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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 14, 2016

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OF

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 4 NOVEMBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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

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October 3, 17, and 31

November 14 and 28

December 12

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

COMMSCOPE CREDIT UNION v. BUTLER & BURKE, LLP

[237 N.C. App. 101 (2014)]

COMMSCOPE CREDIT UNION, PLAINTIFF
v.
BUTLER & BURKE, LLP, A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP, DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL HOLLAR, JOE CRESIMORE, MARK HONEYCUTT, ROSE SIPE, TODD POPE, JASON CUSHING, AND SCOTT SAUNDERS, THIRD-PARTY DEFENDANTS

No. COA14-273

Filed 4 November 2014

Contracts—breach of contract—breach of fiduciary trust—claims sufficient to withstand dismissal—no affirmative defenses established—material issue of fact

The trial court erred in a breach of contract, negligence, breach of fiduciary trust, and professional malpractice case by granting defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). Plaintiff stated its claims sufficiently to withstand defendant's motion to dismiss, defendant did not establish any affirmative defenses which would entitle it to dismissal, and defendant failed to clearly establish that no material issue of fact remained to be resolved and that it was entitled to judgment as a matter of law.

Appeal by Plaintiff from order entered 26 September 2013 by Judge Richard L. Doughton in Catawba County Superior Court. Heard in the Court of Appeals 27 August 2014.

Patrick, Harper & Dixon, LLP, by Michael J. Barnett and L. Oliver Noble, Jr., and Carlton Law PLLC, by Alfred P. Carlton, Jr., for Plaintiff.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for Defendant and Third-Party Plaintiff.

No brief for Third-Party Defendants.

STEPHENS, Judge.

Factual and Procedural Background

Plaintiff Commscope Credit Union is a North Carolina chartered credit union which retained Defendant Butler & Burke, LLP, a certified public accountant firm, in 2001 to provide professional independent audit services. Defendant represented to Plaintiff that it had special expertise in providing auditing services to credit unions and other nonprofit entities. Defendant's engagement letters between 2001 and 2010 asserted that it would, *inter alia*,

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Each year from 2001 to 2009, Plaintiff's general manger, Mark Honeycutt, failed to file with the Internal Revenue Service ("IRS") a Form 990, Return of Organization Exempt From Income Tax Returns[1] ("the tax forms"). In the course of its audits, Defendant never requested copies of the tax forms, and, as a result, did not discover Plaintiff's failure to file them. In April 2010, the IRS notified Plaintiff of its filing deficiency and later informed Plaintiff that a penalty of $424,000 had been assessed against it. The penalty was subsequently reduced to $374,200.

On 8 November 2012, Plaintiff filed a complaint in Catawba County Superior Court against Defendant alleging claims for breach of contract, negligence, breach of fiduciary trust, and professional malpractice.[2] On 28 January 2013, Defendant answered, asserting several affirmative defenses. Defendant filed a third-party complaint on 25 February 2013 against various individuals who had been directors, officers, and supervisory committee members of Plaintiff.[3] That complaint included

1. No copy of a Form 990 is included in the record on appeal, but we take judicial notice that this lengthy, multi-page form requires tax-exempt entities to provide detailed information about their governance, assets, revenue, and expenses, and depending on their specific organizational structure and activities, additional tax schedules may be required to be filed as well. *See* http://www.irs.gov/pub/irs-pdf/f990.pdf (last visited 22 October 2014).

2. On 27 February 2013, the Chief Justice designated the matter as a complex business case and assigned the Honorable Richard L. Doughton to preside over it.

3. Among the third-party defendants was Honeycutt, the general manager for Plaintiff who was alleged to have had the responsibility to the file the tax forms and to have failed to do so.

claims for contribution, indemnity, negligent misrepresentation, and fraud. The third-party defendants answered and asserted various affirmative defenses. Three of the third-party defendants moved to dismiss pursuant to Rule of Civil Procedure 12(b)(6). On 6 June 2013, Defendant moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and 12(c). On 26 September 2013, the trial court granted Defendant's motion and dismissed the case. This action rendered the third-party defendants' motion to dismiss moot, and the trial court did not consider or rule on that motion. From the order granting Defendant's motion to dismiss, Plaintiff appeals.

Discussion

Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). We agree.

I. Standards of review

> 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. The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Sharp v. CSX Transp., Inc., 160 N.C. App. 241, 243, 584 S.E.2d 888, 889 (2003) (citations and internal quotation marks omitted). "When the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, however, the motion will be granted and the action dismissed." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) (citation omitted).

"A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted *unless the movant clearly establishes that no material issue of fact remains to be resolved* and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted; emphasis added).

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving

> party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review *de novo* a trial court's grant of a motion to dismiss under both Rule 12(b)(6) and 12(c). *Id.*; *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, __ N.C. App. __, __, 752 S.E.2d 661, 663-64 (2013).

II. Breach of fiduciary duty

In its motion to dismiss, Defendant argued that Plaintiff had failed to allege facts or circumstances that, if true, would show the existence of a fiduciary duty Defendant owed to Plaintiff. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002) (citation omitted). In this State, fiduciary relationships may arise as a matter of law because of the nature of the relationship, "such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). However, "[o]nly when one party figuratively holds all the cards — all the financial power or technical information, for example — have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347-48 (4th Cir. 1998) (internal quotation marks omitted). Thus, our courts have declined to find the existence of a fiduciary relationship between "mutually interdependent businesses," such as a distributor and a manufacturer, or a retailer and its main supplier. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990).

Even where a fiduciary relationship does not arise as a matter of law, such a relationship does exist

> 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. It extends to any possible case in which a fiduciary relation exists in fact, and in which there is

> confidence reposed on one side, and resulting domination and influence on the other.

Harrold, 149 N.C. App. at 784, 561 S.E.2d at 919 (citations, internal quotation marks, and brackets omitted). For example, in *Harrold*, this Court concluded that no fiduciary relationship existed between a pair of optometrists and an accounting firm hired "to advise them on business opportunities, including mergers and acquisitions." *Id.* at 779, 561 S.E.2d at 917. However, the Court went on to contrast this situation with one in which the accountant defendants "had done accounting . . . and had prepared tax filings" such that they "obviously had acquired a special confidence in preparing tax documents for the trusts, corporations, and individual plaintiffs." *Id.* at 784, 561 S.E.2d at 919 (discussing *Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997)). Thus, while this Court in *Harrold* was correct in stating that no North Carolina case has held that an accounting firm and its clients are *per se* in a fiduciary relationship, that case did not concern accountants and their *audit clients*. That is, in *Harrold*, the accounting firm was not providing auditing or accounting services to its clients, but rather was acting as a consultant on mergers and acquisitions. *Id.* at 779, 561 S.E.2d at 917. In *Smith*, on the other hand, where the accountants were providing accounting and tax-related services, a fiduciary relationship *did* exist. 127 N.C. App. at 10, 487 S.E.2d at 813. We would observe that, in using its specially trained professionals to perform comprehensive audits for credit unions, accounting firms such as Defendant would appear "to hold all the . . . technical information . . . ." *Broussard*, 155 F.3d at 348. In our view, the relationship between Plaintiff and Defendant appears much more like that between "attorney and client, broker and principal," *see Abbitt*, 201 N.C. at 598, 160 S.E. at 906, than that between "mutually interdependent businesses," like distributors and manufacturers, or retailers and suppliers. *See Tin Originals, Inc.*, 98 N.C. App. at 666, 391 S.E.2d at 833.

More importantly, even if the relationship between an accounting firm and its audit clients is not a fiduciary one as a matter of law, Plaintiff's complaint alleges that Defendant pledged to

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

In assuring Plaintiff that it had the expertise to review financial statements to identify "errors [and] fraud[,]" even by Plaintiff's own management and employees, Defendant sought and received "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." *See Harrold*, 149 N.C. App. at 784, 561 S.E.2d at 919. We conclude that, in the light most favorable to Plaintiff, the allegations of the complaint are sufficient to state a claim for breach of fiduciary duty. Accordingly, the trial court erred in dismissing Plaintiff's claim.

III. Plaintiff's remaining claims

As for Plaintiff's claims for breach of contract, negligence, and professional malpractice, Defendant moved to dismiss under the doctrines of (1) *in pari delicto* and (2) contributory negligence, as well as upon contentions that these claims are (3) barred by the explicit terms of Defendant's engagement letter. We are not persuaded.

A. In pari delicto

"The common law defense by which [Defendant] seek[s] to shield [itself] from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [*defendentis*] or 'in a case of *equal or mutual fault* the condition of the party in possession [or defending] is the better one.' " *See Skinner*, 314 N.C. at 270, 333 S.E.2d at 239 (citation and ellipsis omitted). "Our courts have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has observed "that the *in pari delicto* defense traditionally has been *narrowly limited* to situations in which the plaintiff was *equally at fault* with the defendant." *Skinner*, 314 N.C. at 272, 333 S.E.2d at 240 (emphasis in original); *see also Cauble v. Trexler*, 227 N.C. 307, 313, 42 S.E.2d 77, 81-82 (1947) (noting that where "the parties are to some extent involved in the illegality, — in some degree affected with the unlawful taint, — but are not *in pari delicto*, — that is, both have not, with *the same knowledge*, *willingness*, *and wrongful intent* engaged in the transaction, or *the undertakings of each are not equally blameworthy*, — a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent") (citation and internal quotation marks omitted; emphasis added).

The courts of our State have not yet addressed the applicability of *in pari delicto* as a defense by accountants to the malpractice-related claims of their auditing clients, but, in *Whiteheart*, this Court considered the doctrine's applicability as a defense in legal malpractice cases. There, the plaintiff, who was in the business of billboard advertising,

> sent a letter to his various competitors "alerting" them about Ms. Payne. In this letter, [the] plaintiff asserted that Ms. Payne was a "lease jumper" and that she and her business practices were unprofessional, unethical, and despicable. [The p]laintiff also referred to Ms. Payne personally in additional derogatory terms. Although [the] plaintiff's attorney, Betty Waller ("[the] defendant"), reviewed the letter before it was sent, she failed to advise [the] plaintiff of the potential liability that could result from sending such a *per se* defamatory document.

199 N.C. App. at 282, 681 S.E.2d at 420. After Ms. Payne and another entity successfully sued the plaintiff and received judgments totaling over $700,000, the plaintiff sued Betty Waller and her law firm "for legal malpractice, seeking to recover damages sufficient to cover the judgments" against him. *Id.* at 283, 681 S.E.2d at 421. This Court noted that the successful tort cases against the plaintiff had "establish[ed] as a matter of law [the plaintiff's] *intentional wrongdoing*" in sending the letters. *Id.* at 284, 681 S.E.2d at 421 (emphasis added). This Court also cited the reasoning of other state courts in cases where the doctrine was applied to bar claims against attorneys when their clients had knowingly engaged in intentional wrongdoing:

> *Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274 (Iowa 1996) (plaintiffs' malpractice claim dismissed because they acted *in pari delicto* with defendant law firm in *knowingly making false statements in affidavits* submitted to Patent and Trademark Office); *Evans v. Cameron*, 121 Wis. 2d 421, 360 N.W.2d 25 (1985) (plaintiff's malpractice action barred by defense of *in pari delicto* where the client *lied under oath* in a bankruptcy proceeding about transferring money to her mother, even though she claimed her testimony was based upon the advice of her attorney); *Robins v. Lasky*, 123 Ill. App.3d 194, 201-02, 462 N.E.2d 774, 779, 78 Ill. Dec. 655 (1984) (plaintiff's malpractice action barred by defense of *in pari delicto* when he followed defendant attorneys' advice to

> relocate and establish his permanent residence in another state *in order to avoid service of process* in Illinois).

Id. at 285, 681 S.E.2d at 422 (emphasis added). Noting with approval that "some courts have distinguished between *wrongdoing* that would be obvious to the plaintiff and legal matters so complex that a client could follow an attorney's advice, do wrong[,] and still maintain suit on the basis of not being equally at fault[,]" the panel in *Whiteheart* held that such fine distinctions were not necessary in that case because the plaintiff had engaged in intentional wrongdoing, to wit, knowingly lying in an affidavit filed in the courts of our State and knowingly spreading lies about Ms. Payne among the business community in an effort to harm her. *Id.* at 285-86, 681 S.E.2d at 422-23 (citation and internal quotation marks omitted).

Here, Defendant urges that the doctrine applies because the action of Honeycutt, Plaintiff's general manager, in failing to file the tax forms (1) may be imputed to Plaintiff and (2) was an equal and mutual wrong to any negligence, breach of contract, or malpractice in Defendant's auditing process and procedures. However, unlike in *Whiteheart* or the other cases cited *supra*, nothing in Plaintiff's complaint establishes that Honeycutt's failure to file the tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that Honeycutt's alleged failure was not excusable conduct.[4]

Nor do the allegations in the complaint establish as a matter of law that Honeycutt's failure to file the tax forms may be imputed to Plaintiff.

> As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

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4. We note that a copy of the complaint filed by Plaintiff against Honeycutt in a separate legal action alleges, *inter alia*, both negligence and fraud in connection with his failure to file the tax forms. This complaint, however, appears in the record on appeal as an attachment to Defendant's response to Plaintiff's motion for exceptional case designation and assignment of this matter to the North Carolina Business Court and was not part of Plaintiff's complaint for consideration under Rule 12(b)(6) nor part of the pleadings before the trial court in considering Defendant's motion to dismiss under Rule 12(c). In any event, even were it part of the pleadings properly before and considered by the trial court in deciding Defendant's motion to dismiss, the alternate allegations in Plaintiff's complaint against Honeycutt standing alone would not support the application of *in pari delicto* as a defense by Defendant against Plaintiff.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (citation omitted), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In addition,

> [w]here the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply.

Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 482, 124 S.E.2d 365, 368 (1962) (citation and internal quotation marks omitted).

Here, the complaint certainly does not establish that Plaintiff expressly authorized Honeycutt's failure to file the tax forms nor that it ratified this omission after the fact. To the extent any inference is raised by the facts alleged in Plaintiff's complaint, it would be that Honeycutt's failure to file the tax forms did not further Plaintiff's business, and Honeycutt's conduct raises a clear presumption that he would not communicate the situation to Plaintiff. If Plaintiff was exempt from paying taxes by the filing of the tax forms and if the failure to file the forms has resulted in a nearly $400,000 penalty assessment, Honeycutt's conduct not only did not further Plaintiff's business, it actively harmed Plaintiff. In sum, at the present stage of the case, Defendant is not entitled to a dismissal of Plaintiff's breach of contract, malpractice, and negligence claims on the basis of *in pari delicto*.

B. Contributory negligence

Defendant also moved to dismiss based upon an argument that Plaintiff's claims were barred by its own contributory negligence, as imputed from Honeycutt's failure to file the tax forms and his lies and omissions to Defendant and others about Plaintiff's tax compliance.

> Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint, but presupposes or concedes such negligence by him. *Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint.*

Jackson v. McBride, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (citations, internal quotation marks, and emphasis omitted). Contributory negligence will act as a complete defense to malpractice claims against accountants. *See Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997). However, in considering the propriety of submission of the issue of contributory negligence to the jury, our Supreme Court has observed:

> The allegation in an answer that the [tort] was caused by [the plaintiff's] own negligence and not by any negligence of the defendant is not a sufficient plea of contributory negligence. For the same reason, evidence by the defendant to the effect that the plaintiff was injured not by the negligence of the defendant, as alleged in the complaint, but by the plaintiff's own negligence, as alleged in the answer, would not justify the submission to the jury of an issue of contributory negligence.

Jackson, 270 N.C. at 372, 154 S.E.2d at 471-72 (citation and internal quotation marks omitted; emphasis omitted).

Plaintiff cites *Smith* for the proposition that contributory negligence is inapplicable given the facts here. That case held that, "[i]n an action by a principal against an agent, the agent cannot impute his own negligence to the principal. Where the negligence of two agents concurs to cause injury to the principal, the agents cannot impute the negligence of the fellow agent to bar recovery." 127 N.C. App. at 14, 487 S.E.2d at 816 (citations omitted). Plaintiff fails to cite the next sentence in that opinion: "However, if either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to [the] plaintiff." *Id.* (citation omitted). The allegations of Plaintiff's complaint, taken as true, establish *prima facie* that Defendant is an independent contractor. *See Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 345, 601 S.E.2d 915, 923 (2004) ("An independent contractor . . . is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.") (citations and internal quotation marks omitted).

