238 N.C. App.—No. 1 Pages 1-201

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 16, 2016

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 16 DECEMBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

motion seeking a declaration that their proposed use of the pertinent land did not violate a restrictive covenant. Although the covenant provided that a developer may not build a store that constituted a vitamin store, beauty aid store, or pharmacy, the intent of the grantor was not to outlaw the construction of those things which were integral or essential to the operation of a retail business. Thus, the construction of a parking lot and access easement on the restricted property was not a prohibited use. **Charlotte Pavilion Rd. Retail Inv., LLC v. N.C. CVS Pharmacy, LLC, 10.**

DIVORCE

Divorce—equitable distribution—assets co-owned by husband—motion in limine—In an equitable distribution action involving an LLC and a commercial building, the trial court did not abuse its discretion by granting the husband's motion in limine to prohibit the introduction of evidence regarding assets the husband co-owned with his father. The trial court found that there was not sufficient evidence to value these assets. **Montague v. Montague, 61.**

Divorce—equitable distribution—commercial building—post-separation appreciation—separate property—parties bound by tax returns—In an equitable distribution action involving an LLC and a commercial building, the trial court's findings supported its treatment of a portion of an LLC's post-separation appreciation as the husband's separate property. Although there is a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property, in this case the wife and the husband were bound by the manner in which the distributions to the husband were treated on the LLC tax returns. **Montague v. Montague, 61.**

Divorce—equitable distribution—estate plans—donor's intention—In an equitable distribution action involving an LLC and a commercial building, it was within the trial court's discretion to consider the husband's parents' estate plans in making its equitable distribution determination. A trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations. **Montague v. Montague, 61.**

Divorce—equitable distribution—LLC—distribution to husband—In an equitable distribution action involving an LLC and a commercial building, the court's distribution of the LLC to the husband was supported by the trial court's application of the distribution factors and its findings, which were supported by the evidence. Although the wife challenged the trial court's finding that she did not contribute to the LLC, noting that she signed a loan guaranty along with the husband for the loan which financed the purchase of the building from the husband's parents, the trial court's reference to "contributions" was read as "equity" contributions toward the LLC. **Montague v. Montague, 61.**

Divorce—equitable distribution—LLC—lawn mower—loan payments—distribution from corporation—sufficiency of evidence—In an equitable distribution action involving an LLC and a commercial building, the trial court did not err by treating loan payments on a mower as distributions to the husband from the LLC. There was no evidence of the amount of debt still owed on the mower at the date of distribution or of how much the mower had depreciated in value; without those valuations in the record, the trial court was not required to distribute the mower and did not abuse its discretion in not including it within the equitable distribution scheme. **Montague v. Montague, 61.**

after marijuana and other drug-related materials belonging to defendant's babysitter were found in her apartment, plaintiff did not establish that summarily ejecting defendant from the apartment would not produce an unconscionable result. After analyzing the totality of the surrounding facts and circumstances, the Court of Appeals concluded that evicting defendant based solely upon the actions of her babysitter would be excessive and shockingly unfair or unjust, where defendant had no knowledge of her babysitter's actions, did nothing to encourage or even tolerate them, and eviction would put defendant and her small children on the street. **E. Carolina Reg'l Hous. Auth. v. Lofton, 42.**

Landlord and Tenant—ejectment—unconscionability requirement—not preempted by federal statute—North Carolina's unconscionability requirement in its summary ejectment statute is not preempted by federal law, and the trial court here did not err by concluding that plaintiff had failed to establish the existence of a right to have defendant summarily ejected from her apartment. Although plaintiff argued that *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, recognized the existence of a strict liability rule that cannot be reconciled with a prohibition against unconscionable evictions, *Rucker* specifically stated that 42 U.S.C. § 1437d(l)(6) did not require eviction but left that decision to the local public housing authority. **E. Carolina Reg'l Hous. Auth. v. Lofton, 42.**

PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—basketball coach—forced retirement accepted—loyalty to team—administrative remedies not exhausted—The trial court correctly dismissed plaintiff's employment termination action under N.C.G.S. § 1A-1, Rule 12 (b)(6). Plaintiff, the former basketball coach at a state university, retired in the face of the university's indicated intent to pursue termination but alleged in his complaint that he had accepted forced retirement and not pursued administrative relief out of loyalty to his basketball team. Plaintiff was not required to exhaust his administrative remedies if the only remedies available would be inadequate, but he provided no authority that loyalty to the team satisfied his burden of showing an inadequate remedy. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint. **Tucker v. Fayetteville State Univ., 188.**

