 seconds each.

Such findings meet the third factor of *Brown*, as "the totality of the circumstances in examining the reasonableness of [the] checkpoint" was examined and set forth by the trial court in its order. *See Kostick*, ___ N.C. App. at ___, 755 S.E.2d at 421 (citation omitted) (holding that where the record showed the trial court heard and weighed the evidence regarding

whether a DWI checkpoint was established for a legitimate primary purpose and the checkpoint stops were reasonable, advanced an important public interest, and were conducted pursuant to a written plan, the trial court's denial of the defendant's motion to suppress evidence of the checkpoint was affirmed). Therefore, as the trial court determined the checkpoint had a legitimate primary purpose and that the *Brown* factors were met, defendant's argument is accordingly overruled.

No error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
JAMES LEWIS WILSON, JR.

No. COA13-1395

Filed 16 September 2014

1. Indictment and Information—defective short form indictment—attempted first-degree murder—lesser-included offense—attempted voluntary manslaughter

Although the short form indictment used to charge defendant with attempted first-degree murder failed to include the essential element of malice aforethought, the jury's guilty verdict of attempted first-degree murder necessarily meant that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter. The case was remanded to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter.

2. Constitutional Law—effective assistance of counsel—alleged concessions of guilt—closing arguments—no Harbison error

Defendant did not receive ineffective assistance of counsel at trial based on his counsel's alleged concessions of defendant's guilt during closing arguments without defendant's express consent. Although defense counsel's statements were less than clear at closing, none of his statements amounted to a *Harbison* error.

Appeal by Defendant from judgment entered 22 March 2013 by Judge David L. Hall in Superior Court, Guilford County. Heard in the Court of Appeals 12 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Kimberly P. Hoppin for Defendant.

McGEE, Chief Judge.

James Lewis Wilson ("Defendant") appeals his conviction of attempted first-degree murder. Defendant contends that (1) the corresponding short form indictment against him for attempted first-degree murder was defective and (2) he received ineffective assistance of counsel at trial. We agree that the indictment against Defendant was defective, but we do not agree that Defendant received ineffective assistance of counsel.

I. Background

Around five or six in the evening of 19 July 2011, Timothy Lynch ("Mr. Lynch") was walking on a street in the Five Points area in High Point. Mr. Lynch was accompanied by a small group of people.

A blue Cavalier ("the Cavalier") approached and stopped near where Mr. Lynch and his companions were standing. Four men inside the Cavalier, including Defendant, exited the vehicle. Defendant had been riding in the front passenger seat of the Cavalier and was carrying a gun. Defendant testified at trial that the four men were there to confront Mr. Lynch, whom they believed had recently beaten up Defendant's cousin. Defendant further testified that, upon exiting the Cavalier, he pointed his gun at the group with Mr. Lynch in order to get them to disperse. Mr. Lynch's companions fled the scene immediately, but Mr. Lynch remained.

There was conflicting testimony as to what happened next. Multiple witnesses testified that Defendant pulled on the slide of his gun to cock it and then pointed the gun at Mr. Lynch. One witness testified that Defendant next tried to pull the trigger three or four times, but the gun jammed and did not fire. Defendant testified that he tried to cock the gun after Mr. Lynch's companions began running, but the slide itself was jammed and did not move in spite of his multiple efforts. Defendant also testified that he never pointed the gun at Mr. Lynch or tried to pull the trigger after the crowd dispersed.

Defendant then left in the Cavalier, along with the three men who were accompanying him. However, the police soon pulled over the

vehicle and took Defendant into custody. Upon performing a protective sweep of the Cavalier, one officer found Defendant's gun with its safety still on.

Defendant was indicted on 7 November 2011 for attempted first-degree murder. A jury found Defendant guilty of that charge on 20 March 2013. The following day, Defendant gave oral notice of appeal in open court.

II. Defective Indictment

A. Standard of Review

On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

B. Analysis

[1] Defendant contends that the indictment against him for attempted first-degree murder was defective because it omitted an essential element of the offense: malice aforethought. The short form indictment against Defendant, in relevant part, states as follows: "The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to murder Timothy Lynch." By contrast, N.C. Gen. Stat. § 15-144 (2013), entitled "Essentials of bill for homicide," states that in the body of the indictment, "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law."

> The purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense. An indictment is insufficient if it fails to allege the essential elements of the crime charged as required by Article I, Section 22 of the North Carolina Constitution and our legislature in N.C.G.S. § 15-144. When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment.

State v. Bullock, 154 N.C. App. 234, 244–45, 574 S.E.2d 17, 23–24 (2002) (citations omitted).

In this case, the indictment on its face failed to include the essential element of "malice aforethought" as required by Article I, Section 22 of the North Carolina Constitution, N.C.G.S. § 15-144, and *Bullock*. As a result, just as in *Bullock*, we arrest the judgment in Defendant's attempted first-degree murder conviction. *See id.* at 245, 574 S.E.2d at 24 (arresting the judgment in an attempted first-degree murder conviction where the short form indictment failed to allege that the defendant acted with malice aforethought).

However, again, as in *Bullock*, "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *Id.* Voluntary manslaughter consists of an unlawful killing without malice, premeditation, or deliberation. *See id.* (citing *State v. Robbins*, 309 N.C. 771, 777, 309 S.E.2d 188, 191 (1983)). Because the jury's guilty verdict of attempted first-degree murder necessarily means that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter, we remand this matter to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter. *See id.* (citing *State v. Wilson*, 128 N.C. App. 688, 696, 497 S.E.2d 416, 422 (1998)).

III. Ineffective Assistance of Counsel

A. Standard of Review

On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo. *See State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983).

B. Analysis

[2] In his next assignment of error, Defendant contends that he received ineffective assistance of counsel at trial, purportedly because his counsel made concessions of Defendant's guilt during closing arguments without Defendant's express consent. Specifically, during closing arguments, Defendant's counsel told the jury:

> You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun. Pointing the gun with what was some sort of guilt in mind, some intent to use the gun, that can be a crime: Assault with a deadly weapon, intent to kill.
>
> So if this guilty mind points a weapon at someone, assault with a deadly weapon, intent to kill. But, again, what are

> we here for? Attempted first-degree murder of Timothy Lynch. And you're thinking to yourself, those of you who have worked with attorneys, those lawyers need to split hairs. Mr. Green was talking about my client splitting hairs; maybe I am.
>
> But, ladies and gentlemen, this is a case about details. Hopefully, you saw that with the questions that I was asking witnesses. Attempted first-degree murder, intent to kill, pointing the weapon at Timothy Lynch. This is mere preparation; moving the slide. Moving the slide is mere preparation.
>
> The Judge will instruct you on that; mere preparation is not enough. Intent to kill. [T]here has to -- what is that? Mr. Green argued to you in his opening statement and so did I is the pulling of the trigger. That is what this case is about.
>
> Guilty mind, intent to kill Timothy Lynch by my client pointing the weapon at Timothy Lynch. Not moving the slide; pointing, clicking the trigger. That is what this case is about, amd [sic] that is also what you'll need to decide if that has been proven beyond a reasonable doubt.

"In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986), [the North Carolina Supreme Court] held that a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser-included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002). Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error. *See State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986) ("Although counsel stated [at closing that] there was malice, he did not admit guilt . . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]").

In the case before us, Defendant's trial counsel did state that "my client basically admit[ed] that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Notably, at trial, Defendant testified and openly admitted to pointing a gun at the crowd with Mr. Lynch in order to get them to disperse. Although Defendant's counsel used the singular "someone" to describe those at whom Defendant pointed a gun, dispersing the crowd was the only time

Defendant admitted to pointing the gun at anyone. Indeed, throughout direct and cross-examination, Defendant consistently denied that he pointed the gun at Mr. Lynch after the crowd dispersed, despite the State's repeated attempts to elicit such an admission.