However, we agree with Plaintiff's assertion that the doctrine of contributory negligence is inapplicable here, albeit for a much simpler reason. As noted *supra*, nothing in the pleadings establishes either that Honeycutt's failure to file the tax returns was (1) negligent rather than intentional wrongdoing or excusable conduct or (2) imputed to Plaintiff

as a matter of law. Further, Defendant's answer simply alleges that any harm to Plaintiff "was caused by [Plaintiff's] own negligence and not by any negligence of [D]efendant [which] is not a sufficient plea of contributory negligence." *See Jackson*, 270 N.C. at 372, 154 S.E.2d at 472.

C. Terms of the engagement letter

In its motion to dismiss, Defendant also argued that Plaintiff's claims were barred as attempts "to hold [D]efendant[] liable for matters which the parties expressly agreed [P]laintiff was responsible." We disagree.

> A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. If the meaning of the contract is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 191 N.C. App. 163, 165-66, 662 S.E.2d 20, 22 (citations, internal quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 29 (2008).

The engagement letters sent by Defendant to Plaintiff each year used substantially identical language in describing Plaintiff's responsibilities:

> Management is responsible for making all management decisions and performing all management functions; . . . . for establishing and maintaining internal controls, including monitoring ongoing activities; . . . . for making all financial records and related information available to us and for the accuracy and completeness of that information[;] and . . . . for identifying and ensuring that the credit union complies with applicable laws and regulations.

However, as noted *supra*, in the same letters, Defendant explicitly took on the responsibility to

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of

> material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Thus, the plain language of the engagement letters appears to give the parties overlapping, if not conflicting, responsibilities for the very types of situations, actions, and omissions as lie at the heart of this case. This "writing leaves it uncertain as to what the agreement was" and when "the intention of the parties is unclear. . ., interpretation of the contract is for the jury." *See id.* at 165, 662 S.E.2d at 22. Plaintiff and Defendant have made conflicting arguments about what various administrative code sections and standard auditing procedures require with respect to the duties of an auditor and its client, but, on the pleadings, and in the absence of expert testimony or *any* other evidence, we cannot evaluate their contentions.

In sum, Plaintiff has stated its claims sufficiently to withstand Defendant's motion to dismiss, Defendant has not established any affirmative defenses which would entitle it to dismissal, and Defendant has failed to "clearly establish[] that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *See B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted). Accordingly, the trial court erred in granting Defendant's motion to dismiss, and the order so doing is

REVERSED.

Judges CALABRIA and ELMORE concur.

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. D/B/A CAPE FEAR VALLEY HEALTH SYSTEM, PETITIONER

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND FIRSTHEALTH OF THE CAROLINAS, INC., RESPONDENT-INTERVENOR

No. COA14-160

Filed 4 November 2014

1. Hospitals and Other Medical Facilities—certificate of need—burden of proof—summary judgment

The Administrative Law Judge (ALJ) did not err by granting summary judgment in favor of respondent FirstHealth. N.C.G.S. § 131E-188(a) does not prevent an ALJ from entering summary judgment in a contested case challenging a certificate of need (CON) decision. Further, Cape Fear failed to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing.

2. Hospitals and Other Medical Facilities—certificate of need—no substantial prejudice of rights

Summary judgment was properly entered for respondents in a contested case hearing challenging a certificate of need (CON) decision because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights.

Appeal by petitioner from Final Decision entered 17 September 2013 by Administrative Law Judge Beecher R. Gray. Heard in the Court of Appeals 14 August 2014.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney and Steven G. Pine for petitioner-appellant.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, and Candace S. Friel, for respondent/intervenor-appellee FirstHealth.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell and Assistant Attorney General Scott T. Stroud for respondent-appellee DHHS.

STEELMAN, Judge.

N.C. Gen. Stat. § 131E-188(a) does not prevent an administrative law judge from entering summary judgment in a contested case challenging a CON decision. Summary judgment was properly entered for respondents because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights.

I. Factual and Procedural Background

Respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital (FirstHealth) operates FirstHealth Moore Regional Hospital (FirstHealth Moore) in Moore County. In 2010 FirstHealth filed an application for a Certificate of Need (CON) to develop FirstHealth Hoke Community Hospital (FirstHealth Hoke) in Raeford, Hoke County, with eight acute care beds and one operating room (OR). At that time Hoke County was included in two service areas in the State Medical Facilities Plan (SMFP): the Moore/Hoke service area and the Cumberland/Hoke service area. Although there are several multi-county service areas, this was the only instance of a county being included in two service areas. In December 2012 Hoke County became a separate service area and the joint Moore/Hoke and Cumberland/Hoke service areas were eliminated. In April 2012, respondent North Carolina Department of Health and Services, Division of Health Service Regulation, Certificate of Need Section (DHHS), granted FirstHealth's application for a CON to develop FirstHealth Hoke.

On 15 June 2012, FirstHealth and petitioner Cumberland County Hospital System, Inc. d/b/a/ Cape Fear Valley Medical Center (Cape Fear) each filed CON applications to provide 28 acute care beds in the Cumberland/Hoke service area in accordance with the 2012 SMFP. Cape Fear's 28-Bed application proposed to add 28 acute care beds to its existing hospital in Fayetteville, and FirstHealth's 28-Bed application proposed to add 28 acute care beds to FirstHealth Hoke. These were competitive applications under 10A N.C.A.C. 14C.0202(f) ("Applications are competitive if . . . the approval of one or more of the applications may result in the denial of another application reviewed in the same review period."), because, under N.C. Gen. Stat. § 131E-183(a)(1) and the need determination in the 2012 SMFP, both 28-Beds applications could not be approved.

Also on 15 June 2012, FirstHealth submitted a CON application asking to relocate one of its ORs from FirstHealth Moore to FirstHealth Hoke, facilities that were both in the Moore/Hoke service area. The OR was pre-existing, and approval of FirstHealth's OR application would not

cause the disapproval of any other CON applications. DHHS determined that it was a noncompetitive application under 10A N.C.A.C. 14C.0202(f).

On 27 November 2012 DHHS approved FirstHealth's 28-Bed application and its OR application, and denied Cape Fear's 28-Bed application. On 21 December 2012 Cape Fear filed petitions for contested case hearings to challenge DHHS's approval of FirstHealth's OR CON application and its decision to approve FirstHealth's 28-Bed application while denying Cape Fear's 28-Bed application.

On 25 February 2013 the Administrative Law Judge (ALJ) consolidated Cape Fear's petitions for contested case hearings in the 28-Bed and OR cases. Cape Fear's appeal from the decision of the ALJ in the 28-Bed case is currently pending before this Court, and the present appeal involves only FirstHealth's OR application.

On 17 May 2013 Cape Fear filed a motion for partial summary judgment in both cases, and FirstHealth and DHHS filed a joint motion for summary judgment in the OR case. FirstHealth and DHHS asserted that there were no genuine issues of material fact and that they were entitled to summary judgment on the grounds that Cape Fear could not demonstrate that its rights were substantially prejudiced by DHHS's decision to approve the OR application. ALJ Gray conducted a hearing on the parties' summary judgment motions on 31 May 2013. On 17 September 2013 ALJ Gray filed a Final Agency Decision granting summary judgment in favor of FirstHealth and DHHS with respect to Cape Fear's petition for a contested case hearing in the OR case. The ALJ ruled that FirstHealth and DHHS were entitled to summary judgment because Cape Fear had not shown that approval of FirstHealth's OR CON had substantially prejudiced its rights.

Cape Fear appeals.

II. Unconditional Right to Contested Case Hearing

[1] In its first argument, Cape Fear contends that the ALJ erred by granting summary judgment in favor of FirstHealth, on the grounds that it "is entitled to a full contested case hearing, pursuant to N.C. Gen. Stat. § 131E-188, to prove that it was substantially prejudiced." Cape Fear contends that N.C. Gen. Stat. § 131E-188 "guarantees" it a "full contested case hearing." We disagree.

A. Standard of Review

N.C. Gen. Stat. § 150B-151 governs our review of the ALJ's decision and provides in pertinent part that:

. . .

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. . . .
>
> (d) In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

In the present case, Cape Fear appeals from an order granting summary judgment. "Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered '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.' 'In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.' *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the

burden then shifts to the non-movant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

"We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (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) (other citations omitted).

B. Burden of Proof

Preliminarily, Cape Fear argues that the ALJ applied an incorrect burden of proof by failing to first require FirstHealth and DHHS to demonstrate that Cape Fear could not establish a *prima facie* case before shifting the burden to Cape Fear to rebut the movant's showing with specific facts establishing the presence of a genuine factual dispute for trial. Cape Fear bases this argument on the fact that the ALJ's order includes the standard of proof for a contested case hearing. Cape Fear asserts that there "was no reason for the ALJ to recite the standard for a contested case hearing," and that the "only logical conclusion" is that the ALJ employed an incorrect standard by "initially assigning Cape Fear the burden of proof[.]" Cape Fear fails to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing.

This argument lacks merit.

C. Analysis

Cape Fear argues that the ALJ erred by granting summary judgment for FirstHealth because, under N.C. Gen. Stat. § 131E-188(a), it has an absolute "unconditional" right to a full evidentiary hearing. We disagree.

N.C. Gen. Stat. § 131E-188(a) states in relevant part that:

> After a decision of the Department to issue, [or] deny . . . a certificate of need . . . any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department makes its decision. . . .

Cape Fear focuses on the phrase "shall be entitled to a contested case hearing." However, given that the statute grants an affected person a contested case hearing "under Article 3 of Chapter 150B of the General Statutes," we must consider the quoted phrase in the context of the provisions of Chapter 150B.

N.C. Gen. Stat. § 150B-23(a) states in relevant part that:

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings[.] . . . A petition . . . shall state facts tending to establish that the agency named as the respondent has . . . substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. . . .

The statute's enumeration of specific requirements for a contested case petition indicates that the right to an evidentiary hearing is contingent upon a valid petition. In addition, N.C. Gen. Stat. § 150B-33(b)(3a) provides that an ALJ may "[r]ule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure[.]" N.C. Gen. Stat. § 1A-1, Rule 56 authorizes a party to move "for a summary judgment in his favor upon all or any part thereof[,]" and N.C. Gen. Stat. § 150B-34(e) expressly provides that an "administrative law judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case." Moreover, N.C. Gen. Stat. § 150B-51(d) states the standard for a court "reviewing a final decision allowing judgment on the pleadings or summary judgment[.]"

Accordingly, Article 3 of Chapter 150B of the General Statutes generally authorizes an ALJ to resolve a contested case without a full evidentiary hearing by entering summary judgment in appropriate cases. Since N.C. Gen. Stat. § 131E-188(a) provides for the right to a contested case hearing "under Article 3 of Chapter 150B of the General Statutes,"

we hold that, just as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision.

In arguing for a contrary result, Cape Fear relies primarily on the quoted excerpt from N.C. Gen. Stat. § 131E-188(a) stating that an affected person "shall be entitled to a contested case hearing," and asserts that the "plain language" of the statute "grants any 'affected person' an unconditional statutory right to a contested case hearing under the APA." Cape Fear fails to acknowledge that its right to a contested case hearing is explicitly made subject to Chapter 150B, or that similar language in N.C. Gen. Stat. § 150B-23(a), stating that "parties in a contested case shall be given an opportunity for a hearing," does not bar an ALJ from entering summary judgment. Further, Cape Fear's position would lead to the absurd result that an appellant would have an absolute right to a full evidentiary hearing, even if its petition were devoid of any allegations that might justify relief.

Cape Fear concedes that this Court has previously upheld an ALJ's award of summary judgment in favor of a party to a CON appeal. *See, e.g.*, *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 780, 783, 630 S.E.2d 213, 215 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 446 (2007),stating that:

> This Court has previously held that, as genuine material issues of fact will always exist, summary judgment is never appropriate in an application for a CON where two or more applicants conform to the majority of the statutory criteria. *See Living Centers-Southeast, Inc. v. North Carolina HHS*, 138 N.C. App. 572, 580-81, 532 S.E.2d 192, 197 (2000). We find the facts of this case distinguishable. Here, unlike in *Living Centers-Southeast*, [the CON applicant] was the sole applicant for a non-competitive CON. Therefore, an award of summary judgment is permissible in this matter.

Cape Fear attempts to distinguish cases such as *Presbyterian Hosp.* on the grounds that these cases do not expressly analyze an ALJ's authority to enter summary judgment in a CON case. Having completed such an analysis, we hold that in appropriate cases an ALJ may enter summary judgment on a petition for a contested case hearing to challenge a non-competitive CON decision.

This argument is without merit.

III. Substantial Prejudice

A. Relationship Between the 28-Bed and OR Cases

[2] In its second argument, Cape Fear contends that it "was substantially prejudiced as a matter of law by the Agency's approval of the FirstHealth OR Application because the FirstHealth OR Application and the FirstHealth 28-Bed Application were essentially one, intertwined hospital expansion project." For example, Cape Fear directs our attention to FirstHealth's statement that approval of its 28-Bed CON application would result in its operating a 36 bed hospital for which a second OR would be needed. Cape Fear contends that because there was a "symbiosis" between FirstHealth's 28-Bed application and its OR application, we should treat FirstHealth's OR application as a part of its competitive 28-Bed application. We disagree.

As discussed above, a "competitive application" is defined in the North Carolina Administrative Code as follows:

> Applications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.

10A N.C.A.C. 14C.0202(f). Cape Fear does not contend that it submitted a CON application to relocate an OR to Hoke County, but argues that, because FirstHealth's OR application shares factual and legal circumstances with its 28-Bed application, we should deem the OR application to be competitive based on the alleged interconnection between the applications. As discussed above, the 28-Bed case is not before us. Moreover, Cape Fear is essentially asking us to apply a new, expanded definition of a competitive application. "[W]e must decline to, in effect, amend the Rules. 'If changes seem desirable, it is a matter for the legislature.' " *Precision Fabrics Group v. Transformer Sales and Service*, 344 N.C. 713, 719, 477 S.E.2d 166, 169 (1996) (quoting *Powell v. State Retirement System*, 3 N.C. App. 39, 43, 164 S.E.2d 80, 83 (1968)). Because FirstHealth's OR CON application was not "competitive" as defined in the Administrative Code, we do not reach Cape Fear's argument that "a competitive applicant like Cape Fear is substantially prejudiced as a matter of law" by the entry of summary judgment.

B. Failure to Consider the Cumberland/Hoke Service Area

In its third argument, Cape Fear contends that it "was substantially prejudiced as a matter of law by the Agency's failure to review whether

FirstHealth satisfied the criteria for adding an OR to the Cumberland/Hoke Service Area. Hoke County [was] included in both the Cumberland/Hoke Service Area and the Moore/Hoke Service Area. Thus, by relocating an OR to Hoke County, FirstHealth proposed to add an OR to the Cumberland/Hoke Service Area." We dismiss this argument as moot.

FirstHealth's OR CON sought to relocate an existing OR from FirstHealth Moore to FirstHealth Hoke, medical facilities which were both in the Moore/Hoke service area as defined in the SMFP. At that time, Hoke County was also in the Cumberland/Hoke service area. Cape Fear argues that the ALJ erred by approving FirstHealth's CON application without determining the effect of FirstHealth's CON application on the Cumberland/Hoke service area. We do not reach this argument, because the Moore/Hoke and the Cumberland/Hoke service areas have been terminated.

On 15 April 2014 FirstHealth filed a motion in this Court requesting us to take judicial notice of the license issued to FirstHealth Hoke and the statement in the 2014 SMFP that:

> On 12/21/12, for the 2013 State Medical Facilities Plan, Hoke County was designated as a single-county service area for the Operating Room need methodology. Therefore, Hoke, Moore, and Cumberland counties' population growth rates were calculated as single-county operating room service areas.