Public Officers and Employees—county director of elections—salary—statutory requirements—There was sufficient evidence to support the trial court's conclusion that the Guilford County Board of Elections failed to comply with N.C.G.S. § 163-35(c) in setting the salary of its former Director of Elections (Plaintiff). The statute requires that the salary of a county director of elections "be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." The evidence showed that, among the seven largest counties in North Carolina, Guilford County ranked third in voter population, third in voter registration, and first in election complexity; Plaintiff ranked highest in years of service; and Plaintiff's salary ranked last from 2006 to 2012. **Gilbert v. Guilford Cnty., 54.**

PUBLIC RECORDS

Public Records—action to compel production of emails—assistant director not custodian of records—The trial court did not err by dismissing an action filed

not alone rise to the necessary level of extreme physical and psychological suffering; defendant was in the home that he lawfully shared with the victim and his mere presence in his own home did not make his actions especially atrocious, heinous, or cruel; and the fact that the victim did not die instantaneously did not support the factor because the medical examiner testified that the victim likely lost consciousness shortly after being shot and there was no indication she suffered. **State v. Myers, 133.**

Sentencing—second-degree murder—aggravating factors—not supported by evidence—disposition—Where neither of the aggravating factors supporting a sentence for second-degree murder had a sufficient factual basis in the record, the Court of Appeals determined that the proper disposition for defendant's appeal was to set aside his plea agreement and remand for disposition on the original charge of first-degree murder. **State v. Myers, 133.**

Sentencing—second-degree murder—aggravating factors—position of trust or confidence—spouse—The trial court's finding that defendant took advantage of a position of trust or confidence in order to kill his wife was not supported by the evidence. In essence, the State argued that the marital nature of the relationship made his killing a *per se* taking advantage of a position of trust or confidence. However, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence to effectuate the offense. **State v. Myers, 133.**

SEXUAL OFFENDERS

Sexual Offenders—registration—change of address—willful failure to notify sheriff—The record contained sufficient evidence that a registered sex offender changed his address and failed to notify the sheriff's office and sufficient evidence that defendant willfully failed to report his changes of address. **State v. Crockett, 96.**

Sexual Offenders—registration—change of address—willfulness—email notice to sheriff—Urban Ministry—N.C.G.S. § 14-208.11(a) is a strict liability offense if analyzed under the 2005 version of the statutes; however, in 2006, the General Assembly amended the statute to add the requirement that the State must show that defendant willfully failed to comply with the registration requirements. Although defendant argued that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address, an email in lieu of defendant completing and signing paperwork with his address was not sufficient to constitute registration as statutorily prescribed. Even if the email had been sufficient to constitute registration, Urban Ministry (where defendant claimed residence) was not a valid address for compliance with the sex offender registration statute because Defendant could not live there. **State v. Crockett, 96.**

Sexual Offenders—registration—failure to notify new sheriff's office of change of address—sufficiency of indictment—Although the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender improperly alleged that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office, the "new county sheriff." **State v. Pierce, 141.**

Sexual Offenders—registration—failure to notify sheriff's office of change of address—motion to dismiss—temporary home address—The trial court did not err by denying defendant's motion to dismiss the charge of failing to notify the sheriff's office of a change of address as a registered sex offender based on the State's alleged failure to provide substantial evidence that defendant changed his address. The State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address, in Wilkes County. **State v. Pierce, 141.**

Sexual Offenders--registration—jury unanimity—The requirement of jury unanimity was satisfied in a prosecution for violating the sexual offender registration statutes where any of several alternatives satisfied the third element of the jury instruction, that defendant changed his address and failed to notify the sheriff within the requisite time period. **State v. Crockett, 96.**

Sexual Offenders—registration—new address—amendment of indictment—expansion of dates of offense—The trial court did not err by allowing the State to amend the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender to expand the dates of the offense from 7 November 2012 to June to November 2012. The amendment did not substantially alter the charge because the specific date that defendant moved was not an essential element of the crime. Further, defendant's argument that timing was of the essence in charges involving failure to report a change of address as a sex offender was without merit. Finally, defendant failed to show that he detrimentally relied on the original date of the offense and that he was substantially prejudiced by the amendment. **State v. Pierce, 141.**