Defendant was not charged with the offense of assault by pointing a gun at the crowd; he was charged with attempted first-degree murder of Mr. Lynch after the crowd dispersed. Even if we were to assume *arguendo* that Mr. Lynch was in fact the "someone" referred to by Defendant's trial counsel, assault by pointing a gun is not a lesser-included offense of attempted first-degree murder. *Cf. State v. Dickens*, 162 N.C. App. 632, 638, 592 S.E.2d 567, 572 (2004) (holding that "[a]ssault by pointing a gun is not a lesser-included offense of assault with a firearm on a law enforcement officer because the latter offense *does not include the element of pointing a gun at a person*." (emphasis added)). Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*. At best, an admission by Defendant's trial counsel that Defendant pointed a gun at Mr. Lynch, while still maintaining Defendant's innocence of attempted first-degree murder, would appear to place counsel's statements within the rule in *Fisher*, and thus still outside of *Harbison*. *See Fisher* at 533, 350 S.E.2d at 346 (finding no *Harbison* error where the defendant's counsel admitted an element of first-degree murder at trial but still maintained the defendant's innocence).

Also, the declaration by Defendant's trial counsel that "[p]ointing the gun with what was some sort of guilt in mind, some intent to use the gun, that *can* be a crime: Assault with a deadly weapon, intent to kill" was merely a hypothetical statement, not an admission. (emphasis added). Next, counsel described the crime with which Defendant had been charged: "Attempted first-degree murder, intent to kill, pointing the weapon at Timothy Lynch" and then contrasted this to Defendant's theory of the case that Defendant's acts during the incident with Mr. Lynch amounted to "mere preparation; moving the slide. Moving the slide is mere preparation." Here, too, Defendant himself testified that he tried to move the slide on the gun after pointing it at the crowd.

Defendant's counsel concluded by highlighting the key point: "Guilty mind, intent to kill Timothy Lynch by my client pointing the weapon at Timothy Lynch. Not moving the slide; [but] pointing, clicking the trigger. . . . [Y]ou'll need to decide if that has been proven beyond a reasonable doubt."

In total, and despite Defendant's contention that his trial counsel admitted Defendant "pointed a gun at Timothy Lynch with the intent to kill him," we find no such admission in the record before us. Although Defendant's counsel's statements were less than clear at closing, none of his statements amount to *Harbison* error.

We find no other basis for supporting Defendant's claim of ineffective assistance of counsel.

Judgment arrested on attempted first-degree murder; remanded for sentencing and entry of judgment on attempted voluntary manslaughter.

Judges BRYANT and STROUD concur.

TRILLIUM RIDGE CONDOMINIUM ASSOCIATION, INC., PLAINTIFF
v.
TRILLIUM LINKS & VILLAGE, LLC; TRILLIUM CONSTRUCTION COMPANY LLC; SHAMBURGER DESIGN STUDIO, P.C., SHAMBURGER DESIGN, INC. (FKA SHAMBURGER DESIGN STUDIO, INC.), S.C. CULBRETH JR., GREGORY A. WARD, DEFENDANTS

No. COA14-183

Filed 16 September 2014

1. Appeal and Error—preservation of issues—notice of summary judgment motion not given—objection waived

Plaintiff waived the right to object to the lack of timely notice of defendant's effort to obtain summary judgment. Plaintiff failed to object to the adequacy of the notice or request additional time, participated in the hearing, and addressed the issues raised by defendant's motion on the merits.

2. Construction Claims—negligent construction—developer's liability—supervision of construction—summary judgment

The trial court erred by granting summary judgment in favor of defendant and developer Trillium Links with respect to a claim for negligent construction of condominiums. Although Trillium Links argued that a developer does not owe a legal duty to a condominium unit purchaser, the persons responsible for supervising construction are obligated to comply with the Building Code and there was of a genuine issue of material fact concerning the extent to which Trillium Links supervised the construction project.

3. Construction Claims—gross negligence—summary judgment—no specific acts or omissions alleged

The trial court did not err by granting summary judgment in favor of developer and defendant Trillium Links on plaintiff's gross negligence claim arising from the construction of condominiums. Aside from simply asserting that Trillium Links acted in a grossly negligent fashion, plaintiff did not point to any specific act or omission by Trillium Links which it contended was grossly negligent.

4. Statutes of Limitation and Repose—summary judgment—notice of construction defects—issue of material fact

The trial court erred by granting summary judgment for defendant Trillium Links (the developer) and Trillium Construction (the general contractor) on statute of limitations grounds on plaintiff's negligent construction claims. The evidence demonstrated the existence of a genuine issue of material fact concerning the accrual of the negligent construction claim more than three years before the date upon which the complaint was filed.

5. Statutes of Limitation and Repose—unsafe improvement to real property—statute of repose

Plaintiff's negligent construction claims against a developer and a builder sought recovery arising from an allegedly defective or unsafe improvement to real property, and those claims were within the ambit of the statute of repose in N.C.G.S. § 1-50(a)(5)(a).

6. Statutes of Limitation and Repose—statute of repose—substantial completion of building—certificate of occupancy

Plaintiff failed to assert its negligent construction claim within the six year statute of repose for two buildings in a condominium complex where certificates of occupancy were issued seven years before the certificates of occupancy were issued. A building is substantially complete when a certificate of occupancy is issued.

7. Statutes of Limitation and Repose—negligent construction claim—last act—repair to deck—original contract not produced

In a negligent construction claim involving a statute of repose issue, there was no basis for determining that the "last act" occurred later than the date of substantial completion where plaintiff argued that repairs to a deck might have been required under the original contract, which was never produced. Plaintiff had the burden of proof.

8. Statutes of Limitation and Repose—repose—negligent construction—possession of control exception—developer and contractor

Although defendant Trillium Construction (the general contractor) was entitled to rely on the statute of repose as a defense to plaintiff's negligent construction claims relating to two condominium buildings, the extent to which the "possession or control" exception to the statute of repose defense applies to Trillium Links (the developer) was a question for the jury.

9. Estoppel—equitable—statutes of limitation and repose—property damage report—information not hidden

Trillium Links, a developer, was not equitably estopped from asserting the statute of limitations or statute of repose in opposition to plaintiff's negligent construction claims. Although plaintiff argued that defendants were equitably estopped from asserting either the statute of limitations or the statute of repose because plaintiff's property manager reviewed a consultant's report and advised the homeowners association (plaintiff) that he believed that further investigation would not be necessary, plaintiff's entire board received the consultant's report. Additionally, the record was devoid of information tending showing that plaintiff was induced to delay the filing of its action by misrepresentations of Trillium Links.

10. Estoppel—equitable—negligent construction—concealment of defects—plaintiff's notice of defects—summary judgment

The trial court erred by granting summary judgment for defendant Trillium Construction (a general contractor) with respect to whether it was estopped from asserting the statute of limitations or the statute of repose in a negligent building claim where plaintiff argued that Trillium Construction had actively concealed its defective work. However, given the determination elsewhere in this opinion that there were issues of fact as to whether a consultant's report put plaintiff on notice of the defects, issues of fact existed as to whether plaintiff lacked knowledge and the means of knowledge sufficient to bar either defense.

11. Associations—homeowners—fiduciary duties—overlapping board members and development principals

The trial court erred by granting summary judgment on breach of fiduciary duty claims against two of plaintiff homeowner's board members who were also principals in the development of the

community, in an action arising from construction defects. The evidence, viewed in the light most favorable to plaintiff, created a genuine issue of fact concerning whether and to what extent those board members breached a fiduciary duty by failing to disclose relevant information in their possession.

12. Construction Claims—building defects—fiduciary duty of developer—summary judgment

The trial court erred by granting summary judgment for defendant Trillium Links on breach of fiduciary claims arising from building defects in condos where Trillium Links was the developer of the community in which the affected condos were located. The record contained sufficient evidence from which the existence of a fiduciary duty between the developer and the homeowners association could be established in that Trillium Links had a position of dominance over plaintiff homeowners association and that individual unit owners or prospective unit owners had little choice but to rely upon Trillium Links to protect their interests during the period of developer control.

13. Statutes of Limitation and Repose—breach of fiduciary claims—knowledge of building defects—summary judgment

The trial court erred by granting summary judgment on statute of limitations grounds for two of the principals in the development of a community and their company, Trillium Links, concerning breach of fiduciary duty claims arising from construction defects. There were issues of fact concerning the date upon which plaintiff homeowners association knew or had reason to believe that extensive defects existed in the condominium buildings.