Therefore, even if we were to reverse the ALJ's approval of FirstHealth's OR CON, there is no possibility that on remand the ALJ could assess the needs of the Cumberland/Hoke service area, because it no longer exists. As a result, analysis of whether or not the ALJ should have considered the former Cumberland/Hoke service area would have no practical effect on the outcome of this case. " 'A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' " *Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) (quoting *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)). We grant FirstHealth's motion to take judicial notice and dismiss as moot Cape Fear's argument concerning the former Cumberland/Hoke service area.

Cape Fear opposes FirstHealth's motion for judicial notice, on the grounds that neither FirstHealth Hoke's medical license nor the termination of the Cumberland/Hoke service area were before the ALJ at the

time of the summary judgment hearing. However, we are not considering these documents in order to assess the correctness of the Final Decision, but to determine whether the appellate issue of the ALJ's obligation to consider FirstHealth's OR application in the context of the former Cumberland/Hoke service area remains extant. Cape Fear also argues that, in the event that we take judicial notice of the documents proffered by FirstHealth, we should also take judicial notice of certain documents pertaining to FirstHealth's request to use available rooms in FirstHealth Hoke for treatment of emergency room patients. We deny Cape Fear's request to take judicial notice of these documents, which are not relevant to our review of the ALJ's summary judgment order.

IV. DHHS Compliance with N.C. Gen. Stat. § 131E-183

In its fourth argument, Cape Fear asserts that, even if the ALJ concluded that Cape Fear had not produced evidence of substantial prejudice, it was still required to determine whether DHHS had properly applied the review criteria in N.C. Gen. Stat. § 131E-183(a) in its approval of FirstHealth's OR CON. Cape Fear argues that "agency error may result in substantial prejudice," and that "[b]ecause the Final Decision made no determination as to whether the Agency erred, or otherwise met the Section 150B-23 standards, genuine issues of material fact remain regarding whether Agency error substantially prejudiced Cape Fear." Cape Fear takes the position that, because it is possible, in a particular factual context, that substantial prejudice might result from agency error, that this possibility necessarily results in "genuine issues of material fact" unless the ALJ makes findings regarding DHHS's compliance with all pertinent statutory provisions in addition to its determination that Cape Fear failed to show prejudice. We disagree.

"This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute.

> "Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule."

Parkway Urology, P.A. v. N.C. HHS, 205 N.C. App. 529, 536, 696 S.E.2d 187, 193 (2010) (quoting *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995)), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011) (emphasis in *Parkway Urology*).

"In addition, in *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, this Court affirmed a grant of summary judgment against a non-applicant CON challenger specifically because it had failed to demonstrate any genuine issue of material fact as to whether it had been substantially prejudiced by the award of a CON to a nearby competitor." *Id.* In *Parkway Urology*, after determining that the appellant had not shown substantial prejudice, we stated that "[s]ince [the appellant] failed to establish that it was substantially prejudiced by the awarding of the CON to [the appellee], it cannot be entitled to relief under N.C. Gen. Stat. § 150B-23(a). As a result, we decline to address [the appellant's] additional challenges to the [agency decision]." *Id* at 539, 696 S.E.2d at 195.

Cape Fear does not identify any specific right that it possesses which was prejudiced by a particular agency error and we decline to adopt the general rule proposed by Cape Fear that, before an ALJ may rule that an appellant has not shown substantial prejudice, it must make findings regarding the agency's compliance with all pertinent statutory requirements.

Cape Fear also argues that it was "substantially prejudiced by the economic losses it will suffer as a result of the Agency's decision" to approve FirstHealth's OR CON application. However, "t]his Court held in *Parkway Urology* that harm from normal competition does not amount to substantial prejudice:

> [The non-applicant's] argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a). . . . [The non-applicant] was required to provide specific evidence of harm resulting from the award of the CON to [the applicant] that went beyond any harm that necessarily resulted from additional [OR] competition . . . and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied [the non-applicant] relief due to its failure to establish substantial prejudice.

CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regulation, __ N.C. App. __, 751 S.E.2d 244, 251 (2013) (quoting *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195).

For the reasons discussed above, we conclude that the ALJ did not err by granting summary judgment in favor of FirstHealth and DHHS, and that its Final Agency Decision should be

AFFIRMED.

Judges GEER and STROUD concur.

SHIRLEY LIPE, WIDOW AND EXECUTRIX OF THE ESTATE OF ROSS IDDINGS LIPE, DECEASED EMPLOYEE, PLAINTIFF

v.

STARR DAVIS COMPANY, INC., EMPLOYER, TRAVELERS CASUALTY & SURETY (AS SUCCESSOR TO AETNA CASUALTY & SURETY COMPANY), CARRIER, DEFENDANTS

No. COA14-90-2

Filed 4 November 2014

Workers' Compensation—occupational disease—asbestosis—calculation of average weekly wage—last year of employment

The Industrial Commission did not err in a workers' compensation case by ordering defendant Travelers Casualty & Surety to pay death benefits to plaintiff widow. Based on the facts of this case, the Full Commission did not err in calculating decedent's average weekly wages based on the wages during the last year of employment at SDC rather than on the statutory minimum.

This opinion supersedes the opinion *Lipe v. Starr Davis Company*, No. COA14-90, 2014 N.C. App. LEXIS 729 (2014) (unpublished) filed on 1 July 2014. This appeal by Defendant is from an opinion and award entered 30 September 2013 by the North Carolina Industrial Commission and was originally heard in the Court of Appeals on 5 May 2014. This appeal was reheard in the Court on 20 October 2014, pursuant to the Order entered 27 August 2014 allowing Defendant's Petition for Rehearing.

Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher Kincheloe, Sarah P. Cronin, and M. Duane Jones, for Defendant Travelers Casualty & Surety.

DILLON, Judge.

Travelers Casualty & Surety ("Defendant") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("Full Commission" or "Commission") ordering that Defendant pay death benefits to Shirley Lipe ("Plaintiff"), widow of Ross Iddings Lipe ("Decedent"). For the following reasons, we affirm.

I. Factual & Procedural Background

Decedent was employed by Starr Davis Company, Inc. ("SDC")[1] in 10 March 1975. During his employment, he was exposed to asbestos. Decedent retired on 1 July 1991, at a time when his average weekly wage was $606.36, when he became disabled due to multiple sclerosis, unrelated to his exposure to asbestos, and was no longer able to work.

In January 1994, Decedent was diagnosed with asbestosis. Decedent filed an occupational disease claim with the Commission. By opinion and award entered 24 August 1999, the Commission found that Decedent's asbestosis was caused by his exposure to asbestos during his period of employment with SDC. The Commission awarded Decedent benefits of $404.24 per week, which was based on 66 2/3% of what his average weekly wages were when he retired in 1991, rather than based on his average weekly wages at the time he was diagnosed with asbestosis in 1994 – which would have been zero, as Decedent had been out of work since July 1991. This Court affirmed the Full Commission's 24 August 1999 opinion and award in *Lipe v. Starr Davis Co.*, 142 N.C. App. 213, 543 S.E.2d 533, 2001 N.C. App. LEXIS 52 (unpublished), *disc. review denied*, 354 N.C. 363, 556 S.E.2d 303 (2001).

In February 2010, Decedent was diagnosed with lung cancer. He died less than two months later, as a result of his lung cancer, on 11 April 2010. Plaintiff thereafter filed a claim with the Commission seeking death benefits based on Decedent's development of lung cancer through his asbestos exposure while working at SDC. Defendant conceded the compensability of Plaintiff's claim, but agreed to payments of only $30.00 per week, the statutory minimum under N.C. Gen. Stat. § 97-38, arguing that the statutory minimum payout is appropriate in this case.

The Full Commission found that Decedent's lung cancer was caused by the same exposure to asbestos that caused his asbestosis and awarded Plaintiff benefits equal to 66 2/3% of Decedent's average weekly wages

1. SDC is no longer in existence, and is thus only nominally a Defendant for purposes of this appeal.

for 400 weeks. The Commission determined Decedent's average weekly wages to be $606.36, articulating two alternative bases for its decision: (1) that the question concerning the manner of calculating Decedent's average weekly wages had been previously raised and addressed in its 24 August 1999 opinion and award, and Defendant was thus collaterally estopped from re-litigating the issue; and (2) that, even if collateral estoppel did not apply, the fifth of the five permissible methods of calculating average weekly wages under N.C. Gen. Stat. § 97-2(5) permitted the Full Commission to reach the same result – specifically, to calculate Decedent's average weekly wages based on his last full year of employment with SDC. From this opinion and award, Defendant appeals.

II. Standard of Review

In reviewing an opinion and award of the Full Commission, this Court must determine whether competent evidence supports the Commission's findings of fact and whether those findings so supported are sufficient, in turn, to support the Commission's conclusions of law. *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 442, 640 S.E.2d 744, 748 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 177, 658 S.E.2d 273 (2008). Findings supported by competent evidence are binding on appeal, "even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*." *Id.* at 442-43, 640 S.E.2d at 748 (citations omitted).

III. Analysis

Defendant contends that the Commission erred in its computation of Decedent's average weekly wages for purposes of Plaintiff's death benefits claim and should have based Decedent's average weekly wages on the statutory minimum of $30.00 per week.

N.C. Gen. Stat. § 97-38 (2013) provides, in pertinent part, that death benefits are payable in weekly payments to a person "wholly dependent for support upon the earnings of the deceased employee[2]" with each payment equal to 66 2/3% of "the *average weekly wages* of the deceased employee at the time of the accident, but not . . . less than thirty dollars ($30.00), per week[.]" (Emphasis added.) The employee's

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2. Defendant makes an argument in its brief that Plaintiff failed to show that she was "wholly dependent" and therefore not eligible for death benefits. However, the Commission's order reflects that Defendant stipulated that Plaintiff was married to Decedent at the time of his death. As Decedent's widow, Plaintiff is "conclusively presumed to be wholly dependent" on the Decedent at the time of his death, pursuant to N.C. Gen. Stat. § 97-39 (2013). Accordingly, this argument is overruled.

"average weekly wages" may be calculated using one of the five methods described under N.C. Gen. Stat. § 97-2(5). Our Supreme Court has stated that "[t]his statute sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed" and that it "establishes an order of preference for the calculation method to be used[.]" *McAninch v. Buncombe Co. Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997).

In the present case, the Commission applied the fifth method provided for under N.C. Gen. Stat. § 97-2(5), which provides as follows:

> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2013). Our Supreme Court has provided the following guidance regarding the application of this fifth method:

> The final method, as set forth in the last sentence [of N.C. Gen. Stat. § 97-2(5)], clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision."

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citations omitted) (ellipsis in original).

Defendant essentially contends that the Full Commission should have determined that Decedent's average weekly wages were zero because this is the amount he "would be earning were it not for" his diagnosis for lung cancer and that it is not "fair and just" to Defendant to require it to pay benefits based on Decedent's final wages when Decedent had been retired for 19 years and had no earning capacity at the time of his 2010 diagnosis. Defendant argues that this case is controlled by our decision in *Larramore v. Richardson Sports*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), a decision which was affirmed *per curiam* by our Supreme Court at 353 N.C. 520, 546 S.E.2d 87 (2001).

In *Larrimore*, the Full Commission applied the fifth method found in N.C. Gen. Stat. § 97-2(5) in calculating the average weekly wages of a professional football player who had signed a contract with the Carolina Panthers but who never played a down for them due to an injury he suffered during tryouts which caused him not to make the roster. 141 N.C. App. at 252, 255, 540 S.E.2d at 769, 771. Specifically, the Commission calculated the injured player's average weekly wages to be $1,653.85 – the amount he would have made had he made the final roster – finding that this amount represents what the player "would be earning were it not for the injury." *Id.* at 255, 540 S.E.2d at 771.

Defendant argues that, applying *Larramore*, the Full Commission here should have calculated Decedent's average weekly wages to be the statutory minimum because Decedent was earning zero at the time he was diagnosed with lung cancer and he would have continued to earn zero if he had never contracted lung cancer. Defendant further argues that *Larramore* is controlling over any other Court of Appeals decisions that appear to conflict with it because it was affirmed by our Supreme Court.

We believe *Larramore* is distinguishable from the present case and that the present case is controlled by this Court's holdings in *Abernathy v. Sandoz Chemicals*, 151 N.C. App. 252, 565 S.E.2d 218, *disc. review denie*d, 356 N.C. 432, 572 S.E.2d 421 (2002) and *Pope v. Manville*, 207 N.C. App. 157, 700 S.E.2d 22, *disc. review denied*, 365 N.C. 71, 705 S.E.2d 375 (2010). Unlike the present case, *Larramore* involved an employee who suffered an injury while "on the job." The issue of whether an individual was entitled to benefits for an injury which did not manifest until after retirement was not before our Court or the Supreme Court in *Larramore*.

In contrast to *Larramore*, but similar to the present case, *Abernathy* involved an individual who sought benefits for an occupational disease rather than an injury, which did not manifest until after the individual had retired. We affirmed the Commission's application of the fifth method, calculating the average weekly wage based on the individual's last year of employment, stating that "it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income." *Abernathy*, 151 N.C. App. at 258, 565 S.E.2d at 222.

Likewise, in *Pope*, this Court considered a situation where an individual sought benefits for asbestosis for which he was diagnosed well

after he retired. This Court followed its prior holding in *Abernathy* and concluded that the Commission did not err in calculating the individual's average weekly wage based on what he earned during his work life rather than awarding the statutory minimum simply because he had retired before the diagnosis. *Pope*, 207 N.C. App. at 160-61, 700 S.E.2d at 25.

In the present case, based on the Full Commission findings and the stipulation by Defendant, Decedent's lung cancer, diagnosed in 2010, was an occupational disease. *See Hatcher v. Daniel Int'l Corp.*, 153 N.C. App. 776, 781, 571 S.E.2d 20, 22 (2002) (holding that lung cancer may qualify as an occupational disease). Specifically, the Commission found as follows:

> 12. With respect to [Decedent's] lung cancer, the facts are analogous to his prior asbestos claim, with the exception that the lung cancer took a longer period to develop. [Decedent] was last injuriously exposed to the hazards of asbestos while employed by [SDC]. [Decedent's] lung cancer was caused by the same period of asbestos exposure that caused his compensable occupational disease of asbestosis. [Decedent] was not diagnosed with lung cancer until after his retirement from [SDC]. At the time of his diagnosis, [Decedent] had already been disabled by unrelated multiple sclerosis that forced him to retire from [SDC] in 1991. [Decedent] amended the Form 18B originally filed on April 18, 1994 to include a claim for lung cancer due to asbestos exposure and Defendants accepted the lung cancer claim as compensable.

We further believe that the findings are adequate to reflect that the Full Commission considered the first four methods of calculating average weekly wages before deciding to apply the fifth method. Specifically, the Full Commission stated as follows:

> 15. Based upon the preponderance of evidence in view of the entire record, the Full Commission finds that the first three methods of determining average weekly wage pursuant to N.C. Gen. Stat. § 97-2(5) are not applicable because they are based on the earnings of an injured employee during the fifty-two weeks preceding the date of injury or disability and [Decedent] had been retired for many years prior to his diagnosis of lung cancer and his death. The Full Commission further finds no evidence was presented by

> the parties regarding the average weekly wage earned by a similarly-situated employee; therefore, the fourth method of calculating average weekly wage cannot be used. Additionally, the Full Commission finds that it would be unfair and unjust to calculate [Decedent's] average weekly wage based upon his date of diagnosis or date of death as he was no longer employed and was not earning any income at either of those times. Therefore, using the first four methods to determine [Decedent's] average weekly wage would result in [Decedent's] dependents receiving no benefits (except the $30.00 weekly statutory minimum) and the Full Commission finds that such a result would be unfair and unjust.
>
> 16. Since the utilization of the first four methods for determining average weekly wages enunciated in N.C. Gen. Stat. § 97-2(5) are not applicable, the Full Commission finds that the fifth method under the statute, which allows "any other method of calculation," is the most appropriate method to calculate [Decedent's] average weekly wage. Due to the exceptional reasons and circumstances of this claim, [Decedent's] average weekly wage should be calculated based upon the earnings of [Decedent] during his last year of employment with [SDC], divided by fifty-two weeks, as it would most nearly approximate the amount which [Decedent] would have earned if not for his injury while working for [SDC] and is fair and just. During the last full year of his employment with [SDC], [Decedent] earned $31,530.89 resulting in an average weekly wage of $606.36 and a weekly compensation rate of $404.24.