Sexual Offenders—registration—subsequent release from jail—change of address—A registered sex offender's January 2011 release from jail was a change of address falling within the purview of N.C.G.S. § 14-208.9 rather than § 14-208.7 because defendant had been a registered sex offender since April 1999. **State v. Crockett, 96.**

WORKERS' COMPENSATION

Workers' Compensation—ongoing temporary total disability—temporary employee—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff temporary employee was entitled to ongoing temporary total disability payments. Under the applicable standard of review, Dr. Burke's testimony was competent evidence supporting the Commission's finding that plaintiff was unable to continue work as a delivery driver because of his back injury. **Tedder v. A&K Enters., 169.**

Workers' Compensation—temporary total disability—calculation of average weekly wage—temporary employees—The Industrial Commission erred in a workers' compensation case by its calculation for the average weekly wage of temporary total disability compensation for a temporary employee. In calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. **Tedder v. A&K Enters., 169.**

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

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

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRYANT & ASSOCIATES, LLC D/B/A BRYANT ENTERPRISES, LLC, PLAINTIFF
v.
ARC FINANCIAL SERVICES, LLC, D/B/A ARC RISK AND COMPLIANCE, AND
LORENZO MASI, DEFENDANTS

No. COA14-527

Filed 16 December 2014

1. Civil Procedure—parallel lawsuits in multiple states—N.C.G.S. § 1-75.12 motion to stay granted—not abuse of discretion

The trial court did not abuse its discretion by granting defendants' motion to stay under N.C.G.S. § 1-75.12 in an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey. Using the factors outlined in *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, the trial court made detailed findings of fact and conclusions of law that a substantial injustice would result if the stay was denied, that the stay was warranted, and that the alternative forum in New Jersey was convenient, reasonable, and fair.

2. Estoppel—judicial estoppel—party did not adopt an inconsistent position

In an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey, defendants were not judicially estopped from arguing in their motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. When defendants previously certified in their New Jersey complaint that the New Jersey action was not the subject of any

other action or contemplated action, they did not know that plaintiff had filed an action in North Carolina. Defendants therefore never adopted a position that was clearly inconsistent with their previous position.

Appeal by plaintiff from order entered 27 January 2014 by Judge Louis Meyer in District Court, Wake County. Heard in the Court of Appeals 9 October 2014.

John M. Kirby, for plaintiff-appellant.

Brown Law LLP by Justin M. Osborn and Seth D. Beckley, for defendants-appellees.

STROUD, Judge.

Bryant & Associates, LLC d/b/a Bryant Enterprises, LLC ("plaintiff") appeals from an order granting ARC Financial Services, LLC d/b/a ARC Risk and Compliance ("ARC") and Lorenzo Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12 (2013). Finding no error, we affirm.

I. Background

On 1 May 2011, plaintiff and ARC executed a Master Services Agreement ("MSA") in which plaintiff agreed to perform anti-money laundering consulting services for ARC. The parties agreed that the MSA is to be construed according to Delaware law. On 3 September 2012, plaintiff sent an invoice of $3,825 to ARC in connection with work performed for ARC's customer Detica NetReveal ("Detica"). On 1 December 2012, after ARC had failed to respond to plaintiff's communications, Kenneth Bryant, plaintiff's principal and managing director, sent Masi, ARC's managing member, a letter indicating that plaintiff would sue ARC to recover the unpaid amount. Masi responded and exchanged voicemails with plaintiff's counsel. On 27 December 2012, plaintiff gave Masi a few days to consider a settlement offer. A few days later, Masi requested additional time to respond. Over the next few days, the parties negotiated over Masi's deadline to respond, but the parties failed to reach an agreement. On 4 January 2013, plaintiff threatened that it would file suit three days later, on 7 January 2013.

A. North Carolina Action

On 10 January 2013, plaintiff sued ARC and Masi for unjust enrichment and quantum meruit in Wake County District Court. On 4 March

2013, ARC and Masi were properly served. On or about 19 March 2013, plaintiff served interrogatories and its first request for production of documents to ARC. On 20 March 2013, plaintiff amended its complaint to add claims for breach of contract and fraud and sought an additional $4,400. On or about 8 April 2013, plaintiff served its second request for production of documents to ARC. ARC requested an extension of time to respond to plaintiff's requests, to which plaintiff consented.