14. Fraud—constructive—building defects—no evidence of intent to benefit

Plaintiff homeowners association failed to forecast sufficient evidence to establish a constructive fraud claim governed by a ten year statute of limitations rather than a breach of fiduciary duty governed by a three year statute of limitations where it did not adduce any evidence tending to show that defendants sought to benefit themselves in the transaction.

15. Warranties—construction defects—knowledge of defects—issue of fact—statutes of limitation and repose

Trillium Links (the developer of a community) was not entitled to summary judgment in its favor on plaintiff's breach of warranty

claims based on the statute of limitations or the statute of repose. There was an issue of material fact about the date when plaintiff knew or should have known of construction defects.

HUNTER, JR., Robert N., Judge, concurring in part and concurring in result only in part in separate opinion prior to 6 September 2014.

Appeal by plaintiff from orders entered 20 August 2013 and amended orders entered 12 September 2013 by Judge Marvin P. Pope, Jr., in Jackson County Superior Court. Heard in the Court of Appeals 5 June 2014.

Kilpatrick Townsend & Stockton LLP, by Dustin T. Greene, David C. Smith, and Richard D. Dietz, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Luke Sbarra, for Defendant Trillium Links & Village, LLC.

Marc J. Meister, PLLC, by Marc J. Meister, for Defendant Trillium Construction Company, LLC.

Northup, McConnell & Sizemore, P.L.L.C., by Robert E. Allen, for Defendants Ward and Culbreth.

ERVIN, Judge.

Plaintiff Trillium Ridge Condominium Association, Inc., appeals from orders and amended orders granting summary judgment in favor of Defendants Trillium Construction Company, LLC; Trillium Links & Village, LLC; and S.C. Culbreth, Jr., and Gregory A. Ward. On appeal, Plaintiff argues that Defendants' motions for summary judgment should have been denied for the following reasons: (1) Trillium Construction's motion for summary judgment was filed in an untimely manner; (2) Plaintiff's claims are not time-barred; (3) Mr. Culbreth and Mr. Ward breached the fiduciary duty that they owed to Plaintiff; (4) Trillium Links breached the fiduciary duties that it owed to Plaintiff; (5) Trillium Construction and Trillium Links constructed the condominiums in a negligent manner; (6) Trillium Links is liable for breach of warranty; (7) claims based on defects in buildings 100 and 200 are not barred by the applicable statute of repose; (8) summary judgment based on contributory negligence was improper; and (9) Trillium Construction's failure to

mitigate its damages does not support an award of summary judgment.[1] After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders and amended orders should be affirmed in part and reversed in part and that this case should be remanded to the Jackson County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

The Trillium Development is a private residential, lake, and golf community located in Cashiers. The Trillium Development was founded in 1996 and consists of approximately 270 private residences, including homes, townhouses, and condominiums. Trillium Ridge Condominiums, the subject of this appeal, is one of several condominium complexes located in the Trillium Development. The Trillium Ridge Condominiums consist of 22 individual units contained in six buildings identified as Building Nos. 100, 200, 300, 400, 500, and 600 and multiple common elements. The Trillium Ridge Condominiums were constructed in two phases, with Building Nos. 100 and 200 having been constructed during the first phase and Buildings Nos. 300 through 600 having been constructed during the second phase.

Trillium Links, the developer of Trillium Ridge, filed a Declaration for the Trillium Ridge Condominiums on 12 February 2004. Trillium Links was owned and controlled by Mr. Culbreth and Mr. Ward along with two other individuals, Dan Rice and Morris Hatalsky.[2] During the period of construction, Mr. Culbreth and Mr. Ward held the principal ownership interests in Trillium Links. The Declaration allowed Trillium Links, as developer-declarant, the right to appoint officers to Plaintiff's executive board. As a result, Trillium Links appointed Mr. Culbreth and Mr. Ward to serve as Plaintiff's sole initial officers and directors, and

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1. Trillium Construction has not defended any rulings that the trial court may have made in its favor based on contributory negligence and failure to mitigate damages for purposes of this appeal. As a result of the fact that the record does not support a determination that Plaintiff was contributorily negligent as a matter of law and the fact that a failure to mitigate damages is a defense to the size of a damage award rather than a bar to liability, the trial court's decision to grant summary judgment in favor of Trillium Construction cannot be affirmed on the basis of either contributory negligence or any failure on Plaintiff's part to take appropriate steps to mitigate its damages.

2. Mr. Rice was a building contractor who served as the sole member and manager of Trillium Construction. Mr. Hatalsky is a golf course designer.

they continued to act in that capacity until Trillium Links turned control of Plaintiff over to the unit owners on 24 February 2007.

Trillium Construction was solely owned by Mr. Rice, who also owned a minority interest in Trillium Links.[3] Trillium Links and Trillium Construction operated out of the same offices and used the same mailing address, phone number, and website. In 2003, Trillium Links hired Trillium Construction to serve as the general contractor for the construction of the Trillium Ridge Condominiums. Although Trillium Links and Trillium Construction executed a contract providing for the construction of each building, the contract documents have not been located and are presumed to have been destroyed as a result of water damage.

In October 2004, a report from Structural Integrity Engineering, P.A., was delivered to Trillium Construction and to Mr. Culbreth and Mr. Ward individually. According to the Structural Integrity report, a failure to install two foundation piers in Building No. 100 had resulted in a sagging floor. Although Structural Integrity confirmed that these piers were replaced in 2005, it noted that its report "should not be construed as an implication that there are no deficiencies or defects at other locations in this structure."

On 24 February 2007, Trillium Links turned over control of Plaintiff to the unit owners. No information regarding the foundation problems in Building No. 100 or the Structural Integrity report was disclosed to the new board. After control had been transferred to the unit owners, Plaintiff decided to study future maintenance requirements and commissioned Miller+Dodson to perform a reserve study for the condominiums. According to the Miller+Dodson report, the condominiums' wooden siding had a shorter remaining economic life than Plaintiff had anticipated given the type of siding that had been installed.

After receiving the Miller+Dodson report, Plaintiff asked Freddie Boan, the Association's secretary and a Trillium Links employee, to retain an expert for the purpose of providing a second opinion concerning the expected useful life of the wooden siding. As a result, Mr. Boan hired Andy Lee, a professor of forest products at Clemson University, to inspect the siding. On 5 November 2007, Professor Lee delivered a report to Plaintiff in which he discussed certain siding-related issues, including the fact that "some metal flashings are either too narrow or missing, which require immediate corrections." In addition, Professor Lee noted

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3. Mr. Rice died in May 2008, leaving Trillium Construction without a member or manager. As of April 2013, Trillium Construction had been dissolved.

that, at many locations, the bottoms of the siding pieces either touched or were too close to the ground and recommended that this problem be corrected. Finally, Professor Lee concluded that, if the problems were corrected, the wood sidings should last "thirty (30) years or longer."

According to Mr. Boan, all of the members of Plaintiff's board received the Lee Report and were made aware of the flashing defects. Upon receiving the Lee Report, James Tenney, who had been elected to the board after control of the development had been transferred to Plaintiff, talked about the situation with Mr. Boan. After discussing the available options with Professor Lee, Mr. Boan decided that the existing problems could be remedied by continuously caulking over the problematic flashings. In addition, Mr. Boan reached the conclusion that Plaintiff did not need to procure additional inspections of the buildings. As a result, Plaintiff had the problematic flashings caulked over "either prior to or at the time we did the painting in March of 2008."

In approximately October 2010, leaks were discovered in Building Nos. 100 and 300. Upon further investigation, extensive water damage and rotting was discovered. The similarity between the leaks in the two buildings led Mr. Boan to advise Mr. Tenney that the problem might not be a localized one. As a result, Mr. Tenney hired an engineer to inspect the property. On 19 October 2010, Sydney E. Chipman, P.E., submitted a report detailing his findings concerning the condition of Building No. 100. In his report, Mr. Chipman indicated that "[i]mproper flashing details at the doors, windows, and horizontal transitions" had caused serious water damage and that these defects were "probably endemic throughout the community." Subsequent inspections disclosed the existence of numerous defects in the original construction of the condominium buildings.