We, therefore, hold that the findings by the Full Commission are sufficient to support the Commission's calculation method and, moreover, that the Commission correctly determined Decedent's average weekly wages to be $606.36, yielding a corresponding weekly compensation rate of $404.24. Based on our holdings in *Abernathy* and *Pope*, we believe that based on the facts of this case – where (1) Decedent was exposed to asbestos during his career at SDC, (2) he retired from SDC for a reason unrelated to any injury suffered at work, (3) after retirement he was diagnosed with lung cancer directly caused by his exposure to asbestos during his career at SDC, and (4) where he dies as a result of the lung cancer – the Full Commission did not err in calculating

Decedent's average weekly wages based on the wages during the last year of employment at SDC rather than based on the statutory minimum. Defendant's contentions are accordingly overruled.[3]

III. Conclusion

In light of the foregoing, we affirm the Commission's 30 September 2013 opinion and award.

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

3. We note the Commission's alternative basis for its calculation of Decedent's wages, namely, that it had employed the same method in deriving Decedent's wages in connection with his asbestos claim; that this Court had affirmed the Commission's opinion and award pertaining to that claim; and that Defendant here is essentially re-litigating the same calculation issue. We do not reject this alternative basis as meritless, but instead decline to reach the issue in light of our holding, which we believe rests firmly upon *Pope*, a case decided subsequent to the 2001 decision in which we upheld Decedent's asbestos claim.

DEVIN NEIL, KOLLIN KALK, SUSAN ZHAO, AND JOHN STOEHR, PLAINTIFFS
v.
KUESTER REAL ESTATE SERVICES, INC., CHS/ASU, LLC, AND KUESTER-GREENWAY COMPANY, LLC, DEFENDANTS

No. COA14-513

Filed 4 November 2014

1. Appeal and Error—appealability—interlocutory orders and appeals—class certification

An order denying a motion for class certification is immediately appealable because the denial of class certification affects a substantial right and could work an injury if not corrected before the final judgment.

2. Class Actions—certification—same issue of law or fact

When ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether each of the prospective class members has an interest in the same issue of law or fact, and that the issue predominates over issues affecting only individual class members.

3. Class Actions—certification denied—differing facts

The trial court did not abuse its discretion by denying plaintiff's motion for a class certification in an action involving the retention of security deposits by a landlord. The record revealed the existence of competent evidence that defendants claimed different amounts and types of alleged damages by each plaintiff and charged each plaintiff differing amounts for the alleged damages.

Appeal by Plaintiffs from order dated 30 January 2014 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 19 September 2014.

Hedrick Kepley, PLLC, by Michael P. Kepley, and Eggers, Eggers, Eggers and Eggers, by Austin F. Eggers, for Plaintiffs.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher B. Kincheloe and Lindsey L. Smith, for Defendant Kuester Real Estate Services, Inc.

Turner Law Office, PA, by Victoria H. Tobin, for Defendants CHS/ASU, LLC, and Kuester-Greenway Company, LLC.

STEPHENS, Judge.

This case is an appeal from the trial court's denial of Plaintiffs' motion for class certification in their action against various real estate entities which provide rental housing, largely to a college student population, in Boone, North Carolina. The crux of Plaintiffs' complaint concerns alleged violations of the North Carolina Tenant Security Deposit Act ("the Act"), and the dispositive question in resolving their motion for class certification concerns the remedy to which they would be entitled under the Act. Plaintiffs assert that the proper remedy would be an automatic full refund of their security deposits, obviating the need for separate trials on damages for every prospective class member. After careful consideration, we hold that, for the violations of the Act alleged, Plaintiffs would *not* be entitled to an automatic full refund, but rather, would only be entitled to a refund of any amounts withheld from their security deposits for a use not permitted by the Act. Determination of the appropriate amount of each Plaintiff's refund would require individual trials, thus rendering class action an inferior method for the adjudication of Plaintiffs' claims. Accordingly, we affirm the order of the trial court denying Plaintiffs' motion for class certification.

Factual and Procedural Background

At the time their complaint was filed in November 2012, Plaintiffs Devin Neil, Kollin Kalk, Susan Zhao, and John Stoehr were students at Appalachian State University in Boone. On 1 August 2011, Neil and Kalk, along with another individual, entered into a lease agreement with Defendant Kuester Real Estate Services, Inc. ("Kuester"), for unit 407 at Turtle Creek West, an apartment complex owned by Defendant CHS/ASU, LLC ("CHS"), and located near the University. CHS had contracted with Kuester to manage and maintain Turtle Creek West. The lease agreement ended on 31 July 2012, and Neil and Kalk allege that, before they vacated the premises, they thoroughly cleaned the apartment and returned it to the same condition as when they moved in, minus any normal wear and tear.

However, Neil and Kalk later received invoices from Kuester which reflected charges for, *inter alia*, carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an "administrative fee" of $40. This fee is explicitly authorized by the lease addendum to which Neil and Kalk agreed in writing. In pertinent part, the lease addendum provides:

> In order to promote and maintain the community, and as a condition of residency, "Turtle Creek West" has established the following additional rules and regulations for all tenants. Adherence to these rules and regulations is essential for the comfort and convenience of all tenants.
>
> Tenant shall be subject to a $40 Administrative Fee (in addition to the cost of any repairs or remedies) for: [any of some forty listed safety, health, and maintenance regulations]

Among the rules and regulations listed are several which require tenants to keep their units clean and in good condition, specifically including the bathroom, kitchen, walls, and carpets. On appeal and in their complaint, Plaintiffs assert that the charges listed on each invoice exceeded the security deposit of $250 per person which Neil and Kalk had made at the time they entered into the lease, leaving an outstanding balance owed by each of them.[1]

On 6 August 2011, Zhao and Stoehr, along with another individual, entered into a lease agreement with Kuester for unit 104 at Greenway Commons, another apartment complex located in Boone and managed by Kuester. Greenway Commons is owned by Defendant Kuester-Greenway Company, LLC ("Greenway"). Zhao's and Stoehr's lease also ended on 31 July 2012, and like Neil and Kalk, they allege that they thoroughly cleaned their unit and returned it to its original condition, less any normal wear and tear, before moving out. They each received an invoice from Kuester which reflected charges for services such as carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an administrative fee of $40. Greenway Commons requires all tenants to agree in writing to an addendum explaining the administrative fee to be charged for violation of listed rules and regulations. This addendum is identical to that used at Turtle Creek West, with the exception of the apartment complex name. Zhao and Stoehr each initialed an addendum. The complaint alleges

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1. The record on appeal does not support this assertion. The record contains four partially legible documents entitled "Transaction Listing," which appear to list charges by and payments to CHS and Greenway for each Plaintiff from roughly March 2011 through August 2012. The Transaction Listing for each Plaintiff appears to reflect a refund or reimbursement. In addition, in the excerpts of their depositions which are in the record, Stoehr and Kalk each mention receiving partial refunds of their security deposits.

that the total charges on each invoice exceeded the $550[2] per person security deposit Zhao and Stoehr had been required to pay when signing their lease.[3]

On 13 November 2012, Plaintiffs initiated this action by the filing of a complaint in Watauga County Superior Court. The complaint alleges that Defendants formed a plan "to increase profits through the overcharging of their respective tenants and taking their security deposits at the end terms of their respective leases" and includes claims for violations of the Act, unfair and deceptive trade practices ("UDTP"), fraud, and punitive damages. Plaintiffs defined their proposed class as "[a]ll natural and/or legal persons who have entered into lease agreements to lease residential dwelling units at either and/or Turtle Creek West and Greenway Commons, which leases were managed by Defendant Kuester during the years 2009 and ongoing." In support of class certification, the complaint alleges, *inter alia*:

> 37. Common questions of law and fact exist as to all members of the Applicator Class, and they predominate over any questions that affect only individual Applicator Class Members. The questions of law and fact that are common to the Applicator Class, and which would dominate [sic] over any individualized issues, include but are not limited to the following:
>
> > a. Whether Defendants violated the . . . Act through their administration and use of the Plaintiffs' and Applicator Class Members' respective security deposits;
> >
> > b. Whether Defendants withheld as damages part of Plaintiffs' and the Applicator Class Members' respective security deposits for conditions that were due to normal wear and tear;
> >
> > c. Whether Defendants retained amounts from Plaintiffs' and the Applicator Class[members'] respective security deposits which exceeded their actual damages;

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2. The record suggests that Neil and Kalk were required to pay a lower security deposit than Zhao and Stoehr because the former two Plaintiffs assumed an existing lease from other tenants.

3. *See* Footnote 1, *supra*.

d. Whether Defendants knew, reasonably should have known, or were reckless in not knowing the lease agreements the Defendants were using to rent their respective properties contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;

e. Whether Defendants negligently, recklessly, and/or unfairly and deceptively concealed from [their] tenants the fact that their contracts contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;

f. Whether Defendants misrepresented to their respective tenants the actual damage sustained by Defendants, if any;

g. Whether Defendants failed to disclose material facts about the alleged need for repairs and/or cleaning to each of their respective tenants prior to sending the respective tenants invoices for alleged charges;

h. Whether Defendants' conduct constitutes unfair and/or deceptive acts or practices, in or affecting commerce, in violation of Chapter 75 of the North Carolina General Statutes;

i. Whether Plaintiffs and Applicator Class Members are entitled to compensatory damages;

j. Whether Plaintiffs and Applicator Class Members are entitled to an award of treble damages;

k. Whether Plaintiffs and Applicator Class Members are entitled to all or some of their security deposits to be returned to them along with all or some of the charges which were charged over and above their respective security deposits;

l. Whether Plaintiffs and Applicator Class Members are entitled to an award of punitive damages; and

m. Whether Plaintiffs and Applicator Class Members are entitled to an award of their reasonable attorneys'

fees, expert witness fees, pre-judgment interest, post-judgment interest, and costs of suit.

38. The only non-common issue is the amount of specific damages for each particular member of the Applicator Class; therefore, common questions of law and fact clearly predominate within the meaning of Rule 23 of the North Carolina Rules of Civil Procedure.

39. Plaintiffs' claims are typical of the claims of all Applicator Class Members, in that Plaintiffs leased property from Defendant Kuester, and they were sent statements for itemized charges for alleged necessary cleaning, painting, and other alleged damage to the Premises once they vacated the Premises, and they seek to recover for the damages caused by Defendants' conduct and material misrepresentations to them regarding the alleged charges. Consequently, Plaintiffs' legal claims are the same as those of another Applicator Class Member, and the relief they seek is the same as that of any other Applicator Class Member. Plaintiffs will fairly and adequately represent the interests of the absent Applicator Class Members, in that Plaintiffs have no conflicts with any other Applicator Class Members that would interfere with their zealous pursuit of these claims on behalf of the other Applicator Class Members. Furthermore, Plaintiffs have retained competent counsel who are experienced plaintiffs' attorneys and are in good standing with the North Carolina State Bar.

40. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy described herein, because it permits a large number of injured persons to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence and effort. Class treatment will also permit the adjudication of claims by Applicator Class Members who could not afford to individually litigate these claims against large corporate defendants.

On 14 January 2013, Kuester filed its answer, moving to dismiss Plaintiffs' lawsuit pursuant to Rule of Civil Procedure 12(b)(6) and asserting various affirmative defenses. On 15 January 2013, CHS and Greenway filed a joint answer which also included a motion to dismiss and affirmative defenses.

On 13 November 2013, Plaintiffs moved for class certification, alleging:

> 1. The class of people the named plaintiffs are seeking to represent are too numerous as to make it practicable to bring them all before the [c]ourt;
>
> 2. The named and unnamed members of the class have an interest in the same issues of law or fact that predominate over issues affecting only individual class members to wit:
>
> a. Did [D]efendants violate the . . . Act by doing one or more of the following:
>
> i. Charging tenants an unlawful $40.00 "administrative fee", and taking the "administrative fee" from each tenant's security deposit;
>
> ii. Withholding funds as damages from their tenants' security deposits for conditions which were due to normal wear and tear;
>
> iii. Retaining amounts from their tenants' security deposits which exceeded their actual damages.
>
> b. If so, did [D]efendants commit fraud and/or unfair and/or deceptive trade practices?
>
> c. If so, what are the damages to each tenant?
>
> 3. The class members within the [c]ourt's jurisdiction can fairly and adequately represent the interests of those within and without the [c]ourt's jurisdiction; and
>
> 4. No reasons exist to deny the present motion.

Following a hearing on 18 November 2013, the trial court entered an order denying Plaintiffs' motion for class certification dated 5 February 2014. That order states:

> This action was filed on November 13, 2012, by Plaintiffs[] Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr on behalf of themselves and others similarly situated, alleging issues of law and fact common to all members of the Applicator Class, including, *inter alia*, the following:
>
> a. Whether Defendants violated the North Carolina Tenant Security Act;

b. Whether Defendants improperly withheld funds from tenant deposits for conditions that were due to normal wear and tear;

c. Whether the amounts withheld by Defendants exceeded their actual damages;

d. Whether Defendants misrepresented their actual damages; and

e. Whether Defendants' conduct entitles members of the proposed class to a refund of all or some of their security deposits.

The order also contained the following findings of fact:

1. There is nothing in the record to indicate that [] Plaintiffs, Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr, would unfairly or inadequately represent the interest of all of the potential members of a class in this matter;

2. There is no evidence of record that there exists a conflict of interest between []Plaintiffs and members of the proposed class;

3. []Plaintiffs have a genuine personal interest in the outcome of the case;

4. The [c]ourt assumes for purposes of this motion only that alleged issues of fact and law (a) and (e) above are common to all members of the proposed class;

5. With regard to issues (b), (c), and (d), the [c]ourt finds the resolution of the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit.

6. Even assuming as Plaintiffs' counsel has argued, that Defendants have no compulsory counterclaims, it still must be assumed that if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, as Plaintiffs allege, then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. These, too, would require separate trials of the breach of contract claims and result in

potentially differing outcomes, thereby negating the benefits of a class action lawsuit.

7. The common issues of fact that may be shared by the class members do not predominate over issues affecting only individual class members.

Based upon those findings of fact, the trial court made the following conclusions of law:

1. The named representatives established that they will fairly and adequately represent the interests of all members of the class;

2. There is no conflict between the named representatives and class members;

3. The named representatives have a genuine personal interest in the outcome of the case;

4. The class members are so numerous that it is impractical to bring them all before the court;

5. The common issues of fact in this matter do not predominate over issues affecting only individual class members.

6. Plaintiffs' Motion for Class Certification is denied.

From the order denying their motion for class certification, Plaintiffs appeal.

Grounds for Appellate Review

[1] As Plaintiffs note, the order denying their motion for class certification is interlocutory, as it does not constitute a final judgment on the merits of their claims. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[a]n interlocutory order is appealable if it affects a substantial right and will work injury to the appellants if not corrected before final judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 355-56 (1984) (citation omitted). This Court has held that, in cases purporting to warrant class certification, where a plaintiff "recovers after the trial court has refused to certify the action, the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment." *Id.* at 762, 318 S.E.2d at 356. Accordingly, an order denying a motion for class certification is immediately appealable. *Id.*

Standard of Review

Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. It states in pertinent part: If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued. First, parties seeking to employ the class action procedure pursuant to our Rule 23 must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites: (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class. When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy.

Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. The trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [our case law].

The touchstone for appellate review of a Rule 23 order is to honor the broad discretion allowed the trial court in all matters pertaining to class certification. Accordingly, we review the trial court's order denying class certification for abuse of discretion. The test for abuse of discretion is

> whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Beroth Oil Co. v. N.C. Dep't of Transp., __ N.C. __, __, 757 S.E.2d 466, 470-71 (2014) (citations, internal quotation marks, ellipses, and certain brackets omitted). When reviewing a class certification order, the trial court's "findings of fact are binding if supported by competent evidence, and [its] conclusions of law are reviewed *de novo*." *Id.* at __, 757 S.E.2d at 471.