On 22 April 2013, ARC and Masi moved to dismiss plaintiff's action or, in the alternative, moved to stay further proceedings because of a contemporaneous New Jersey action. Masi averred that plaintiff had performed all its work for ARC outside North Carolina. On or about 21 June 2013, plaintiff moved to compel ARC and Masi to respond to its discovery requests. On 16 August 2013, the Wake County District Court compelled ARC and Masi to respond to plaintiff's discovery requests. On 24 September 2013, Bryant averred that plaintiff's principal place of business is in North Carolina and plaintiff performed its work for Detica in North Carolina. Bryant also averred that Detica is headquartered in Massachusetts.

On or about 15 October 2013, the Wake County District Court denied ARC and Masi's motion to dismiss but refrained from ruling on ARC and Masi's motion to stay in order to allow the parties to supplement the record regarding the New Jersey action.[1] A hearing on the motion to stay was set for 15 November 2013.[2] On or about 12 November 2013, ARC and Masi's counsel averred that some witnesses reside in New York, New Jersey, and Massachusetts. On or about 13 November 2013, Bryant averred that he and Masi would be the only necessary witnesses.

B. New Jersey Action

On 11 January 2013, ARC sued plaintiff and Bryant in New Jersey Superior Court for breach of the MSA's confidentiality and non-compete provisions, interference with ARC's contract with Detica, wrongful disclosure of proprietary and confidential information, breach of duty of loyalty, and civil conspiracy. In its complaint, ARC certified that: "The matter in controversy is not the subject of any other action in any Court . . . . No other action or arbitration proceeding is contemplated in regard to the matter in controversy." ARC asserts that plaintiff was properly served in the New Jersey action on or about 16 January 2013. Plaintiff

1. The Wake County District Court, however, granted Masi's motion to dismiss plaintiff's claims against him that were based on piercing the corporate veil.

2. We do not have a transcript of this hearing in the record on appeal.

contends that service was not proper. On or about 18 January 2013, the New Jersey Superior Court entered temporary restraints on plaintiff. On or about 8 February 2013, plaintiff and Bryant moved to dissolve the temporary restraints and dismiss ARC's complaint for lack of personal jurisdiction. On 24 May 2013, the New Jersey Superior Court denied plaintiff and Bryant's motion to dismiss.

On or about 24 June 2013, plaintiff and Bryant answered ARC's complaint and included counterclaims that mirrored plaintiff's claims against ARC in the North Carolina action. Plaintiff and Bryant also mentioned the North Carolina action in their answer. On 28 June 2013, ARC answered plaintiff and Bryant's counterclaims. On or about 3 July 2013, the New Jersey Superior Court ordered the parties to mediate.

On 20 September 2013, plaintiff and Bryant filed a third-party complaint against Masi and included claims that mirrored plaintiff's claims against Masi in the North Carolina action. On or about 19 November 2013, the parties failed to reach an agreement at mediation.

C. Wake County District Court's Order Granting Stay

On 27 January 2014, the Wake County District Court, after making many detailed findings of fact, granted ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12. On 21 February 2014, plaintiff gave a timely notice of appeal.

II. Motion to Stay

A. Standard of Review

We review a trial court's grant of a motion to stay for an abuse of discretion. *Muter v. Muter*, 203 N.C. App. 129, 132, 689 S.E.2d 924, 927 (2010).

> We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's [grant] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 134, 689 S.E.2d at 928 (citations and quotation marks omitted).

B. Analysis

[1] Plaintiff challenges the trial court's grant of ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12, which provides:

> If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C. Gen. Stat. § 1-75.12(a). In determining whether trying a case in North Carolina would work a "substantial injustice" on the moving party, the trial court may consider the following factors:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Muter, 203 N.C. App. at 132, 689 S.E.2d at 927 (citing *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371, *appeal dismissed and disc. rev. denied*, 301 N.C. 93, 273 S.E.2d 299 (1980)).

> In considering whether to grant a stay under [N.C. Gen. Stat. § 1-75.12], the trial court need not consider every factor and will only be found to have abused its discretion when it abandons any consideration of these factors. In addition, this Court has held that it is not necessary that the trial court find that all factors positively support a stay.

Id. at 132-33, 689 S.E.2d at 927 (citations and quotation marks omitted). A trial court, however, must find that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair. *Wachovia Bank v. Harbinger Capital Partners Master Fund 1, Ltd.*, 201 N.C. App. 507, 520, 687 S.E.2d 487, 495 (2009).