B. Procedural History

On 3 August 2011, Plaintiff filed a complaint against Trillium Links; Trillium Construction; Mr. Culbreth; Mr. Ward; Shamburger Design Studio, P.C.; and Shamburger Design, Inc.[4] In its complaint, Plaintiff asserted claims for breach of warranty against Trillium Links; negligent construction against Trillium Links, Trillium Construction, and the Shamburger Defendants; gross negligence against Trillium Links; and breach of fiduciary duty against Mr. Culbreth, Mr. Ward, and Trillium Links. On 6 October 2011, 10 October 2011, and 12 December 2011,

4. The Shamburger defendants were involved in designing the condominium buildings. Shamburger Design Studio was never served and an entry of default was made against Shamburger Design on 9 January 2012.

respectively, Mr. Culbreth and Mr. Ward, Trillium Links, and Trillium Construction filed answers in which they denied the material allegations of Plaintiff's complaint and asserted various affirmative defenses.

On 9 October 2012, Trillium Construction filed a motion seeking partial summary judgment in its favor with respect to all negligent construction claims relating to Building Nos. 100 and 200. On 18 January 2013, Trillium Construction withdrew its partial summary judgment motion based upon the expectation that the Chief Justice would designate this case as exceptional pursuant to Rule 2.1 of the General Rules of Practice. On 8 March 2013, the Chief Justice designated this case as exceptional and transferred responsibility for it to the trial court.

On 1 July 2013, Mr. Culbreth and Mr. Ward filed motions for summary judgment, or in the alternative, partial summary judgment. On 22 July 2013, Trillium Links filed a motion for summary judgment. On 9 August 2013, Trillium Construction filed a revised motion for summary judgment. On 14 August 2013, Plaintiff filed materials in opposition to these summary judgment motions. On 16 August 2013, Plaintiff filed a response to Trillium Construction's summary judgment motion.

The pending summary judgment motions came on for hearing before the trial court at the 19 August 2013 civil session of the Jackson County Superior Court. On 20 August 2013, the trial court entered orders granting summary judgment in favor of Mr. Culbreath, Mr. Ward, Trillium Construction, and Trillium Links with respect to all of Plaintiff's claims and granting partial summary judgment in favor of Trillium Construction with respect to Plaintiff's claims relating to Building Nos. 100 and 200. On 12 September 2013, the trial court entered amended orders granting summary judgment in favor of Mr. Culbreath, Mr. Ward, Trillium Construction, and Trillium Links, granting partial summary judgment in favor of Trillium Construction, and certifying its order for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). On 18 September 2013, Plaintiff noted an appeal to this Court from the trial court's orders and amended orders.[5]

II. Substantive Legal Analysis

On appeal, Plaintiff argues that the trial court erred by granting Defendants' summary judgment motions. More specifically, Plaintiff

5. As a result of the fact the trial court properly certified its orders for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the fact that Plaintiff's appeal has been taken from an interlocutory order is no bar to our consideration of this case on the merits.

argues that Trillium Construction's motion for summary judgment was untimely; that Plaintiff's claims are not barred by the applicable statute of limitations or statute of repose; and that the evidentiary forecast presented for the trial court's consideration established that Mr. Culbreth and Mr. Ward had breached a fiduciary duty owed to Plaintiff, that Trillium Links had breached a fiduciary duty owed to Plaintiff, and that Trillium Construction and Trillium Links had negligently constructed the condominium buildings. We will address each of Plaintiff's arguments in turn.

A. Standard of Review

"A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 3, 714 S.E.2d 438, 440 (2011). As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004). "Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). " 'When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate.' " *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P'ship*, 134 N.C. App. 391, 394, 518 S.E.2d 17, 21 (1999) (quoting *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 391 (1985), *overruled in part on other grounds in N.C. Dept. of Transp. v. Rowe*, 351 N.C. 172, 177, 521 S.E.2d 707, 710 (1999)), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000). We review orders granting or denying summary judgment using a *de novo* standard of review, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), under which "this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Burgess v. Burgess*,

205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Timeliness

[1] As an initial matter, Plaintiff contends that Trillium Construction's summary judgment motion was untimely. Although Trillium Construction acknowledges having failed to provide notice of its effort to obtain summary judgment in its favor in a timely manner, it contends that Plaintiff has waived the right to object to the lack of timely notice. Trillium Construction's argument is persuasive.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c), a motion for summary judgment must be served at least ten days before the time fixed for hearing. N.C. Gen. Stat. § 1A-1, Rule 56(c). In the event that service is effectuated by mail, three days must be added to the prescribed notice period. N.C. Gen. Stat. § 1A-1, Rule 6(e). However, "[t]he notice required by [N.C. Gen. Stat. § 1A-1,] Rule 56(c) of the North Carolina Rules of Civil Procedure may be waived 'by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party.' " *Patrick v. Ronald Williams, Prof'l Ass'n*, 102 N.C. App. 355, 367, 402 S.E.2d 452, 459 (1991) (quoting *Westover Products v. Gateway Roofing*, 94 N.C. App. 163, 166, 380 S.E.2d 375, 377 (1989)).

As a result of the fact that Trillium Construction mailed its summary judgment motion on 9 August 2013 and the fact that the hearing on that motion was scheduled for 19 August 2013, Trillium Construction concedes, as it must, that it failed to serve its summary judgment motion in a timely manner. At the beginning of the summary judgment hearing, Plaintiff informed the trial court that Trillium Construction had failed to serve its summary judgment motion in accordance with the statutorily prescribed deadline. However, Plaintiff did not object to the adequacy of the notice that it had received or request additional time within which to respond to Trillium Construction's motion, participated in the hearing, and addressed the issues raised by Trillium Construction's motion on the merits.[6] As a result of Plaintiff's failure to object to the lack of notice or to request additional time and its decision to participate in the hearing, *Patrick*, 102 N.C. App. at 367, 402 S.E.2d at 459, Plaintiff waived the right to object to Trillium Construction's summary judgment motion on notice-related grounds. As a result, the trial court's decision to grant

6. Although Plaintiff mentioned the timeliness issue in its rebuttal argument before the trial court, it conceded that "we've addressed the issues."

summary judgment in Trillium Construction's favor should not be disturbed on timeliness grounds.

C. Negligent Construction Claims

Next, Plaintiff argues that the trial court erred by granting summary judgment in favor of Trillium Links and Trillium Construction on the grounds that Trillium Links and Trillium Construction were negligent, and that Trillium Links was grossly negligent, during the construction of the condominiums. Although Plaintiff's gross negligence claim lacks merit, the trial court erred by granting summary judgment in favor of Trillium Links and Trillium Construction with respect to Plaintiff's negligent construction claims.

1. Finding of Liability

a. Negligence

[2] "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). " 'In the absence of a legal duty owed to the plaintiff by [the defendant], [the defendant] cannot be liable for negligence.' " *Id.* (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 631-32, 507 S.E.2d 882, 892 (1998)).

According to Trillium Links, a developer does not owe a legal duty to a condominium unit purchaser and cannot, for that reason, be held liable for negligence. In support of this assertion, Trillium Links notes that Plaintiff has not cited any support for its contention that such a duty exists. On the other hand, Plaintiff points out that the Building Code " 'imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the Code such that the violation proximately causes injury or damage,' " *Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (quoting *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 863 (1988)), *disc. review denied*, 354 N.C. 363, 556 S.E.2d 302 (2001), and that a violation of the Building Code constitutes negligence *per se*. *Oates v. Jag, Inc.*, 314 N.C. 276, 280, 333 S.E.2d 222, 225 (1985). As a result, any person responsible for supervising a construction project is subject to being held liable on a negligent construction theory.