[2] In sum, when ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether "each of the [prospective class] members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at __, 757 S.E.2d at 470. If the court determines that no class exists, no further analysis is required. *Id.*

Discussion

[3] Plaintiffs argue that the trial court erred in holding that Plaintiffs failed to establish the existence of a class and, therefore, that the court abused its discretion in refusing to grant their motion for class certification. We disagree.

Specifically, Plaintiffs contend that the trial court erred in making finding of fact 5, that "the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit[;]" and finding of fact 6, that, "if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, . . . then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. . . . [which] would require separate trials. . . ." Plaintiffs also challenge the court's ultimate determination, finding of fact 7 and conclusion of law 5, that "common issues of fact in this matter do not predominate over issues affecting only individual class members."

While denominated as factual findings, findings of fact 5 and 6 are better characterized as mixed findings of fact and conclusions of law. Finding of fact 7 is a legal conclusion. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the application of legal

principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.") (citations and internal quotation marks omitted).

Certainly, the trial court considered evidentiary facts, such as the alleged damage done to Plaintiffs' units and the specifics of the billing to repair that damage, in order to reach the challenged determinations. However, our review of the record reveals the existence of competent evidence that Defendants claimed different amounts and types of alleged damages by each Plaintiff and charged each Plaintiff differing amounts for the alleged damages. For example, the Transaction Listings reflect that Plaintiffs were each charged different amounts for varied types of cleaning and repairs on their individual bedrooms and in the common areas of their units. A former property manager for Kuester testified that tenants were charged differing amounts based on the specific need for repairs and/or cleaning to the tenant's individual unit. Each Plaintiff was charged a different total amount against their security deposits, and each received some portion of his or her security deposit back. In sum, the factual portions of the trial court's determinations are supported by competent evidence and, thus, are binding on appeal. *See Beroth Oil Co.*, __ N.C. at __, 757 S.E.2d at 471. Even so, the core of Plaintiffs' appeal is their contention that the trial court reached erroneous legal conclusions about the remedies available to them under the Act which in turn led to erroneous conclusions about the need for separate trials on damages. We must consider the court's conclusions *de novo*. *Id.*

Plaintiffs assert that any willful violation of the Act would require a *total* refund of each class member's security deposit, regardless of what damage may have been done to individual apartments, and that Defendants would not be entitled to file any counterclaims. They argue that the sole issue to be decided is whether Defendants violated the Act and that individual trials are neither necessary nor the most efficient option to determine that issue. If Plaintiffs' understanding of the Act is correct, we agree that no separate trials for individual class members would be required. We conclude, however, that Plaintiffs misinterpret the remedies available to them for Defendants' alleged violations of the Act.

The Act contains seven sections. The first section mandates how security deposits must be maintained by landlords:

> Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed

> and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (2013). The second section discusses the permitted uses of security deposits:

> Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to [section] 62-110(g) and electric service pursuant to [section] 62-110(h), damage to the premises, nonfulfillment of rental period, any unpaid bills that become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, costs of removal and storage of the tenant's property after a summary ejectment proceeding or court costs in connection with terminating a tenancy. The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in [section] 42-52.

N.C. Gen. Stat. § 42-51 (2011).[4]

4. Section 42-51 was amended effective 1 October 2012. 2012 N.C. Sess. Laws 17, s.4. The former version of this statute quoted herein applies to Plaintiffs' case. The substance of the statute remained largely the same, though the format was altered to list by subsection the specific permitted uses of the security deposit. One noteworthy change was the addition of subsection (a)(8): "Any fee permitted by G.S. 42-46." Section 42-46 is part of Article 5, entitled "Residential Rental Agreements" and includes provisions for various court-related fees, and fees for late payment of rent. N.C. Gen. Stat. § 42-46(a)(1) (2013). In their argument on appeal, Plaintiffs include a brief reference to Defendants' alleged violation of subsection (a)(8). Because subsection (a)(8) is contained in the amended version of the statute not applicable to Plaintiffs' security deposits, we do not address assertions regarding section 42-46 in this opinion.

Section 42-52 discusses the obligations of landlords in providing tenants an accounting of any money withheld from the security deposit and a timely refund of any remaining balance:

> Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in [section] 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the extent of the landlord's claim against the security deposit cannot be determined within 30 days, the landlord shall provide the tenant with an interim accounting no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord and shall provide a final accounting within 60 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the tenant's address is unknown the landlord shall apply the deposit as permitted in [section] 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages.

N.C. Gen. Stat. § 42-52 (2013). Section 42-53 concerns pet deposits, section 42-54 discusses transfer of units between landlords, and section 42-56 describes the persons and entities considered landlords under the Act and to whom the Act applies. *See* N.C. Gen. Stat. §§ 42-53, -54, -56 (2013).

Most pertinent to resolution of this appeal, the section entitled "Remedies" provides that,

> [i]f the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. *The willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article shall void the landlord's right*

> *to retain any portion of the tenant's security deposit as otherwise permitted under [section] 42-51.* In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, such willful noncompliance is against the public policy of this State and the court may award attorney's fees to be taxed as part of the costs of court.

N.C. Gen. Stat. § 42-55 (2013) (emphasis added). Plaintiffs focus on the italicized language as the remedy for Defendants' alleged violation of section 42-51 — by taking the $40 administrative fee from their security deposits – and section 42-52 — by withholding from the security deposits damages attributable to normal wear and tear and retaining amounts greater than the actual damages done to the units. We are not persuaded by Plaintiffs' assertions.

Under our long-standing principles of statutory construction, "we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. [In addition], words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent while avoiding absurd or illogical interpretations." *Fort v. Cnty of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012). Applying these principles to the plain language of the Act, section 42-55 sets forth four distinct remedies: (1) where a landlord "fails to account for and refund the balance of the tenant's security deposit as required[,]" tenants can bring a civil action to receive the required accounting and appropriate refunds due them ("the appropriate refund remedy"); (2) where a landlord "willfully fails to comply with the deposit, bond, or notice requirements of this Article[,]" a tenant can seek refund of the entire security deposit, even if the landlord would otherwise be entitled to retain some portion thereof ("the full refund remedy"); (3) where a tenant has incurred damages from the landlord's failure to comply with the Act, the tenant may sue to recover those damages ("the damages remedy"); and (4) where a landlord's noncompliance is willful, the tenant can seek attorney's fees ("the attorney's fees remedy"). *See* N.C. Gen. Stat. § 42-55.

While the damages remedy and the attorney's fees remedy could be sought in conjunction with each other or with the other remedies,

the appropriate refund remedy and the full refund remedy are mutually exclusive. The first allows only for the required accounting and proper refund of the security deposit, while the second entitles a tenant to a total refund, even if the tenant's actions would otherwise subject his deposit to partial or complete forfeit. Put another way, the appropriate refund remedy merely requires a landlord to comply with the accounting and refund requirements of the Act, while the full refund remedy imposes a penalty for noncompliance. It follows, then, that these two remedies must apply to different types of noncompliance with the Act, since otherwise, every tenant with a noncomplying landlord would certainly elect to receive a full refund.

Plaintiffs appear to interpret the trigger for the full refund remedy, to wit, the phrase "willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article[,]" as a reference to non-permitted uses of security deposits in violation of section 42-51 and overcharging for damages in violation of section 42-52. We do not believe that the word "deposit" in the above-quoted portion of the remedy section is intended to reference *any and all* wrongful use or withholding of a security deposit. Such an interpretation would lead to a nonsensical result since the entire Act concerns security deposits, and thus every violation of the Act by a landlord would afford the landlord's tenants full refunds and the appropriate refund remedy would become, in effect, surplusage. Such statutory interpretations must be avoided. *See Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citations and internal quotation marks omitted).

We conclude that the full refund remedy is available only for willful violations of section 42-50, the only section of the Act containing provisions regarding deposit, bond, *and* notice *vis a vis* security deposits:

> Security deposits from the tenant in residential dwelling units *shall be deposited in a trust account* with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, *furnish a bond* from an insurance company licensed to do business in North Carolina. . . . The landlord or his agent *shall notify* the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (emphasis added).

It seems equally clear that the appropriate refund remedy, to wit, a proper accounting and refund of any remaining portion of the security deposit to which a tenant is entitled, applies to violations of section 42-52, such as overcharging for damages and charging for normal wear and tear. The appropriate refund remedy is available when a landlord "fails to account for and refund the balance of the tenant's security deposit as required[,]" N.C. Gen. Stat. § 42-50, an echo of the requirement that landlords "shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord." N.C. Gen. Stat. § 42-52.[5] Nothing in the statute would require an automatic refund of every tenant's full security deposit for Defendants' alleged overcharging for repairs and charging for normal wear and tear. Thus, we agree with the trial court's conclusion that each prospective class member would require a separate trial to determine, *inter alia*, what portion of the class member's individual charges, if any, was attributable to overcharging or charging for normal wear and tear.

As for Plaintiffs' allegation that Defendants have violated section 42-51 by deducting the administrative fee — essentially a fine for breaking the rules and regulations listed in the lease addendum — from their security deposits, we likewise conclude that any such violations would entitle them only to the appropriate refund remedy, damages remedy, and/or attorney's fees remedy. Withholding money for an issue not on the list of permitted uses for security deposits directly implicates the proper amount of a tenant's security deposit refund, thereby triggering the appropriate refund remedy.[6]

Further, we can find nothing in the Act that would prevent a landlord from fining tenants for violating health, safety, or other rules and regulations such as those Plaintiffs agreed to in their lease addenda. The Act simply bars landlords from taking those amounts out of security deposits. *See* N.C. Gen. Stat. § 42-51. Thus, even if Plaintiffs prevail in proving that Kuester violated the Act by deducting the administrative fee from their security deposits and the fees were therefore refunded to them, CHS and Greenway could simply bill them separately for the $40 fee.

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5. The damages and attorney's fees remedies could also be available if Plaintiffs were able to establish that they incurred damages from Defendants' noncompliance and/or that the noncompliance was willful. *See* N.C. Gen. Stat. § 42-55. Of course, any determination of damages would also require individual trials for each Plaintiff.

6. *See* Footnote 5, *supra*.

We also note that, if any of the applicator class members had damage and cleaning costs which exceeded the amount of their security deposit, such that CHS or Greenway had to bill them for additional amounts, a fact-finder would need to determine whether the administrative fee was taken out of the security deposits or was part of the additional amount billed.[7]

In sum, the factual underpinnings of the findings of fact Plaintiffs challenge on appeal are supported by competent evidence. The trial court did not err in its ultimate finding and legal conclusion that "common issues of fact in this matter do not predominate over issues affecting only individual class members." Plaintiffs having failed to establish the existence of a class, the trial court did not abuse its discretion in denying Plaintiffs' motion. *See Beroth Oil Co.*, __ N.C. at __, 757 S.E.2d at 470-71. The order denying Plaintiffs' motion for class certification is

AFFIRMED.

Chief Judge McGEE and Judge HUNTER concur.

7. The Transaction Listing for each of the four named plaintiffs appears to include a line item for $40 noted as "Administrative Fee" with "Administrative fee" noted under the "Comment" column. In contrast, the amounts billed for various cleaning and repairs required after Plaintiffs vacated their units are described as "Security Deposit Forfeit" with specific explanations of charges listed in the Comment column. For example, Kalk's Transaction Listing includes a charge of $4 as "Security Deposit Forfeit" with the comment "Clean washer/dryer[.]" Accordingly, the evidence is disputed as to whether the administrative fees were actually taken out of the security deposits.

DANIEL E. SKINNER, PLAINTIFF
v.
SUZANNE REYNOLDS, BLAKE MORANT, NATHAN HATCH, JAMES REID MORGAN, WAKE FOREST UNIVERSITY, AND WAKE FOREST UNIVERSITY SCHOOL OF LAW, DEFENDANTS

No. COA14-325

Filed 4 November 2014

Defamation—libel per se—libel per quod—failure to state a claim—dismissal proper

Plaintiff's complaint was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) because it failed to state a claim for defamation based on libel per se or libel per quod. Plaintiff's claims for negligent supervision were properly dismissed as derivative of his substantive claims.

Appeal by plaintiff from order entered 12 July 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 11 September 2014.

Daniel E. Skinner, pro se.

Bell, Davis & Pitt, P.A., by William K. Davis, and Stephen M. Russell, Sr., for defendant-appellees.

STEELMAN, Judge.

Plaintiff's complaint was properly dismissed under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because it failed to state a claim for defamation based on libel *per se* or libel *per quod*. Plaintiff's claims for negligent supervision were properly dismissed as derivative of his substantive claims.

I. Factual and Procedural Background

Daniel Skinner (plaintiff) was enrolled at Wake Forest University School of Law, beginning in the fall of 2009. Plaintiff, who had received merit scholarships, was informed in June 2011 that the amount of his scholarships would be reduced by half because he had failed to remain in the top two-thirds of his law school class. Plaintiff disputed the reduction of his scholarships, arguing that the class rank requirement did not apply to certain scholarships. He pursued his challenge to the scholarship reduction over the following year. He first met with Melanie Nutt,

then the school's Director of Admissions, who informed him that the condition applied to his entire financial aid award. He then appealed to Jay Shively, the Assistant Dean for Admissions and Financial Aid, who wrote to plaintiff in August 2011 informing plaintiff that all of his scholarships were subject to the requirement that he remain in the top two-thirds of his class. Plaintiff next submitted a grievance to Ann Gibbs, Associate Dean for Administrative and Student Services, who consulted with the law school's legal counsel. In September 2011 Dean Gibbs notified plaintiff that she and the school's legal counsel concluded that all of his scholarships were subject to the class rank requirement. Plaintiff's contentions were then reviewed by Law School Dean Blake Morant, who wrote to plaintiff on 21 November 2011 "comprehensively addressing" his arguments and reiterating that the condition applied to all of his scholarships. In April 2012, plaintiff met in person with Dean Morant and Suzanne Reynolds, the Executive Associate Dean for Academic Affairs. Dean Reynolds also held a second meeting with plaintiff to discuss the terms of his scholarships.

On 10 May 2012 Dean Reynolds hand-delivered a letter to plaintiff, in which she stated that she had "two purposes in this letter. One is to set out our position about your scholarship award. The other is to remind you of the code of conduct expected of students." The letter first reviewed the events surrounding plaintiff's challenge to the reduction of his scholarship, and responded to plaintiff's assertion that the law school's review of plaintiff's grievance did not comply with the requirements of the American Bar Association. The second part of the letter discussed plaintiff's behavior during his challenge to the reduction of his scholarships, stated her opinion that plaintiff tended to react with suspicion to those who disagreed with him, and reminded plaintiff of the need to comply with the university's code of conduct. Dean Reynolds provided Dean Morant and Associate Dean Gibbs with copies of her letter to plaintiff.

On 9 May 2013 plaintiff filed this lawsuit, asserting claims of defamation against Dean Reynolds, Wake Forest University, and Wake Forest School of Law; and claims of negligent supervision against Dean Morant and against Nathan Hatch and James Reid Morgan, the president and senior vice president of Wake Forest University. Plaintiff alleged that certain statements in the second part of Dean Reynolds's letter constituted libel *per se* and libel *per quod*, that the university and law school were vicariously liable for Dean Reynolds's libel, and that the other defendants were liable for failure to properly supervise Dean Reynolds.

On 24 May 2013 defendants filed an answer denying the material allegations of the complaint and moving for dismissal of plaintiff's suit

under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 12 July 2013 the trial court entered an order granting defendants' motion and dismissing all of plaintiff's claims.

Plaintiff appeals.

II. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. '[D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6).' " *Malloy v. Preslar*, __ N.C. App. __, __, 745 S.E.2d 352, 355 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979)). "In our review of the trial court's ruling on a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), '[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' While we treat plaintiffs' factual allegations as true, we may ignore plaintiffs' legal conclusions." *McCrann v. Pinehurst*, __ N.C. App. __, __, 737 S.E.2d 771, 777 (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), and citing *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)), *disc. review denied*, 366 N.C. 593, 743 S.E.2d 221 (2013).

III. Analysis

A. Libel *Per Se*

" 'Libel *per se* is a publication which, *when considered alone without explanatory circumstances*: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.' " *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 736, 659 S.E.2d 483, 486 (2008) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) (internal quotations omitted) (emphasis in *Nucor*). Further:

> "[D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to

> disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." "Although someone cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact." This Court considers how the alleged defamatory publication would have been understood by an average reader. In addition, the alleged defamatory statements must be construed only in the context of the document in which they are contained, "stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof."