Plaintiff first complains that, in its order granting the motion to stay, the trial court erred in (1) considering the fact that plaintiff had not moved to stay the New Jersey action; (2) finding that mediation had failed due to ARC and Masi's motion to stay; (3) misstating ARC's

claims against plaintiff and Bryant; (4) finding that most of the parties' contact with each other and with Detica occurred outside North Carolina; (5) finding that ARC and Masi would likely call witnesses from New Jersey, Massachusetts, and New York; and (6) concluding that granting a stay would avoid potentially conflicting results. We, however, do not review these issues individually; rather, we address plaintiff's contentions as a single issue: whether the trial court abused its discretion in granting the motion to stay. *See Muter*, 203 N.C. App. at 131, 689 S.E.2d at 926 (addressing a party's five assignments of error as a single argument that the trial court abused its discretion in denying a motion to stay). In its order, the trial court addressed many of the *Motor Inn Management* factors in its findings of fact and conclusions of law:

> 9. At present, there are parallel lawsuits in New Jersey and North Carolina involving the same parties and essentially the same causes of action[], which are based upon the same subject matter and facts.
>
> 10. The New Jersey lawsuit also contains the claims raised by ARC Financial Services, LLC regarding [plaintiff] and Kenneth Bryant's services performed for Detica pursuant to a Master Services Agreement entered into between the parties and [plaintiff's] relationship with Detica. These claims have not been raised as counterclaims in the North Carolina action, and while it is conceivable that they could be raised in the North Carolina lawsuit, the New Jersey lawsuit, at present, includes these claims plus all claims raised by both sides of parties in the North Carolina lawsuit and, therefore, is slightly broader than the North Carolina action.
>
> 11. [Plaintiff's] contacts with ARC Financial Services, LLC and Lorenzo Masi in New Jersey pertaining to the subject matter of the parallel litigation were minimal. Similarly, ARC Financial Services, LLC's and Lorenzo Masi's contacts with [plaintiff] in North Carolina pertaining to said subject matter were minimal. Most of the parties' contacts with each other and Detica pertaining to said subject matter were in states other than North Carolina and New Jersey, including Detica's home state of Massachusetts as well as New York.
>
> 12. The Master Services Agreement between the parties pertaining to the services [plaintiff] performed for ARC

Financial Services, LLC's customer Detica, which are at issue in the parallel lawsuits, is governed by Delaware law, so each side's breach of contract claims will be governed by Delaware law, and the New Jersey state court is well capable of applying Delaware law as well as any North Carolina law that may apply to [plaintiff's] other claims.

13. [Plaintiff's] principal, Kenneth Bryant, likely will be the sole witness from [plaintiff] in any trial of the parallel lawsuits, and he resides in North Carolina. ARC Financial Services, LLC and Lorenzo Masi likely will call Mr. Masi and at least 1 or 2 other witnesses from ARC Financial Services, LLC in any trial of the parallel lawsuits, and they reside in New Jersey. ARC Financial Services, LLC and Lorenzo Masi intend to call witnesses, located in Massachusetts and employed by Detica, in any trial of the parallel lawsuits, and there may be another witness who resides in New York.

14. The parties have conducted a minimal amount of discovery in each of the respective parallel lawsuits. The New Jersey state court has denied [plaintiff's] motion in the New Jersey lawsuit to dismiss for lack of personal jurisdiction and lack of service of process, and the New Jersey appellate courts denied an appeal of that decision. A mediation was conducted in the New Jersey action but it was impassed, largely due to the motion[ ] to stay in the North Carolina action not being resolved. This Court is unable to conclude that one of the parallel lawsuits is more or less advanced in progress than the other; however, at present, there is no pending motion in the New Jersey lawsuit, nor has there been any effort in the New Jersey lawsuit, to request the New Jersey state court to stay the New Jersey action in favor of the parties proceeding with their dispute in the North Carolina action.