According to Plaintiff, the record contains evidence tending to show that Trillium Links supervised the construction of the Trillium Ridge

condominiums. More specifically, Plaintiff notes that Trillium Links hired Neill Dalrymple to work on the Trillium Ridge condominium construction project; that Mr. Dalrymple's "Construction duties & responsibilities" made him "[r]esponsible & accountable" for the Trillium Ridge project, among others; and that Mr. Dalrymple "ha[d] the authority to stop any construction activity at any time to clear up any misunderstandings or expectations or under other terms when he acts on behalf of [Trillium Links]." According to Mr. Culbreth, if Mr. Dalyrmple "knowingly saw something that was wrong[,] he could stop it just like a QA, QC officer." In addition, Trillium Links charged Trillium Construction more than $80,000.00 for acting as an "Asst Project Manager" during the construction of Buildings 100 and 200. As Plaintiff suggests, this evidence, when viewed in the light most favorable to Plaintiff, is sufficient to establish the existence of a genuine issue of material fact concerning the extent to which Trillium Links supervised the construction project and whether Trillium Links could lawfully be held liable for negligent construction based upon alleged Building Code violations.

In seeking to persuade us to reach a different result, Trillium Links argues, in reliance upon *Lassiter*, that, even if it were required to adhere to the Building Code, the fact that a Code violation occurred did not establish the existence of a legally effective duty of care. *Lassiter* does not, however, control the present issue given that the plaintiffs in that case never came under the protection of the Building Code because their house was never completed. *Lassiter*, 145 N.C. App. at 684, 551 S.E.2d at 223-24. As a result, since persons responsible for supervising construction are obligated to comply with the Building Code and since the necessity for compliance with the Building Code clearly creates a compliance obligation applicable to supervisory personnel, we hold that the trial court erred by granting summary judgment in Trillium Links' favor with respect to the negligent construction issue.

b. Gross Negligence

[3] In addition, Plaintiff argues that Trillium Links is liable for gross negligence, which consists of "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551 (1999). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (citations omitted). Aside from simply asserting that Trillium Links acted in a grossly negligent fashion, however, Plaintiff has not pointed to any specific act or omission on the part of Trillium Links which it contends to have been grossly negligent. As a

result, given Plaintiff's failure to identify any act or omission on the part of Trillium Links that was "done with conscious or reckless disregard for the rights and safety of others," *Parish*, 350 N.C. at 239, 513 S.E.2d at 551, we conclude that the trial court did not err by granting summary judgment in favor of Trillium Links with respect to Plaintiff's gross negligence claim.

2. Statute of Limitations and Repose

a. Statute of Limitations

[4] Next, Trillium Links and Trillium Construction argue that, even if they owed a legally recognized duty to Plaintiff, Plaintiff's negligent construction claim was barred by the applicable statute of limitations. Plaintiff, on the other hand, contends that the record reflects the existence of genuine issues of material fact concerning the date upon which its negligent construction claims against Trillium Links and Trillium Construction accrued for purposes of the statute of limitations. We believe that Plaintiff has the better of this disagreement.

"The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Crawford v. Boyette*, 121 N.C. App. 67, 70, 464 S.E.2d 301, 303 (1995), *cert. denied*, 342 N.C. 894, 467 S.E.2d 902 (1996). "As a general proposition, an order [granting summary judgment] based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Williams*, 213 N.C. App. at 4, 714 S.E.2d at 440 (internal quotations omitted). On the other hand, when the evidence "is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Hatem v. Bryan*, 117 N.C. App. 722, 724, 453 S.E.2d 199, 201 (1995).

Negligent construction claims resulting from physical damage to the plaintiff's property are subject to the three year statute of limitations set out in N.C. Gen. Stat. § 1-52(16), with such claims accruing when "bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643, 643 S.E.2d 28, 33 (quoting N.C. Gen. Stat. § 1-52(16)), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). In support of their contention that Plaintiff's negligent construction claims are time-barred, Trillium Links and Trillium Construction argue that Plaintiff had actual notice of the existence of

construction defects, consisting of missing or inadequate flashings, in the condominium buildings as of 5 November 2007, when the Lee Report was delivered.

As we have already noted, the Lee Report pointed out that "[s]ome metal flashings are either too narrow or missing, which require immediate corrections" and that "some bottom pieces of wood sidings in many locations either touched the ground or are too close to the ground." On the other hand, Dr. Lee expressed the "opinion that these wood sidings are in good to excellent condition, with the exceptions of the problems outlined in the above observations," and stated that, in the event that the problems delineated in the report were to be corrected, the sidings should last "thirty (30) years or longer." According to Trillium Links and Trillium Construction, this information provided Plaintiff with notice that the Trillium Ridge condominiums suffered from construction defects sufficient to put Plaintiff on notice of the negligent construction claims that have been asserted in this case and triggering the running of the applicable statute of limitations with respect to those claims.

On the other hand, Plaintiff argues that the problems outlined in the Lee Report were corrected and that it did not have notice of the problems that prompted the assertion of the present claims until 2010, at which point Plaintiff hired an engineer and discovered the existence of extensive problems in other condominium buildings. According to the evidentiary forecast upon which Plaintiff relies in support of this contention, Mr. Tenney, acting in his capacity as President of Plaintiff's board, reviewed the Lee Report, informed his colleagues about the flashing problems outlined in that document, and obtained their agreement that the continuous caulking approach recommended by Professor Lee should be adopted. In addition, the record reflects that Mr. Boan did not believe, after learning of the flashing-related defects, that any additional investigation was necessary. Mr. Tenney testified that neither Mr. Boan nor Mr. Lee ever advised Plaintiff that there was any reason to conduct a more extensive investigation concerning the possibility that there were defects in the other buildings at that time. Finally, Plaintiff notes that multiple construction defects outlined in its complaint bore no relation to the flashing problems discussed in the Lee Report. We believe that this evidence, when viewed in the light most favorable to Plaintiff, demonstrates the existence of a genuine issue of material fact concerning the extent, if any, to which the negligent construction claim that Plaintiff seeks to assert against Trillium Links and Trillium Construction accrued more than three years before the date upon which the complaint was filed. As a result, the trial court erred by granting summary judgment with

respect to Plaintiff's negligent construction claims in favor of Trillium Links and Trillium Construction on statute of limitations grounds.

b. Statute of Repose

[5] Next, Plaintiff argues that the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5)(a) does not bar Plaintiff's negligent construction claims relating to Building Nos. 100 and 200 against Trillium Construction and Trillium Links.[7] N.C. Gen. Stat. § 1-50(a)(5)(a) provides that "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement," N.C. Gen. Stat. § 1-50(a)(5)(a), with an action based upon or arising out of the defective or unsafe condition of an improvement to real property "[f]or purposes of this subdivision" having been defined to include an "[a]ction[] to recover damages for negligent construction or repair of an improvement to real property." N.C. Gen. Stat. § 1-50(a)(5)(b)(2). "'[N.C. Gen. Stat. § 1-50(a)(5)(a)] is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms.'" *Roemer v. Preferred Roofing, Inc.*, 190 N.C. App. 813, 815, 660 S.E.2d 920, 923 (2008) (quoting *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861, *disc. rev. denied*, 360 N.C. 545, 635 S.E.2d 62 (2006)). A statute of repose "is a substantive limitation that establishes a time frame in which an action must be brought to be recognized." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). As a result, given that the negligent construction claims that Plaintiff has asserted against Trillium Links and Trillium Construction seek recovery arising from an allegedly defective or unsafe improvement to real property, those claims come within the ambit of N.C. Gen. Stat. § 1-50(a)(5)(a).

"Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (internal citations omitted). "Under the statute, a plaintiff has the burden of showing that he or she brought the action within six years of either (1) the substantial completion of the house or (2) the specific last act or omission of defendant

7. As a result of the fact that the claims that Plaintiff has asserted against them sound in breach of fiduciary duty rather than defective construction, Mr. Culbreth and Mr. Ward have not asserted a statute of repose defense in their brief.

giving rise to the cause of action." *Boor v. Spectrum Homes, Inc.*, 196 N.C. App. 699, 705, 675 S.E.2d 712, 716 (2009). In the event that Plaintiff fails to establish that it had asserted its claim before the expiration of the statute of repose, its claim is "insufficient as a matter of law." *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990).

i. Substantial Completion

[6] As an initial matter, Trillium Links and Trillium Construction contend that Plaintiff has failed to bring its claim related to Building Nos. 100 and 200 within six years of the date upon which those buildings were substantially completed. N.C. Gen. Stat. § 1–50(a)(5(c) defines "substantial completion" as being "that degree of completion of a project, improvement or specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended." N.C. Gen. Stat. § 1-50(a)(5)(c). As this Court had previously held, a building is "substantially complete" on the date upon which a certificate of occupancy has been issued. *Boor*, 196 N.C. App. at 705, 675 S.E.2d at 716 (finding that the date of substantial completion for purposes of N.C. Gen. Stat. § 1–50(a)(5) was the date upon which the certificate of occupancy was issued); *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999) (holding that a house was substantially completed for purposes of N.C. Gen. Stat. § 1–50(a)(5) upon the issuance of a certificate of compliance), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). According to the record developed before the trial court, certificates of occupancy were issued for Building No. 100 between 17 August and 23 August 2004 and for Building No. 200 between 11 February and 30 March 2004. As a result of the fact that Building Nos. 100 and 200 were substantially completed nearly seven years before Plaintiff commenced this action on 3 August 2011, Plaintiff failed to assert its negligent construction claim within six years of the date upon which Building Nos. 100 and 200 were substantially completed.

ii. Last Act or Omission

[7] According to Plaintiff, Trillium Construction's last act with respect to Building No. 200 occurred when it repaired Mr. Tenney's deck in 2006. Although the expression "last act or omission" has not been statutorily defined, this Court has stated that, "[i]n order to constitute a last act or omission, that act or omission must give rise to the cause of action." *Nolan*, 135 N.C. App. at 79, 518 S.E.2d at 793. As a result, although an act sufficient to affect the running of the statute of repose may occur after the date of substantial completion, "a 'repair' does not qualify as a

'last act' under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties" given that "allow[ing] the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240-41, 515 S.E.2d 445, 449-50 (1999). Even so, Plaintiff argues that, since the original construction contract was never produced, the repairs to Mr. Tenney's deck might have been required as part of the original contract and, therefore, could qualify as a "last act" for statute of repose purposes. However, given that Plaintiff "has the burden of showing that he or she brought the action within six years of . . . the specific last act or omission of defendant giving rise to the cause of action," *Boor*, 196 N.C. App. at 705, 675 S.E.2d at 716, we are unable to accept this contention. As a result, we have no basis for determining that the "last act" underlying Plaintiff's negligent construction claims occurred later than the date of substantial completion.

iii. Possession or Control

[8] Finally, Plaintiff argues that Trillium Links and Trillium Construction are not entitled to rely upon N.C. Gen. Stat. § 1-50(a)(5)(a) on the grounds that they retained "possession or control" over the condominium buildings. According to N.C. Gen. Stat. § 1-50(a)(5)(d), the statute of repose "shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition." N.C. Gen. Stat. § 1-50(a)(5)(d). As the Supreme Court has stated, "the purpose of the exclusion" is to impose a continuing duty "to inspect and maintain" on persons who, after having constructed an improvement, remain in possession of and control over that improvement. *Cage v. Colonial Bldg. Co., Inc. of Raleigh*, 337 N.C. 682, 685, 448 S.E.2d 115, 117 (1994). In support of this assertion, Plaintiff argues that Trillium Construction remained in "possession or control" of the condominiums by virtue of its "intermingled existence" with Trillium Links and that Trillium Links, as the declarant, had actual control over Plaintiff based upon its board appointment authority until the Association came under the control of the unit owners on 24 February 2007. On the one hand, we are unable to see how the fact that Trillium Construction had an "intermingled existence" has any tendency to show that it had possession of

or control over the condominium buildings after the completion of the construction process given the absence of any attempt on Plaintiff's part to pierce the corporate veil. On the other hand, while Trillium Links did, arguably, have possession of or control over the condominium buildings, the record discloses the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links knew or should have known of the existence of the defects upon which Plaintiff's claim rests. As a result, although we conclude that Trillium Construction is entitled to rely on the statute of repose as a defense to Plaintiff's negligent construction claims relating to Building Nos. 100 and 200, we further conclude that the extent to which the "possession or control" exception to the statute of repose defense applies to Trillium Links is a question for the jury. As a result, although Trillium Construction is entitled to rely on the statute of repose to the extent that it is not equitably estopped from doing so, there is a jury question concerning the extent to which Trillium Links is entitled to rely on the statute of repose.

c. Equitable Estoppel

[9] Next, Plaintiff argues that Defendants are equitably estopped from asserting either the statute of limitations or the statute of repose. Equitable estoppel may be invoked, in proper cases, to bar a defendant from relying upon the statute of limitations or statute of repose. *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987); *see also Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 209 N.C. App. 310, 319, 703 S.E.2d 883, 889, *disc. review denied*, 365 N.C. 202, 710 S.E.2d 21 (2011). "North Carolina courts 'have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against "stale" claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit.' " *White*, 166 N.C. App. at 305, 603 S.E.2d at 162 (quoting *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998)).

"The essential elements of equitable estoppel are: '(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.' " *Id.* (quoting *Friedland*, 131 N.C. App. at 807, 509 S.E.2d at 796-97). " 'The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.' " *Id.* (quoting *Friedland*, 131 N.C. App. at 807, 509 S.E.2d at 796-97). "In order for equitable estoppel to bar application

of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997).

In its brief, Plaintiff argues that Trillium Links should be estopped from asserting a statute of limitations or repose defense because its property manager, Mr. Boan, reviewed the Lee Report and advised the Association that he believed that further investigation would not be necessary. However, given that Plaintiff's entire board received the Lee Report and, for that reason, had the same information that was available to Trillium Links, we are unable to see how Trillium Links concealed any information that should have been made available to Plaintiff with respect to the Lee Report. In addition, the record is totally devoid of any information tending to show that Plaintiff was "induced to delay filing of the action by the misrepresentations of" Trillium Links. *Jordan*, 125 N.C. App. at 720, 482 S.E.2d at 739. As a result, Trillium Links is not equitably estopped from asserting the statute of limitations or statute of repose in opposition to Plaintiff's negligent construction claims.

[10] Similarly, Plaintiff argues that Trillium Construction should be estopped from asserting the statute of limitations or the statute of repose against Plaintiff on the grounds that Trillium Construction actively concealed its defective work from Plaintiff. In support of this assertion, Plaintiff points to evidence tending to show that Trillium Construction placed other building materials over subsurface construction defects before these defects could be observed. In addition, Plaintiff asserts that, on occasion, Trillium Construction learned that various defects needed to be repaired without either passing this information along to Plaintiff or ensuring that the defects in question were fixed. According to Plaintiff, this conduct deprived it of the opportunity to discover the defects in a more timely manner and, thus, delayed the filing of Plaintiff's action. Trillium Construction, on the other hand, argues that the Lee Report put Plaintiff on notice of the construction defects in 2007 and is, for that reason, precluded from asserting that it is equitably estopped from asserting the statute of limitations or statute of repose.

Given our determination that genuine issues of material fact exist as to whether or not the Lee Report put Plaintiff on notice of the existence of the construction-related defects described in its complaint, it follows that issues of fact exist as to whether Plaintiff lacked "knowledge and the means of knowledge as to the real facts in question" sufficient to establish that Trillium Construction is equitably estopped from asserting the statute of limitations or statute of repose in opposition to the negligent

construction claim that it has asserted against Trillium Construction. *White*, 166 N.C. App. at 305, 603 S.E.2d at 162. As a result, given that the record discloses the existence of a genuine issue of material fact concerning the extent to which Trillium Construction is estopped from asserting the statute of limitations or the statute of repose in opposition to Defendant's negligent construction claim, the trial court erred by granting summary judgment in favor of Trillium Construction with respect to this issue.