Nucor, 189 can at 736, 659 S.E.2d at 486-87 (quoting *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317-18, 312 S.E.2d 405, 409 (1984) (citation and quotation marks omitted) (emphasis in original), and *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006), and citing *Boyce*, 153 N.C. App. at 31, 568 S.E.2d at 899).

Plaintiff's claims for libel are based on statements contained in the second part of Dean Reynolds's letter, which is reproduced below:

> II. The Code of Conduct Expected of Students
>
> I have no concern about law students having disputes with administrators. After all, part of what we teach in a law school is how to raise disputes and pursue them. I am deeply concerned, however, with your conduct in this process. In the course of this disagreement, you have claimed that several administrators have acted fraudulently and have accused another of lying. You have made these statements in the presence of other students. You have sent an email to the entire law school faculty calling for the removal of the Dean.
>
> I would be concerned about this conduct by any student, but it is of particular concern to me in a law student. In the practice of law, people often disagree with each other and must work to resolve those disagreements. From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit. If you had

made similar accusations under similar circumstances to a client, you would be fired. If you had made similar accusations under similar circumstances to a judge, you would be held in contempt.

We have tolerated your conduct because we have assumed that the issue has consumed you. I do not want our lenience to date to make you think we find such conduct acceptable. It is not. This letter puts you on notice that like all students, we expect you to abide by the code of conduct set out in Chapter 7 of the Student Handbook, which provides in part:

> Members of the Law School community are expected to adhere to standards of conduct that will reflect credit upon themselves, the Law School, the legal profession, and Wake Forest University. Students aspiring to the Bar are expected to behave appropriately, to respect the rights and privileges of other[s], and to abide [by] the laws of the city, state, and nation and the regulations of the University and the School of Law.

Now that this dispute is behind us, I will assume that you will abide by the code of conduct. We have given you so many audiences for your position because we want nothing but the best for you. That same desire motivates us now to put an end to the hearings about your scholarship award and to notify you that we expect appropriate conduct from you. We have tolerated inappropriate conduct in hearing you out, but we will not tolerate inappropriate conduct any longer.

I want to close by highlighting our desire for your success - in your remaining year of law school and beyond. We admitted you with every expectation that you would succeed as a law student and as a lawyer. We continue to wish for you the brightest of futures.

Plaintiff focuses his arguments primarily on the following sentence in Dean Reynolds's letter: "From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit." We conclude that this sentence, whether considered alone or in the context of the rest of the letter, does not constitute actionable libel.

The phrase "from my experience with you on this issue" is tantamount to "in my opinion" or "in my experience." The subjective nature of Dean Reynolds's statement is demonstrated by the rest of the sentence, which states her personal opinion that "if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit." Plaintiff admits that he has accused various parties of fraud and deceit. Dean Reynolds's opinion that his accusations were motivated by suspicion of those who disagree with him is not a fact that is subject to being proven or disproved, and cannot constitute actionable libel *per se*.

In addition, the paragraph from which plaintiff extracts this sentence indicates that Dean Reynolds was providing guidance to plaintiff, then a student, regarding the standard of behavior to which he would be held if he chose to practice law:

> I would be concerned about this conduct by any student, but it is of particular concern to me in a law student. In the practice of law, people often disagree with each other and must work to resolve those disagreements. From my experience with you on this issue, if people disagree with you, you appear to assume that those persons are acting in bad faith and you accuse them of fraud and deceit. If you had made similar accusations under similar circumstances to a client, you would be fired. If you had made similar accusations under similar circumstances to a judge, you would be held in contempt.

The general tenor of the paragraph is that (1) during the course of plaintiff's challenges to the reduction in his scholarship amount he appeared to have an emotional reaction to disagreement, responding with accusations of fraud and deceit rather than objectively assessing the merits of opposing views, and; (2) plaintiff would be advised to develop other ways of dealing with dispute if he wished to succeed as an attorney. This paragraph expresses Dean Reynolds's opinions; neither plaintiff's inner motivation for his accusations, nor the hypothetical reaction of a future client or judge is a fact that can be proven. *Daniels*, 179 N.C. App. at 540, 634 S.E.2d at 591 (dismissing defamation claim in part because "whether or not plaintiff spoke in a 'sinister' or 'Gestapo' voice is a matter of [the defendant's] opinion, incapable of being proven or disproved"). Neither Dean Reynolds's views on plaintiff's personal reaction to disagreement, nor her advice regarding the practice of law were defamatory.

Plaintiff, however, argues that the cited language from Dean Reynolds's letter is defamatory because it would "subject the plaintiff to ridicule, contempt, and disgrace," and "impeach[es] the plaintiff in his profession." Plaintiff does not support these conclusory allegations with alleged facts. Instead, plaintiff, who was a student at the time Dean Reynolds wrote to him, posits that if he graduated from law school, was licensed to practice law, and then, in a hypothetical case, engaged in baseless accusations, that he would then be subject to the negative consequences discussed by Dean Reynolds in her letter. As discussed above, the reaction of hypothetical parties to plaintiff's hypothetical future behavior is not a fact subject to proof, and thus cannot form the basis of a libel claim. Moreover, plaintiff's discussion of possible future occurrences constitutes the kind of "explanatory circumstances" that are not properly part of our analysis of whether a complaint states a valid claim for defamation. *Aycock v. Padgett*, 134 N.C. App. 164, 167, 516 S.E.2d 907, 909 (1999) (upholding dismissal of defamation claim where "there would seem to be a need for explanatory circumstances for the listener or reader here to know that plaintiff had committed an infamous crime").

Plaintiff also argues that other statements in Dean Reynolds's letter "implied defamatory facts." For example, he contends that the letter's warning that "we will not tolerate inappropriate conduct any longer" "implied that there were facts that would justify plaintiff's expulsion" from the university. However, the letter does not identify specific examples of "inappropriate conduct," does not refer to particular sanctions available to the university in response to "inappropriate conduct," and does not mention expulsion. Similarly, plaintiff alleges that Dean Reynolds's caution that he could be subject to contempt proceedings if he responded to a judge's disagreement with accusations of fraud and deceit implied that plaintiff had committed a crime. As discussed above, for statements to constitute libel *per se*, "the alleged defamatory statements must be construed only in the context of the document in which they are contained, 'stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof.' " *Nucor*, 189 N.C. App. at 736, 659 S.E.2d at 488 (quoting *Renwick* at 317-18, 312 S.E.2d at 409 (citation and internal quotation marks omitted). Plaintiff's arguments do not rest on the language of Dean Reynolds's letter, but on hypothetical scenarios and alleged "implications" of her statements. We reject these arguments, and hold that the letter did not defame plaintiff and that it does not support a valid claim for libel *per se*. Having reached this conclusion, we need not reach the parties' arguments regarding the letter's publication or whether it was privileged.

C. Claim for Libel *Per Quod*

Plaintiff next argues that his complaint sufficiently alleges facts to support a claim for libel *per quod.* We do not agree.

Libel *per quod* "may be asserted when a publication is not obviously defamatory, but when considered in conjunction with innuendo, colloquium, and explanatory circumstances it becomes libelous." *Nguyen v. Taylor*, 200 N.C. App. 387, 392, 684 S.E.2d 470, 474 (2009) (citing *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990)). "To state a claim for libel *per quod*, a party must specifically allege and prove special damages as to each plaintiff." *Nguyen*, 200 N.C. App. at 393, 684 S.E.2d at 475 (citing *Griffin v. Holden*, 180 N.C. App. 129, 138, 636 S.E.2d 298, 305 (2006) ("the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand.") (internal quotation omitted)), and *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624 (1980) ("[S]pecial damages must be pleaded with sufficient particularity to put defendant on notice.") (citations omitted)).

The only "special damages" asserted in plaintiff's complaint consists of an allegation that the letter "contained false statements . . . causing specific damages, including but not limited to, lost wages and the expenses of mitigating the defamation[.]" Plaintiff fails to state any facts indicating the circumstances of the alleged "special damages" or the amount claimed. The conclusory allegation that he suffered unspecified "lost wages" and "expenses" associated with "mitigating the defamation" is insufficient to inform defendants of the scope of his claim. *See Pierce v. Atlantic Group, Inc.*, __ N.C. App. __, __, 724 S.E.2d 568, 579 ("We do not believe that Plaintiff's allegation that the alleged defamation 'damaged . . . [Plaintiff's] economic circumstances' fairly informs Defendants of the scope of Plaintiff's demand. Therefore, we conclude the trial court did not err by dismissing Plaintiff's claim of libel *per quod* pursuant to Defendants' Rule 12(b)(6) motion."), *disc. review denied*, 366 N.C. 235, 731 S.E.2d 413 (2013). We conclude, based on the absence of specific allegations of special damages, that the trial court did not err by dismissing plaintiff's claim for libel *per quod*. Therefore, we need not address plaintiff's other arguments pertaining to libel *per quod*.

D. Claims for Negligent Supervision

Plaintiff's claims for negligent supervision of Dean Reynolds are predicated on his allegation that Dean Reynolds's letter defamed him. Since we hold that plaintiff's claims for libel were properly dismissed,

it follows that the derivative claims for negligent supervision were also subject to dismissal.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err and that its order dismissing plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) should be

AFFIRMED.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA
v.
CHARLES STEVENS BLOW, JR.

No. COA14-133

Filed 4 November 2014

1. Rape—number of counts—evidence ambiguous

The ambiguous characterization of the number of times defendant penetrated a rape victim as "a couple" was insufficient to charge defendant with three counts of first degree rape. Defendant's admission to three instances of "sex" with the victim. did not equate to an admission of vaginal intercourse; he openly admitted to performing oral sex on the victim, among other sexual acts, but vehemently denied penetrating her vagina with his penis.

2. Criminal Law—continuance denied—no prejudice

There was no prejudicial error in a first-degree rape prosecution from the trial court's refusal to grant defendant a continuance when defense counsel learned of a potential defense witness on the eve of trial. Defense counsel conceded that defendant had participated in the psychological evaluations and had knowledge of them, and that defense counsel had two months to confer with defendant to prepare the case before trial. Even if the denial of the motion to continue was erroneous, defendant failed to demonstrate prejudice because he was able to use the psychological reports to impeach the victim's testimony.

Judge ERVIN concurring in part and dissenting in part in separate opinion.

Appeal by defendant from judgments entered 31 July 2013 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Associate Attorney General Christina E. Simpson, for the State.

Paul F. Herzog for defendant-appellant.

HUNTER, Robert C., Judge.

Charles Stevens Blow, Jr. ("defendant") appeals from six judgments entered 31 July 2013 after a jury convicted him on three counts each of first degree rape and first degree sex offense on a child. On appeal, defendant contends that the trial court erred by: (1) denying his motion to dismiss with respect to one count of first degree rape and (2) denying his motion to continue when defense counsel learned of a potential defense witness on the eve of trial.

After careful review, we vacate one judgment for first degree rape, but we find no error in the denial of defendant's motion to continue.

Background

Defendant is the biological father of M.B.[1] and her sister, C.B. M.B. was born in 2001 and was eleven years old when this case went to trial. Defendant and Angela Blow ("Angela"), the mother of M.B. and C.B., married in 2005. In August 2010, Angela and defendant separated and Angela moved to Michigan with M.B. and C.B. While in Michigan, Angela suffered a breakdown and left M.B. and C.B. with her brother. As a result, psychological and medical evaluations were performed on M.B., C.B., Angela, and defendant in April 2011 in the process of determining placement of custody for the children. During these evaluations, M.B. denied the occurrence of any previous abuse when her family lived in North Carolina. Pursuant to an agreement between Angela and defendant, M.B. and C.B. moved to North Carolina to live with defendant and his new girlfriend in June 2011.

1. A pseudonym will be used to protect the privacy and identity of the minor and her minor sibling.

While visiting her mother in Michigan on 23 December 2011, M.B. was being teased by other children in the family when she became upset and retreated to the bathroom. When Angela went in to check on her, M.B. revealed to Angela that "[s]ometimes dad takes his boy parts and he touches my girl parts." M.B. then said, "[defendant] told me that if I did not let him do it to me, that now that [C.B.] was getting older he was going to do it to her." M.B. told Angela, and later testified at trial, that this abuse had been occurring since she was about six years old. The next morning, Angela took M.B. to the local hospital for an examination.

At the hospital, M.B. was questioned by Trooper Ruth Osborne ("Trooper Osborne") of the Michigan State Police. M.B. told Trooper Osborne that defendant would put "his boy parts" "on [M.B.'s] girl parts." When asked for clarification, M.B. later stated to Trooper Osborne that defendant would put his "boy parts" inside her. M.B. stated during the interview that defendant would touch her on her private parts with his hand, his "boy part," and his electric toothbrush. A sexual assault examination was performed on M.B. during this hospital visit, however the prosecution was not able to present this evidence because the swabs were accidentally thrown away before being examined by the North Carolina State Bureau of Investigation.

The Michigan State Police contacted Detective Dottie Parker ("Detective Parker") of the Henderson County Sheriff's Office, and a North Carolina investigation began. Defendant consented to an interview with Detective Parker on 28 December 2011. During this interview, defendant admitted that he had rubbed his penis on M.B.'s vagina, performed oral sex on M.B., and put a vibrating toothbrush on her vagina. However, defendant repeatedly denied ever "penetrating" M.B. with either his finger, toothbrush, or penis.

Defendant was arrested following the interview. He was indicted on 26 March 2012 on three counts of first degree rape, alleged to have occurred between June 2011 and December 2011, and three counts of first degree sex offense, alleged to have occurred between June 2007 and June 2010.

The defense made a pretrial motion to continue on the eve of trial, claiming that defense counsel had learned of the psychological evaluations completed on defendant, Angela, and M.B. the day before trial was scheduled to begin. During the motion hearing, the defense asserted that the relevance in these evaluations lay in (1) the impeachment of M.B. through purported prior inconsistent statements, and (2) the psychological profiles of M.B. and defendant. The motion was denied.

At trial, M.B. testified that during the time period when she and C.B. lived with defendant and his girlfriend from June to December 2011, defendant would oftentimes come into the small bedroom M.B. shared with C.B. and would touch M.B. on her "private parts" and chest. M.B. stated that this happened "a lot," not just once or twice. M.B. testified that defendant performed oral sex on her "a lot," sometimes taking her into his bedroom to perform these acts. M.B. also stated that defendant placed his fingers and electric toothbrush inside her vagina "a couple times." M.B. further testified that defendant put his penis in her vagina "a couple times." M.B. did not remember exactly how many times defendant put his penis inside her, but she testified that it happened "more than one time." M.B. testified that she did not tell anyone about this abuse initially because she was afraid "[defendant] would hurt me."

Defendant presented no evidence, but moved to dismiss all charges at the close of the State's evidence and renewed the motion before the case was submitted to the jury. Defendant argued in part that one of the charges for first degree rape should be dismissed because the only evidence presented by the State to support those charges was M.B.'s testimony that defendant inserted his penis into her vagina "a couple" times. Both motions were denied. The jury convicted defendant of all charges. Defendant was sentenced to 221 to 275 months imprisonment for each of the three charges of first degree rape and one count of first degree sex offense, all of which are to be served concurrently. He was also sentenced to 221 to 275 months imprisonment for the remaining two counts of first degree sex offense, which are to be served consecutively. Thus, in total, defendant was sentenced to 663 to 825 months of active imprisonment.

Discussion

I. Motion to Dismiss

[1] Defendant first argues that the trial court erred when it denied defendant's motion to dismiss with respect to one count of first degree rape. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). To defeat a motion to dismiss, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

State v. Denny, 361 N.C. 662, 664-665, 652 S.E.2d 212, 213 (2007) (quotation marks omitted). "Generally, a jury may find a defendant guilty of an offense based solely on the testimony of one witness." *State v. Combs*, __ N.C. App. __, __, 739 S.E.2d 584, 586, *disc. review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

In considering a motion to dismiss, the trial court must look at the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference drawn from that evidence. *Denny*, 361 N.C. at 665, 652 S.E.2d at 213. However, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

"A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.2(a)(1) (2013). Our Supreme Court has held that "intercourse" means "the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970).