15. The matters being litigated by the parties in the parallel lawsuits are not matters of unique local concern to either North Carolina or New Jersey. There is equal or closely comparable availability to all parties in both the North Carolina and New Jersey forums of compulsory process to produce non-party witnesses at any trial of the parallel lawsuits. All parties have equal or closely comparable

> access in both the North Carolina and New Jersey forums to sources of proof.
>
> 16. [Plaintiff] contends that ARC Financial Services, LLC filed the New Jersey lawsuit knowing the North Carolina action was being filed and in an effort to lay groundwork to have the North Carolina action stayed in favor of the New Jersey lawsuit; however, this Court is unable to conclude that ARC Financial Services, LLC engaged in inequitable conduct in filing the New Jersey lawsuit. Further, this Court is unable to conclude whether or not either party or set of parties on opposing sides of these disputes may have filed their respective lawsuits for an inequitable purpose; rather, it appears that, on their face, each of the parallel lawsuits was filed for a legitimate purpose.
>
> 17. ARC Financial Services, LLC and Masi, through their attorneys in the North Carolina action, have represented to the Court in the above-captioned action and stipulated during the most recent court hearing in the above-captioned North Carolina action that ARC Financial Services, LLC and Lorenzo Masi consent and will submit to the jurisdiction of the New Jersey state court for purposes of proceeding with [plaintiff] and Kenneth Bryant's claims that have been asserted against them in the North Carolina action and the New Jersey lawsuit.

In light of the trial court's reasoned analysis of the *Motor Inn Management* factors and consequent detailed findings of fact and conclusions of law, we hold that the trial court's grant of the motion to stay was not "a patently arbitrary decision, manifestly unsupported by reason." *See id.* at 134, 689 S.E.2d at 928.

[2] Plaintiff next contends that the doctrine of judicial estoppel prevented ARC from asserting, in its 22 April 2013 motion to stay, that the New Jersey action directly related to the subject matter of the North Carolina action, because it had certified, in its 11 January 2013 complaint, that the matter in controversy in the New Jersey action was not the subject of any other action or contemplated action. Judicial estoppel protects the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Powell v. City of Newton*, 364 N.C. 562, 568, 703 S.E.2d 723, 728 (2010). In determining whether to invoke the doctrine, we consider,

among other factors, whether a party's subsequent position is "clearly inconsistent" with its earlier position. *Id.* at 569, 703 S.E.2d at 728.

ARC certified its complaint one day after plaintiff filed its action in North Carolina. ARC was not served with the North Carolina action until 4 March 2013, almost two months later. ARC's certification that the matter in controversy was not the subject of any other action thus accurately reflected ARC's knowledge at the time it was made. It is unclear whether ARC's additional certification that "[n]o other action . . . *is contemplated* in regard to the matter in controversy" refers to the contemplations of the certifying party or the opposing party. (emphasis added). We interpret this certification to require a party to certify its own contemplations, rather than those of the opposing party. We therefore hold that, at the very least, ARC never adopted a position that was "clearly inconsistent" with its position that the New Jersey action directly related to the subject matter of the North Carolina action. *See id.*, 703 S.E.2d at 728. Accordingly, we hold that ARC was not judicially estopped from arguing in its motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. *See id.* at 568, 703 S.E.2d at 728.

Plaintiff further contends that ARC initiated the New Jersey action in bad faith as a "tactical maneuver." But, in its order, the trial court found that ARC had not engaged in "inequitable conduct" and had filed its lawsuit for a "legitimate purpose." Nothing in the record suggests that ARC's complaint is a sham pleading. Accordingly, we hold that the trial court did not abuse its discretion in granting ARC and Masi's motion to stay.

III. Conclusion

Because the trial court did not abuse its discretion in granting ARC and Masi's motion to stay, we affirm the trial court's order.

AFFIRMED.

Judges GEER and BELL concur.

CHARLOTTE PAVILION ROAD RETAIL INVESTMENT, L.L.C., AND WLA ENTERPRISES, INC., PLAINTIFFS

v.

NORTH CAROLINA CVS PHARMACY, LLC; JEFFREY CARPENTER; CARPENTER INVESTMENT PROPERTIES, LLC; SUBURBAN GARDENS INCORPORATED; AND SONNY BOY PROPERTIES, LLC, DEFENDANTS

No. COA14-658

Filed 16 December 2014

Declaratory Judgments—offensive summary judgment—restrictive covenants—construction of parking lot

The trial court did not err in a declaratory judgment action by granting plaintiff developers' offensive summary judgment motion seeking a declaration that their proposed use of the pertinent land did not violate a restrictive covenant. Although the covenant provided that a developer may not build a store that constituted a vitamin store, beauty aid store, or pharmacy, the intent of the grantor was not to outlaw the construction of those things which were integral or essential to the operation of a retail business. Thus, the construction of a parking lot and access easement on the restricted property was not a prohibited use.