D. Breach of Fiduciary Duty

1. Individual Directors

[11] The only claim asserted against Mr. Culbreth and Mr. Ward in Plaintiff's complaint rests upon an alleged breach of the fiduciary duty that they owed to Plaintiff during their service as members of Plaintiff's board. "A fiduciary duty arises when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 60, 418 S.E.2d 694, 699 (internal quotation omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). According to N.C. Gen. Stat. § 47C-3-103(a), "[i]n the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions[,]" N.C. Gen. Stat. § 47C-3-103(a), with the duties imposed upon members of Plaintiff's board by the Declaration having included the "management, replacement, maintenance, repair, alteration, and improvement of the Common Elements."

Trillium Links, acting as declarant, appointed Mr. Culbreth and Mr. Ward to Plaintiff's board.[8] Mr. Culbreth and Mr. Ward argue that, given that Plaintiff had no role in the construction of the condominium buildings, they had no responsibility for the construction of those buildings or any obligation to hire inspectors or to otherwise oversee the construction process. In support of this position, Mr. Culbreth and Mr. Ward point to the testimony of Mr. Gentry, who indicated that, in his experience,

8. Although Plaintiff argues that, since Mr. Culbreth and Mr. Ward were also members of Trillium Links, this arrangement was "presumptively fraudulent," Plaintiff's expert, Marvin Gentry, testified that it is not improper for a developer or declarant to appoint its principals to serve on the board of a condominium association during the period of declarant control.

condominium associations do not typically participate in the original construction of the condominium buildings, and the absence of any evidence tending to show that Plaintiff had anything to do with the construction of the buildings during the period when the declarant retained control over Plaintiff.

In spite of the fact that Mr. Culbreth and Mr. Ward had no direct involvement in the construction of the condominium buildings, they did, as directors, have an obligation to disclose material facts regarding the existence of any construction defects of which they were aware to Plaintiff. *King v. Bryan*t, __ N.C. App. __, __, 737 S.E.2d 802, 809 (2013) (stating that an affirmative duty "to disclose all facts material to a transaction" is inherent in any fiduciary relationship); *Searcy v. Searcy*, 215 N.C. App. 568, 572, 715 S.E.2d 853, 857 (2011) (stating that "[a] duty to disclose arises where a fiduciary relationship exists between the parties to [a] transaction"). Although Mr. Culbreth and Mr. Ward do not dispute the existence of such a duty to disclose, they do argue that the record does not contain any evidence tending to show that they possessed any information concerning the existence of construction-related defects in the condominium buildings of the type alleged in the complaint. On the other hand, Plaintiff argues that Mr. Culbreth and Mr. Ward actually knew of material defects in the foundation of Building No. 100 and failed to disclose the existence of these problems to Plaintiff. For example, Mr. Culbreth and Mr. Ward acknowledge that they had received the Structural Integrity report, which noted that two foundation piers had not been installed in Building No. 100 and that a sagging floor had resulted from this omission. In addition, Mr. Tenney stated that the unit owner-controlled board was never informed by either of the prior directors that foundation problems had been discovered beneath one of the buildings. As a result of the fact that this evidence, when viewed in the light most favorable to Plaintiff, creates a genuine issue of material fact concerning the extent, if any, to which Mr. Culbreth and Mr. Ward breached a fiduciary duty that they owed to Plaintiff by failing to disclose relevant information in their possession,[9] the trial court erred by granting summary judgment in their favor with respect to this claim.

2. Trillium Links

[12] Next, Plaintiff argues that the trial court erroneously granted summary judgment in favor of Trillium Links on the grounds that the same

9. Although Mr. Culbreth and Mr. Ward stated that the foundation pier problem was corrected and that no one had ever described the sagging floor as a construction defect, these facts go to the weight and credibility of the evidence rather than its sufficiency to support a breach of fiduciary duty claim.

facts that support a determination that Mr. Culbreth and Mr. Ward violated a fiduciary duty establish a breach of fiduciary duty by Trillium Links as well. Trillium Links, on the other hand, argues that a condominium developer does not, as a matter of North Carolina law, owe a fiduciary duty to the property owner's association during the period of declarant control. Although N.C. Gen. Stat. § 47C-3-103(a) expressly provides that the members of a condominium association board owe a fiduciary duty to the association, N.C. Gen. Stat. § 47C-3-103(a), the Condominium Act is silent with respect to the issue of whether such a duty is owed to the condominium association by a developer or declarant. However, N.C. Gen. Stat. § 47C-1-108 states that, "[t]he principles of law and equity supplement the provisions of this chapter, except to the extent inconsistent with this chapter." N.C. Gen. Stat. § 47C-1-108. Thus, the extent to which Trillium Links owed a fiduciary duty to Plaintiff during the period of declarant control must necessarily be governed by common law principles.

" 'Generally, in North Carolina . . . there are two types of fiduciary relationships: (1) those that arise from legal relations such as attorney and client, broker and client . . . partners, principal and agent, trustee and cestui que trust, and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.' " *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quoting *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 540, 546 (M.D.N.C.1999) (internal quotations omitted)). As a result of the fact that Plaintiff has not asserted that any fiduciary duty arose from a "legal" relationship between Plaintiff and Trillium Links, we must determine whether a fiduciary relationship existed between Plaintiff and Trillium Links as a matter of fact.

The undisputed record evidence establishes, during the period of declarant control, "the Declarant [Trillium Links had] control of the Association through its power to appoint and remove Board Members." Trillium Links remained in control of Plaintiff until 24 February 2007, when authority over the Association was transferred to the unit owners. As a result of the fact that Trillium Links had a position of dominance over Plaintiff and the fact that individual unit owners or prospective unit owners had little choice except to rely upon Trillium Links to protect their interests during the period of developer control, we hold that the record contains sufficient evidence from which the existence of a fiduciary duty between the two entities could be established. In addition, for the reasons set forth above in connection with our discussion

of the breach of fiduciary duty claim that Plaintiff asserted against Mr. Culbreth and Mr. Ward, we further conclude that the record evidence, when considered in the light most favorable to Plaintiff, evidences the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links breached a fiduciary duty that it owed to Plaintiff. As a result, the trial court erred by granting summary judgment in favor of Trillium Links with respect to this issue.

3. Statute of Limitations

[13] Mr. Culbreth, Mr. Ward, and Trillium Links argue that Plaintiff's fiduciary duty claims are barred by the statute of limitations on the grounds that the Lee Report sufficed to put Plaintiff on notice of the facts upon which their breach of fiduciary duty claims rely. Breach of fiduciary duty claims accrue upon the date when the breach is discovered and are subject to a three year statute of limitations. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (stating that "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1)"), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). As a result of our determination that the trial court erred by granting summary judgment with respect to the issue of whether Plaintiff's negligent construction claims were time-barred given the existence of genuine issues of material fact concerning the date upon which Plaintiff knew or had reason to believe that extensive defects existed in the condominium buildings and the fact that the same principles are applicable to the present issue, we conclude that the trial court erred by granting summary judgment in favor of Mr. Culbreth, Mr. Ward, and Trillium Links with respect to Plaintiff's breach of fiduciary duty claims on statute of limitations grounds.

E. Constructive Fraud

[14] Next, Plaintiff contends that the record evidence tends to show the existence of a valid claim for constructive fraud against Mr. Culbreth, Mr. Ward, and Trillium Links. For that reason, Plaintiff further contends that the trial court erred by granting summary judgment in favor of Mr. Culbreth, Mr. Ward, and Trillium Links on the grounds that a ten-year statute of limitations applies to this claim.[10] Plaintiff's argument lacks merit.

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10. "A claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations[.]" *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

Although the showing necessary to establish the existence of a breach of fiduciary duty and constructive fraud involves overlapping elements, the two claims are separate under North Carolina law. *White*, 166 N.C. App. at 293, 603 S.E.2d at 155. In order to recover for constructive fraud, a plaintiff must establish the existence of circumstances "(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust[.]" *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)), *disc. review dismissed*, 349 N.C. 240, 558 S.E.2d 190 (1998). "Further, an essential element of constructive fraud is that defendants sought to benefit themselves in the transaction." *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007) (quotation omitted), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *White*, 166 N.C. App. at 294, 603 S.E.2d at 156. In order to satisfy this requirement, "Plaintiff's evidence must prove defendants sought to benefit themselves or to take advantage of the confidential relationship." *Wilkins v. Safran*, 185 N.C. App. 668, 675, 649 S.E.2d 658, 663 (2007) (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997)).