Here, M.B. explicitly testified at trial that defendant put his penis into her vagina. She told Trooper Osborne that she "didn't know what he was doing," but defendant said that it was "just sex." M.B. testified that the first time defendant put his penis into her vagina, it caused her pain because she "never did it before." When asked how many times defendant put his penis into her vagina, M.B. said "a couple," and that it happened "more than once," but could not remember exactly how many times it occurred.

Defendant and the State are in agreement that M.B.'s testimony supported two charges of first degree rape. Indeed, M.B. testified that defendant inserted his penis into her vagina "more than once," and under any definition of the term, "a couple" indicates more than one. However, defendant contends that since M.B. testified that defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. We agree.

The dissent relies on Detective Parker's testimony regarding her post-interview report to reach the conclusion that the State presented substantial evidence of three counts of rape. In the report, Detective Parker indicated that defendant admitted to having intercourse with

M.B. three times. We do not believe that Detective Parker's conclusion regarding defendant's statements amounts to substantial evidence supporting three charges of first degree rape. Defendant openly conceded that he committed sexual acts with M.B., such as rubbing his penis, hands, and a vibrating toothbrush on her vagina and performing oral sex on her. Thus, when asked by Detective Parker if he had "sex" with M.B. about three times when she lived with him in North Carolina, he answered in the affirmative. However, defendant did not admit to penetrating M.B.'s vagina with his penis. Detective Parker's testimony revealed that defendant seemed confused about what her definition of "sex" was:

> Q: Do you recall Mr. Blow ever telling you in his – from his mouth that "I've had sex with [M.B.] three times"?
>
> A: I would ask him how many times and he said "about once every three months."
>
> . . .
>
> Q: Okay. And from your calculation from that to him in the video you indicate you believe that was about three times?
>
> A: Yes.
>
> Q And you got him – when you said that he agreed with you.
>
> A: Yes.
>
> Q: He said okay. And there was a point later in the video, a little over an hour into your interview with him . . . that Mr. Blow indicated to you that – he says "you keep saying that I put my penis in her," but he tells you that that didn't happen, and you explain to him, "well, that's what sex is"?
>
> A: Uh-huh.
>
> Q: . . It may be difficult, but I'm – because I'm referring to a specific point where near the end, before you go out the second time, for about a 12- to 14- minute period you and he are discussing what sex is.
>
> A: Uh-huh.
>
> Q Do you recall that point?

A: I do recall.

Q: Okay. And – and at that point he is telling you again that he did not put his penis inside of her, that [it] was on her?

A: Uh-huh.

Q And that – and in fact, actually, I think you made a point of it yesterday in your direct that he kept saying "on" not "in"?

A: Yes.

Q: He said that a lot?

A: He did.

Thus, defendant's admission to three instances of "sex" with M.B. does not equate to an admission of vaginal intercourse. He openly admitted to performing oral sex on M.B., among other sexual acts, but vehemently denied penetrating her vagina with his penis.

Furthermore, Detective Parker herself conceded on cross examination that defendant later clarified his statements and denied penetrating M.B. with his penis. Specifically, Detective Parker testified as follows:

Q You indicate in your report that Mr. Blow admitted to actually having intercourse with [M.B.]; is that right?

A: Yes.

Q: Do you recall that Mr. Blow actually told you that if there had been changes to [M.B.] that any penetration would have been accidental?

A: I recall him saying that, yes.

Q: Okay. And you recall him telling you throughout the interview that he had never put anything, I think his words were, "I never stuck anything in [M.B.]"?

A: Yes.

Q He told you he never put his finger in [M.B.]?

A: Yes.

Q: He told you that he had never put the toothbrush in [M.B.]; is that right?

A: Yes.

Q: He told you that he never put his penis in [M.B.]?

A: Yes.

Q: And he told you that, would it be fair to say, about ten times?

A: Sure.

Given the context of Detective Parker's testimony, we do not believe that her assertion in her report that defendant admitted to having sex with M.B. three times was a reasonable account of defendant's statements. This may explain the State's passing mention of this argument in its brief on appeal.[2] Even giving the State every reasonable inference, defendant's admission to multiple acts of sexual abuse, but adamant denial of penetrating M.B.'s vagina with his penis, does not amount to evidence that a "reasonable mind might accept as adequate to support" the conclusion that defendant inserted his penis into M.B.'s vagina on three separate occasions. *Denny*, 361 N.C. at 664-665, 652 S.E.2d at 213.

The State therefore relies on the definition of "a couple" to argue that it presented substantial evidence of three counts of first degree rape. As the State notes, Merriam-Webster Dictionary provides several definitions for the term "couple," one of which being "an indefinite small number" that may be used interchangeably with the term "few." Additionally, defendant points us towards other sources indicating that "a couple" can also be defined as "two individuals of the same sort considered together"; "two similar things"; "two of the same species or kind, near in place or considered together"; and "a pair."[3]

However, we need not determine whether "a couple" means "two" or "more than two" of something to rule on this matter. Instead, we agree with defendant's contention that the ambiguous nature of the term "a

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2. Specifically, the entirety of the State's argument on this issue is the following: "The State also submitted evidence of Defendant's extrajudicial admission to an interviewing office [sic] to having had sex with the child about once every three months over the nine month period she resided in his house since her move in April 2010. Or, as he acceded, according to his previous estimation, 'about three times.'"

3. Although not a controlling source of authority on this distinction, we find the following anecdote indicative of the common usage of the term "a couple." When a father asked his four-year-old daughter if he could take "a couple" of french fries from her plate, the daughter said yes. But when the father took four french fries, the little girl took back two of them and stated emphatically, "A couple means two!"

couple" causes M.B.'s testimony to raise no more than a suspicion or conjecture that more than two instances of rape occurred. If we agree with the State that testimony of "a couple" instances of conduct amounts to substantial evidence supporting "an indefinite small number" of charges, we open the door to speculation as to how many charges can fit within those bounds. Using this logic, the State could potentially charge a defendant with four or five crimes just as it could with three, based only on an allegation that the criminal conduct happened "a couple" of times. We believe that this is the type of "speculation" and "conjecture," *State v. Brown*, 162 N.C. App. 333, 338, 590 S.E.2d 433, 437 (2004), that cannot defeat a motion to dismiss. *See State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424 (2011) ("A motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.").

Accordingly, although "the unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury," *State v. Carter*, 198 N.C. App. 297, 306, 679 S.E.2d 457, 462 (2009), M.B.'s ambiguous characterization of the number of times defendant inserted his penis into her vagina as "a couple" was insufficient to charge defendant with three counts of first degree rape.

II. Motion to Continue

[2] Defendant next contends that the trial court erred in denying defendant's motion to continue, as defense counsel learned of a potential defense witness on the eve of trial. We disagree.

Ordinarily, the ruling on a motion to continue is "addressed to the discretion of the trial court," and it is not subject to review absent "a gross abuse of that discretion." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). However, "when a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable on appeal." *Id.* Even if a constitutional issue is raised, denial of a motion to continue is grounds for a new trial only if the defendant can show that the ruling was both erroneous and prejudicial. *State v. Garner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988).

"It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). "However, no set length of time is guaranteed and whether defendant is denied due process must be

determined under the circumstances of each case." *Id.* Here, defendant argues that he was denied this right because his defense counsel learned of the psychological reports conducted on defendant and M.D. on the eve of trial and did not have adequate time to subpoena the psychologist to testify. At the hearing on the motion to continue, defense counsel conceded that defendant had knowledge of these proceedings due to his participation in the psychological evaluations and that defense counsel had two months to confer with defendant in order to prepare their case before trial. Based on these circumstances, *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747, we conclude that the two-month period during which defense counsel could have learned of the psychological reports had there been diligent communication with his client amounted to a "reasonable time to investigate, prepare and present his defense." *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747. Thus, we find no error in the trial court's denial of defendant's motion to continue.

Additionally, even if the denial of the motion to continue was erroneous, defendant has failed to demonstrate prejudice. *See Garner*, 322 N.C. at 594, 369 S.E.2d at 596. During the cross-examination of M.B., defense counsel was allowed to introduce relevant parts of the psychologist's written report. Specifically, defense counsel had M.B. read to the jury a portion of her psychological evaluation which stated, "[M.B.] denies being physically or sexually abused. She denies being afraid of either parent or any other relatives." After reading this part of the report, M.B. testified that she had very little recollection of the psychological examination and did not have any recollection of denying sexual abuse by defendant. Thus, because defendant was still able to use the psychological reports at trial to impeach M.B.'s testimony, the denial of the motion to continue did not prevent defendant from "present[ing] his defense," *Carter*, 184 N.C. App. at 712, 646 S.E.2d at 851, and he has failed to demonstrate the prejudice required to be granted a new trial.

Accordingly, we find no error in the trial court's denial of defendant's motion to continue.

Conclusion

For the foregoing reasons, we vacate the underlying judgment entered for the third count of first degree rape, number 11 CRS 55728. We find no error in the trial court's denial of defendant's motion to continue. Because the sentences entered on the three judgments for first degree rape are to be served concurrently, this decision does not alter defendant's sentence, and we need not remand the matter to the trial court.

JUDGMENT IN NUMBER 11 CRS 55729 VACATED.

NO ERROR AS TO REMAINING JUDGMENTS.

Judge McCULLOUGH concurs.

ERVIN, Judge, concurring in part and dissenting in part.

Although I concur in the Court's determination that the trial court did not err by denying Defendant's continuance motion, I am unable to join the portion of the Court's opinion that concludes that the trial court erred by denying Defendant's motion to dismiss one of the three first degree rape charges that had been lodged against him. After carefully reviewing the record in light of the applicable law, I am compelled to conclude, contrary to the result reached by my colleagues, that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict Defendant of three counts of first degree rape. As a result, although I concur in the remainder of the Court's opinion, I respectfully dissent from my colleagues' decision to vacate one of Defendant's first degree rape convictions for insufficiency of the evidence.

In the course of concluding that the State failed to present sufficient evidence to support the jury's decision to convict Defendant of three counts of rape, the Court focuses on the testimony of the alleged victim, M.B., who stated that Defendant put his penis into her vagina "a couple times." In the course of clarifying this portion of her testimony, M.B. further stated that, although Defendant penetrated her vagina with his penis on more than one occasion, she could not remember exactly how many times Defendant engaged in this unlawful conduct. Although I agree with my colleagues that this portion of M.B.'s testimony, viewed in isolation, does not suffice to support a determination that Defendant raped M.B. on three different occasions, the record also contains the testimony of Detective Dottie Parker of the Henderson County Sheriff's Office, who testified that, in the course of discussing M.B.'s allegations with her, Defendant admitted having "had sex" with M.B. about once every three months over a seven month period and that he had engaged in this conduct "about three times." Given that, "when considering a motion to dismiss, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of 'every reasonable inference to be drawn therefrom,' " *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309

S.E.2d 232, 236 (1983)), I believe that Defendant's admission that he had "had sex" with M.B. "about three times," when taken in the light most favorable to the State, sufficiently supports the trial court's decision to allow the jury to consider the issue of Defendant's guilt of three counts of first degree rape and dissent from my colleagues' decision to the contrary.

In rejecting the analysis set out in this concurring and dissenting opinion, the Court relies upon two essential arguments. First, my colleagues appear to argue that Defendant's statement that he had "had sex" with M.B. did not constitute an admission that Defendant had vaginally penetrated her with his penis on those occasions. However, when read in context, I believe that Defendant's statements, as recounted by Detective Parker, are reasonably susceptible to the interpretation, which is consistent with ordinary parlance, that Defendant used the term "having sex" as a shorthand reference to engaging in vaginal intercourse. Secondly, my colleagues argue that various statements that Defendant made during the remainder of his conversation with Detective Parker establish that he did not acknowledge having vaginal intercourse with M.B. more than twice. Although Defendant made a number of different statements during his conversation with Detective Parker, I believe that the extent, if any, to which his subsequent comments contradicted, rather than explained, his admission to having "had sex" with M.B. on three different occasions was a question for the jury rather than a matter to be resolved by the trial court in addressing Defendant's dismissal motion. *State v. Wagoner*, 249 N.C. 637, 639, 107 S.E.2d 83, 85 (1959) (stating that "[t]he contradictory statements made by the defendant to the investigating officer do not cancel out the testimony given in the trial"). As a result, given that I am unable to agree with my colleagues that the record fails to contain sufficient evidence to support all three of Defendant's rape convictions and would uphold the denial of Defendant's dismissal motion relating to Defendant's third rape conviction, I concur in the Court's decision in part and dissent from that decision in part.

STATE OF NORTH CAROLINA
v.
DERICK JOHNELLE MILES

No. COA14-458

Filed 4 November 2014

Sexual Offenses—attempted second-degree sexual offense—request for fellatio—violent, threatening context—force and against victim's will

The trial court erred by denying defendant's motion to dismiss an attempted second-degree sexual offense charge arising from defendant's request for fellatio. Given the violent, threatening context, defendant's request amounted to an attempt to engage the victim in a sexual act by force and against her will.

Appeal by defendant from judgments entered on or about 7 June 2013 by Judge Thomas H. Lock in Superior Court, Alamance County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A. by James R. Glover, for defendant-appellant.

STROUD, Judge.

Derick Johnelle Miles ("defendant") appeals from a conviction for an attempted second-degree sexual offense. Defendant contends that insufficient evidence supports his conviction. We find no error.

I. Background

In 2010, M.G. met defendant while working at a car wash. M.G. and defendant talked on the phone and went on one date. In 2010, they had sexual relations twice. After hearing a rumor about defendant, M.G. ended their relationship.

In early 2011, M.G. and her daughter moved to an apartment in Mebane. In February 2011, while picking up her daughter from day care, M.G. saw defendant. They agreed to meet again. Defendant wanted a romantic relationship, but M.G. wanted a friendship only. Between February and May 2011, defendant and M.G. had sexual relations

five times. In May 2011, after defendant threatened M.G., M.G. ended their relationship and attempted to cut off contact with defendant. In response, defendant called M.G.'s phone numerous times, knocked on M.G.'s door for an hour, attempted to evict M.G., and threatened to damage M.G.'s car. M.G. sometimes answered his phone calls and told him that she did not want a relationship.

Sometime after 8:00 p.m. on 3 July 2011, while M.G. was cleaning her apartment, she heard a knock on her door. M.G. looked through her peephole and saw one of her neighbors. She did not see anyone else, so she opened the door. After she opened it, defendant appeared, ran into her apartment, slammed the door behind him, and took his clothes off. Defendant had asked M.G's neighbor to knock on her door, so that defendant could "surprise" her. M.G. attempted to run toward the back of the apartment, but defendant grabbed her by her shoulder. Defendant threw M.G. on the couch, and M.G. cried, screamed, and yelled. M.G. tried to fight off defendant, but defendant overpowered her. Defendant took M.G's clothes off and raped her. M.G. tried to escape through the front door, but defendant grabbed M.G. by her hair, ripping out some of her hair extensions, and pulled her back into the apartment. Defendant then choked M.G. with his hand, impeding M.G.'s ability to breathe. Defendant flipped M.G. upside down, yelled at her, grabbed a screwdriver, and jabbed it at her in a threatening manner. M.G. told defendant that she needed to pick up her daughter. Defendant demanded that M.G. first drive him to his apartment in Burlington.

After M.G. drove defendant to his apartment, defendant grabbed her car keys. Defendant grabbed M.G. by her waist and dragged her out of her car and into his apartment. Defendant yelled and slapped M.G.'s face so hard that her braces cut the inside of her mouth. Defendant then acted as if he would let her leave and allowed her to go back to her car. But then defendant grabbed her and dragged her back into his apartment. Defendant grabbed a pointed kitchen knife and tried to hand it to M.G. He told her that she would escape only if she used it against him. She refused to take it. Defendant then asked her to perform fellatio and showed her his penis. M.G. begged him to not make her do it. Defendant then took M.G.'s clothes off and attempted to perform anal intercourse on her. After M.G. screamed and jumped in pain, defendant turned M.G. over and raped her. After unsuccessfully trying to fight off defendant, M.G. decided to feign love for defendant in order to get him to stop his abuse. Defendant gave M.G. some of his clothes and let her leave around 1:00 a.m.

On or about 13 February 2012, a grand jury indicted defendant for two counts of first-degree rape, two counts of first-degree kidnapping,

first-degree burglary, assault by strangulation, a first-degree sexual offense, and an attempted first-degree sexual offense. At the conclusion of all the evidence at trial, defendant moved to dismiss all the charges. The trial court denied the motion. On or about 7 June 2013, a jury found defendant guilty of second-degree rape, non-felonious breaking or entering, and two counts of attempted second-degree sexual offense and not guilty of all other charges. One of the attempted second-degree sexual offense convictions arose from defendant's request for fellatio. The trial court sentenced defendant to 146 to 236 months' imprisonment for second-degree rape, 128 to 214 months' imprisonment for an attempted second-degree sexual offense, and 128 to 214 months' imprisonment for an attempted second-degree sexual offense and non-felonious breaking or entering. The sentences were to be served consecutively. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

A. Standard of Review

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012).

B. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss the attempted second-degree sexual offense charge arising from defendant's request for fellatio. A person is guilty of this offense if the person engages in a sexual act with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5(a)(1) (2011). Fellatio is a sexual act within the meaning of the statute. *State v. Jacobs*, 128 N.C. App. 559, 563, 495 S.E.2d 757, 760, *disc. rev. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). The force required need not be physical force; fear, fright, or coercion may take the place of force. *Id.*, 495 S.E.2d at 760. "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent." *State v. Locklear*, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981).

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Henderson*, 182 N.C. App. 406, 412, 642 S.E.2d 509, 513 (2007). "[W]henever the design of a person to commit a crime is clearly shown, *slight acts* in furtherance of the design will constitute an attempt." *Id.* at 413, 642 S.E.2d at 514.

Defendant contends that requesting a sexual act from an adult cannot constitute an attempted sexual offense, because such a request does not show an intention to commit a sexual act "[b]y force and against the will of the other person." *See* N.C. Gen. Stat. § 14-27.5(a)(1). In this way, this case differs from cases involving attempted statutory sex offenses where a defendant requests a sexual act from a victim who legally cannot give consent. *See*, *e.g.*, *State v. Sines*, 158 N.C. App. 79, 579 S.E.2d 895, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003); *Henderson*, 182 N.C. App. 406, 642 S.E.2d 509. Defendant is correct that requesting fellatio from an adult who is legally capable of consent in a non-threatening manner generally would not constitute an attempted sexual offense. But where the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that

this request is accompanied by a threat and a show of force and thus amounts to an attempt. Had M.G. complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to M.G. amounted to an attempt to engage M.G. in a sexual act by force and against her will. *See* N.C. Gen. Stat. § 14-27.5(a)(1); *Jacobs*, 128 N.C. App. at 563, 495 S.E.2d at 760; *Locklear*, 304 N.C. at 540, 284 S.E.2d at 503. We thus hold that sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense arising from defendant's request for fellatio.

III. Conclusion

Because sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense, we hold that the trial court committed no error.

NO ERROR.

Chief Judge McGEE and Judge GEER concur.

STATE OF NORTH CAROLINA
v.
MATTHEW SMITH SHEPLEY

No. COA14-390

Filed 4 November 2014

1. Appeal and Error—appealability—guilty plea—motion to suppress—motion to dismiss

Based upon defendant's guilty plea in a driving while impaired case, defendant had a right to appeal only the trial court's denial of his motion to suppress and not the denial of his motion to dismiss the charge.

2. Motor Vehicles—driving while impaired—blood test—no right to witness—refusal of breath test

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the results of a blood test. Because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol

level, he did not have a right under N.C.G.S. § 20-16.2 to have a witness present.

3. Search and Seizure—motion to dismiss—traffic stop—probable cause—operating moped without proper helmet—reasonable suspicion

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the evidence based on an alleged illegal traffic stop. The deputy observed defendant operating his moped without wearing a proper helmet, and a law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation. Thus, the deputy's stop of defendant was supported by reasonable suspicion.

Appeal by defendant from judgment entered 9 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper by Assistant Attorney General Joseph L. Hyde for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STEELMAN, Judge.

The law enforcement officer's stop of defendant was justified by reasonable suspicion. Where the officer obtained a blood sample from defendant pursuant to a warrant, after defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under N.C. Gen. Stat. § 20-139.1(a). The procedures for obtaining the blood sample did not have to comply with the requirements of N.C. Gen. Stat. § 20-16.2, and defendant did not have a right to have a witness present. Because defendant pled guilty, he did not have a right to appeal the denial of his motions to dismiss the charges.

I. Factual and Procedural Background

Just before midnight on 22 November 2011, Deputy Dean Hannah was on patrol in Buncombe County, North Carolina, and saw Matthew Shepley (defendant) driving his moped on Smokey Park Highway. Defendant was wearing a bicycle helmet instead of a DOT approved helmet, and his moped did not have a taillight. After observing the helmet and the absence of a taillight, Officer Hannah illuminated his blue lights

to initiate a traffic stop. Defendant initially sped up but stopped after traveling about 220 yards. When Officer Hannah approached defendant, he "immediately smelled a strong odor of alcoholic beverage on his breath."

Based on his observations during the stop, Officer Hannah arrested defendant for driving while impaired and failing to wear a DOT approved helmet, and took him to the Buncombe County Detention Center. Defendant requested that a witness be present to observe the breath testing procedures. When the witness arrived, defendant refused to give a breath sample. The law enforcement officer escorted the witness out of the room, obtained a search warrant, and a blood sample was drawn from defendant outside the presence of the witness. The blood sample was sent to the State Bureau of Investigation where, after a substantial delay, it was determined that defendant had a .14 blood alcohol level.

On 14 May 2013 defendant was convicted in district court of driving while impaired and appealed to superior court. On 6 June 2013, defendant filed a motion to suppress the evidence against him, asserting that Deputy Hannah's stop of defendant violated his rights under the 4th Amendment because the stop was not supported by reasonable suspicion of criminal activity. Defendant also filed a motion to dismiss the charge based upon an alleged deprivation of his U.S. constitutional right to a speedy trial. On 8 July 2013 defendant filed a motion to suppress the results of the blood test and dismiss the charge against him because his witness had not been allowed to observe the drawing of his blood pursuant to the search warrant. The trial court denied defendant's motions in orders entered 12 July 2013. On 5 August 2013 defendant filed a motion asking the trial court to reconsider its ruling on the issue of whether Deputy Hannah's stop of defendant was supported by reasonable suspicion. The motion was based upon the assertion that at the original hearing on defendant's suppression motion Deputy Hannah testified that he had taken defendant's helmet into evidence, but after the hearing Deputy Hannah determined that he had not confiscated the helmet. Following a hearing, the trial court orally denied defendant's motion. After defendant's motions were denied, he filed written notice of his intent to appeal the denial of his motions to suppress and dismiss.

On 9 September 2013 defendant pled guilty to driving while impaired, and reserved his right to appeal the denial of his suppression motions. The trial court imposed level two punishment, sentenced defendant to a term of twelve months, suspended the sentence, and placed him on probation for 18 months.

Defendant appeals.

II. Legal Analysis

A. Scope of Review

[1] On appeal defendant argues that the trial court erred by denying his suppression motion and his motions to dismiss the charge against him. " 'In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' A defendant who pleads guilty has a right of appeal limited to the following: . . . Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)[(2013)], 15A-1444(e) [(2013)][.]" *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)). "Here, upon defendant's guilty plea, defendant has a right to appeal only the trial court's denial of his motion to suppress. . . . Defendant does not have a right to appeal the trial court's denial of his motion to dismiss[.]" *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008). Therefore, we do not address defendant's arguments pertaining to the denial of his motions to dismiss.

B. Suppression Motion

1. Right to Witness at Blood Drawing

[2] In his first argument, defendant contends that the trial court erred by denying his motion to suppress the results of the blood test because he "was denied his statutory and constitutional right to have a witness present for the blood draw." We disagree.

N.C. Gen. Stat. § 20-16.2 provides in relevant part that:

> (a) Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. . . . Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst . . . or a law enforcement officer . . . who shall inform the person orally and also give the person a notice in writing that:
>
> . . .
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives[.]. . .

> (a1) Under this section, an "implied-consent offense" is an offense involving impaired driving, a violation of G.S. 20-141.4(a2), or an alcohol-related offense[.] . . .
>
> . . .
>
> (c) A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

"During the administration of a breathalyzer test, the person being tested has the right to 'call an attorney and select a witness to view for him the testing procedures.' This statutory right may be waived by the defendant, but absent waiver, denial of this right requires suppression of the results of the breathalyzer test." *State v. Myers* 118 N.C. App. 452, 454, 455 S.E.2d 492, 493 (1995) (quoting N.C. Gen. Stat. § N.C.G.S. 20-16.2(a)(6), and citing *McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495, 497, 386 S.E.2d 73, 75 (1989), and *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (1973) (other citation omitted). However, as stated above, if a defendant refuses to submit to the test designated by the law enforcement officer, no blood alcohol tests "may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law." The plain language of the statute limits its application to situations in which a defendant consents to take a breathalyzer or other test designated by the officer.

N.C. Gen. Stat. § 20-139.1(a) addresses the admissibility of chemical analyses of blood alcohol other than those performed pursuant to N.C. Gen. Stat. § 20-16.2, and provides in relevant part that "[i]n any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration . . . as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests."

The relationship between N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1 has been addressed in several cases. In *State v. Drdak*, 101 N.C. App. 659, 400 S.E.2d 773 (1991), the defendant was injured in a

motor vehicle accident and taken to the hospital, where his blood was tested for alcohol without first informing him of his right to consent or refuse the blood test or of his rights under N.C. Gen. Stat. § 20-16.2. On appeal we held that the results of the blood test were inadmissible, because the blood test was not performed in accordance with N.C. Gen. Stat. § 20-16.2. The North Carolina Supreme Court reversed:

> The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: "This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests." This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1. . . . [I]t is the holding of this Court that the obtaining of the blood alcohol test results in this case was not controlled by N.C.G.S. § 20-16.2(a) and did not have to comply with that statute because the test in question is "other competent evidence" as allowed by N.C.G.S. § 20-139.1.

State v. Drdak, 330 N.C. 587, 592-93, 411 S.E.2d 604, 607-08 (1992) (emphasis added). We hold that the argument advanced by defendant in the instant case has been rejected by our Supreme Court. Similarly, in *State v. Davis*, 142 N.C. App. 81, 542 S.E.2d 236 (2001), after the defendant refused to consent to a breath test of his blood alcohol level, the law enforcement officer obtained a search warrant and took urine and blood samples from the defendant. On appeal, we upheld the admission of the results of these tests, citing *Drdak*:

> Here the defendant was given the opportunity to voluntarily submit to the testing. He refused, and the officer obtained a search warrant based on probable cause. We hold that testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1. In a similar case our Supreme Court . . . [held that] "it is not necessary for the admission of such 'other competent evidence' that it be obtained in accordance with N.C.G.S. § 20-16.2."

Davis, 142 N.C. App. at 86, 542 S.E.2d at 239 (quoting *Drdak*). Based on the language of N.C. Gen. Stat. § § 20-16.2 and 20-139.1, as well as the *Drdak* and *Davis* opinions, we conclude that after defendant refused a breath test of his blood alcohol level, he was not entitled to have a witness present at the blood test performed pursuant to a search warrant.

In arguing for a contrary result, defendant asserts that *Davis* is not controlling precedent because, although it held that evidence introduced under N.C. Gen. Stat. § 20-139.1(a) did not have to comply with the strictures of N.C. Gen. Stat. § 20-16.2, it did not enumerate the specific provisions of the statute. We disagree, given that its quote from *Drdak*, stating that when evidence is admitted under N.C. Gen. Stat. § 20-139.1(a) " 'it is not necessary for the admission of such 'other competent evidence' that it be obtained in accordance with N.C.G.S. § 20-16.2' " would necessarily include the right to have a witness present. Moreover, defendant does not acknowledge *Drdak*, in which our Supreme Court expressly held that the provisions of N.C. Gen. Stat. § 20-16.2 need not be followed if evidence of a defendant's blood alcohol is admitted under N.C. Gen. Stat. § 20-139.1(a) as "other competent evidence." We hold that, because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, he did not have a right under N.C. Gen. Stat. § 20-16.2 to have a witness present.

2. Constitutionality of Stop of Defendant

[3] In his second argument, defendant contends that the trial court erred by denying his motion to suppress because Deputy Hannah "did not have legal grounds to initiate" a traffic stop of defendant. We do not agree.

"The Fourth Amendment protects individuals 'against unreasonable searches and seizures.' U.S. Const. amend. IV. Traffic stops are permitted under the Fourth Amendment if the officer has 'reasonable suspicion' to believe that a traffic law has been broken.' " *State v. Hopper*, 205 N.C. App. 175, 177, 695 S.E.2d 801, 803 (2010) (quoting *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (internal quotation omitted). Reasonable suspicion exists if "[t]he stop . . . [is] based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation omitted). Reasonable suspicion requires a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch[.]' " *State v. Steen*, 352 N.C. 227,

239, 536 S.E.2d 1, 8 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1, 10 (1989).

N.C. Gen. Stat. § 20-140.4(a)(2) provides in relevant part that "[n]o person shall operate a . . . moped upon a highway . . . [u]nless the operator and all passengers thereon wear on their heads, with a retention strap properly secured, safety helmets of a type that [comply] with Federal Motor Vehicle Safety Standard (FMVSS) 218." Violation of this statute is an infraction. N.C. Gen. Stat. § 20-140.4(c). Deputy Hannah testified that he observed defendant operating his moped without wearing a proper helmet. This observation clearly provided the officer with a reasonable suspicion that defendant had committed an infraction. Under N.C. Gen. Stat. § 15A-1113(b), a "law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation." Deputy Hannah's stop of defendant was supported by reasonable suspicion, and the trial court did not err by denying defendant's motion to suppress evidence.

Defendant concedes that Deputy Hannah testified to seeing defendant operating his moped with an improper helmet, but argues that because the officer could not confirm "whether or not the helmet was DOT approved until after he approached" defendant, the officer's belief that defendant's helmet was improper "cannot support reasonable suspicion[.]" However, our Supreme Court has held that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. As a result, we are not persuaded by defendant's argument.

For the reasons discussed above, we conclude that the trial court did not err in denying defendant's motion to suppress and that its order should be

AFFIRMED.

Judges GEER and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 NOVEMBER 2014)

BEDIZ v. CAPITAL FACILITIES FOUND., INC. No. 14-421	Guilford (13CVS10111)	Affirmed
HENDERSON v. GARCIA MOTORRAD, LLC No. 14-466	Wake (13CVS5714)	Dismissed
IN RE A.C.H. No. 14-239	McDowell (10JT74)	Affirmed
IN RE A.K.D. No. 14-506	Dare (11JT75) (11JT76)	Affirmed
IN RE D.D.A. No. 14-366	Craven (10JT105)	Vacated
IN RE K.A. No. 14-518	Mecklenburg (13JA253-254)	Reversed and Remanded
IN RE K.C. No. 14-410	Pitt (12JT90)	Affirmed
IN RE M.M.V. No. 14-545	Mecklenburg (04JT1210-1211)	Affirmed
IN RE Q.T.F. No. 14-550	Guilford (12JT599)	Affirmed
LSREF2 ISLAND HOLDINGS, LTD., INC. v. PORRATA No. 14-316	Mecklenburg (13CVS16679)	DISMISSED IN PART; REVERSED IN PART
RREF ST ACQUISITIONS, LLC v. AGAPION No. 14-499	Guilford (13CVS5201)	Affirmed
SAFRON v. COUNCIL No. 14-288	Orange (12CVD593)	No Error
SPENCE v. WILLIS No. 14-399	Harnett (14CVD110)	Dismissed

STATE v. JACKSON No. 14-424	Wake (11CRS208650) (11CRS727961)	No prejudicial error; no plain error
STATE v. SMITH No. 14-384	Craven (11CRS54777) (13CRS132)	Reversed

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