In its complaint, Plaintiff alleged in support of its constructive fraud claim that:

> 70. By virtue of their positions as officers and directors of the Association and their control over the Association, Defendants Trillium Links, Culbreth and Ward stood in a relationship of special faith, confidence and trust with respect to the Plaintiff Association. These Defendants therefore owed fiduciary duties to the Association under North Carolina law.
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> . . . .
>
> 72. These Defendants breached their fiduciary duties and acted in their own interests instead of those of the Association by hiring Trillium Construction, which shared common ownership and control with Trillium Links, to build the Trillium Ridge Condos. Upon information and belief, these Defendants benefited from this transaction at the expense of the Association.

. . . .

> 74. These Defendants also breached their fiduciary duties by failing to disclose material facts regarding the defects and their own negligence and conflict of interest actions to the unit owners and the new members of the Association's Executive Board when control of the Association was transferred in February, 2007.

Although Plaintiff alleged that Mr. Culbreth, Mr. Ward, and Trillium Links "benefitted from this transaction at the expense of the Association," Plaintiff has not directed our attention to any evidence tending to show that Defendants sought or gained any personal benefit by taking unfair advantage of their relationship with Plaintiff. Simply put, given that Plaintiff has failed to adduce any evidence tending to show that "defendants sought to benefit themselves in the transaction," *Piles*, 187 N.C. App. at 406, 653 S.E.2d at 186, it has failed to forecast sufficient evidence to establish a constructive fraud claim governed by a ten year statute of limitations rather than a breach of fiduciary duty governed by a three year statute of limitations.[11]

F. Breach of Warranty

[15] Finally, Plaintiff argues that the trial court erred by granting summary judgment in favor of Trillium Links with respect to its breach of warranty claim. More specifically, Plaintiff argues that Trillium Links breached the implied warranty applicable to condominium units to the effect that "the premises are free from defective materials, constructed in a workmanlike manner, [and] constructed according to sound engineering and construction standards[.]" N.C. Gen. Stat. § 47C-4-114. However, "a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain." N.C. Gen. Stat. § 47C-4-115(b). Although Trillium Links does not contest the existence of the warranty upon which Plaintiff's claim relies or argue that the record does not contain any evidence tending to show that a breach of this warranty occurred, it does argue that Plaintiff's breach of warranty claim is barred by the applicable statute of limitations or statute of repose.

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11. However, for the reasons set forth above, Plaintiff's breach of fiduciary duty claims survive the summary judgment stage of this case.

Plaintiff's claim for breach of warranty is subject to a three year statute of limitations, with this claim accruing upon discovery of the breach. *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 44, 587 S.E.2d 470, 477 (2003) (the statute of limitations for breach of warranty is three years from the date of the breach), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004). As a result of our earlier determination that the record reflects the existence of a genuine issue of material fact concerning the date upon which Plaintiff knew or reasonably should have known of the existence of the construction defects upon which its claim relies, we hold that Trillium Links was not entitled to the entry of summary judgment in its favor with respect to Plaintiff's breach of warranty claims on statute of limitations grounds. Similarly, given the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links knew, or had reasonable grounds to know, of the existence of the defects in the construction of the Trillium Ridge condominiums, Trillium Links was not entitled to summary judgment in its favor on statute of repose grounds. As a result, to the extent to that the trial court granted summary judgment in favor of Trillium Links with respect to Plaintiff's breach of warranty on the basis of the applicable statute of limitations or the statute of repose, the trial court erred.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly granted summary judgment with respect to some issues and erred by granting summary judgment with respect to other issues. As a result, the trial court's orders and amended orders should be, and hereby are, affirmed in part and reversed in part and this case should be, and hereby is, remanded to the Jackson County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge STROUD concurs.

Judge ROBERT N. HUNTER, JR. concurring in part and concurring in result only in part in separate opinion prior to 6 September 2014.

I concur in the opinion of the majority in all respects except for the analysis of the constructive fraud claim. For the reasons discussed in *Orr v. Calvert*, 212 N.C. App. 254, 270, 713 S.E.2d 39, 50 (Hunter, Jr., J., dissenting), *rev'd for reasons stated in dissenting opinion*, 365 N.C. 320, 720 S.E.2d 387 (2011), I only concur in the results as to this issue.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2014)

STATE v. BEST No. 14-198	Wayne (11CRS54080) (11CRS55932) (11CRS55933) (12CRS4460)	No Error
STATE v. DUBLIN No. 14-84	Johnston (11CRS51511) (12CRS2080)	No Error
SWAIN v. SWAIN No. 14-181	Craven (10CVD888)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 SEPTEMBER 2014)

CASOLA v. CALDWELL CNTY. No. 14-177	Caldwell (12CVS839)	Affirmed
COUNTRY CAFAYE, INC. v. TRAVELERS CAS. INS. CO. OF AM. No. 14-226	Stokes (12CVS508)	Reversed in part; affirmed in part
CUT N UP HAIR SALON OF CAROLINA BEACH, LLC v. BENNETT No. 13-1417	New Hanover (12CVS3023)	Affirmed
GREGORY v. OLD REPUBLIC HOME PROT. CO. No. 13-1439	Forsyth (10CVS8267)	No Error
IN RE ALDRIDGE No. 14-275	Union (11SP578)	Affirmed
IN RE C.V.M. No. 14-205	Surry (13JT63)	Affirmed
IN RE J.V. No. 14-300	Currituck (12JB30)	Dismissed in Part, Affirmed in Part
IN RE K.A.D. No. 14-407	Jackson (05JT28)	Affirmed
IN RE L.N.P.H. No. 14-373	New Hanover (11JT201-202)	Affirmed
IN RE M.J.C. No. 14-367	Robeson (08JT263-266)	Reversed and Remanded
IN RE P.M.N No. 14-431	Randolph (10JA56)	Affirmed
IN RE R.J.C.M. No. 14-358	Randolph (12JT33-36)	Affirmed
PRICE v. JONES No. 14-128	Cumberland (12CVS2720)	Reversed in part; dismissed in part
ROBBINS v. HUNT No. 14-243	New Hanover (10CVD5691)	Affirmed in Part, Reversed and Remanded in Part, Dismissed in Part

SEC. CREDIT CORP., INC. v. BAREFOOT No. 14-250	Johnston (13CVS2155)	Dismissed
SPAIN v. SPAIN No. 14-312	N.C. Industrial Commission (W28283)	Affirmed
STATE v. BARNETTE No. 14-308	Gaston (13CRS55426) (13CRS55428) (13CRS55430) (13CRS7708)	Dismissed in Part, No Error in Part
STATE v. BRYANT No. 13-1384	Brunswick (08CRS3040) (08CRS52588) (11CRS1781)	No Error
STATE v. CELLENT No. 14-207	Mecklenburg (11CRS246140)	No Prejudicial Error
STATE v. CHAVEZ No. 14-341	Guilford (03CRS70577)	Dismissed
STATE v. GRAHAM No. 14-157	Sampson (11CRS52998) (11CRS53012)	No error; Remand for resentencing.
STATE v. LUKE No. 13-1261	Mecklenburg (11CRS250932)	No Error
STATE v. MATTHEWS No. 14-174	Mecklenburg (09CRS237810) (09CRS237821) (10CRS17532)	No Error in Part, Dismissed in Part
STATE v. SMITH No. 14-193	Durham (12CRS55506)	Affirmed
STATE v. THOMAS No. 13-1298	Wake (11CRS221410) (12CRS11048) (12CRS8966)	No Error in Part, Vacated in Part, and Remanded for Resentencing in Part
STATE v. WILLIS No. 14-111	Sampson (12CRS50372-73)	Vacated and Remanded
SWAPS, LLC v. ASL PROPS., INC. No. 14-234	Union (09CVS674)	Affirmed

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