Appeal by defendants from order entered 11 March 2014 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2014.

ELLIS & WINTERS LLP, by Matthew W. Sawchak, Thomas D. Blue, Jr., Jeremy M. Falcone, Emily E. Reardon, for North Carolina CVS Pharmacy, L.L.C. and Sonny Boy Properties, LLC.

FERGUSON, SCARBROUGH, HAYES, HAWKINS & DEMAY, PLLC, by James R. DeMay, for Jeffrey Carpenter, Carpenter Investment Properties, LLC, and Suburban Gardens Incorporated.

MULLEN HOLLAND & COOPER, P.A., by John H. Hasty and Justin N. Davis, for Charlotte Pavilion Road Retail Investment, LLC, and WLA Enterprises, Inc.

ELMORE, Judge.

In 2013, Charlotte Pavilion Road Retail Investment, L.L.C. and WAL Enterprises (collectively "developers") filed a declaratory judgment action against North Carolina CVS Pharmacy, L.L.C., Jeffrey Carpenter, Carpenter Investment Properties, LLC, Suburban Garden Incorporated, and Sonny Boy Properties, LLC (collectively "CVS"). The developers sought a declaration that their proposed use of the land at issue did not violate a restrictive covenant. The developers moved for offensive summary judgment and Judge Linwood O. Foust granted the motion. CVS timely appealed. After careful consideration, we affirm.

I. Background

The facts in this case are not in dispute. Jeffrey Carpenter, principal member of Carpenter Investment Properties, LLC, owned a fifteen acre tract of land ("the Carpenter tract") in north Charlotte. In 2006, Mr. Carpenter conveyed approximately two acres of the Carpenter tract to an entity that he controlled, Pavilion at Twenty Nine, LLC ("Pavilion"). Pavilion leased the two acres to CVS Pharmacy ("CVS tract"), which is still operating a pharmacy on the land today. Mr. Carpenter/Pavillion agreed to place a restriction in the CVS lease on the future use of the Carpenter tract to entice CVS to enter the lease agreement.

On 18 August 2008, Mr. Carpenter sold the CVS tract to Sonny Boy Properties, LLC. As part of the sale, Mr. Carpenter implemented the restriction outlined in the CVS lease by encumbering his adjoining land, the Carpenter tract, with a restrictive covenant. The restrictive covenant is recorded and runs with the land. The recorded covenant mirrors the restriction that appears in the CVS lease. It states:

> During the term of the existing CVS lease . . . no owner of any portion of the Carpenter Tract shall allow its parcel to be leased or to be used for the purpose of a health and beauty aids store, a drug store, a vitamin store, and/or a pharmacy. A "pharmacy" shall include the dispensing of prescription drugs by physicians, dentists, or other health care practitioners, or entities such as health maintenance organizations, where such dispensing is for profit or a facility which accepts prescriptions which are filled elsewhere and delivered to the customer. A "health and beauty aids store" shall mean a store which devotes more than 10% of its retail selling space to the display and sale of health and beauty aids.

In 2012, Mr. Carpenter contracted to sell the restricted Carpenter track to the developers. The developers also contracted to purchase

an adjacent tract of land ("the Charter tract") from Charter Properties. The Charter tract is unrestricted. The developers intend to construct a shopping center to be located on both the Carpenter and Charter tracts. Specifically, the developers intend to lease a portion of the Charter tract to Walmart, and Walmart proposes to build a store that would sell, *inter alia*, health and beauty aids, drugs and vitamins, and operate a pharmacy. On the Carpenter tract, the developers intend to build a parking lot and access easement to be used by the shopping center customers and tenants. Although Walmart would share the parking lot with other retail establishments, its customers would be expected to park on the Carpenter tract to access the Walmart store.

When CVS learned that the developers intended to construct a parking lot on the Carpenter tract for Walmart's use, it informed the developers that, in its opinion, such use would violate the restrictive covenant. To be certain, the developers filed a declaratory judgment action against CVS. The developers sought a declaration by the trial court that the proposed use of the land would not violate the restrictive covenant. After a 27 January 2014 summary judgment hearing, Judge Foust granted the developers' motion for summary judgment, concluding that the construction of a parking lot would not violate the terms of the restrictive covenant. CVS and Sonny Boy filed a timely notice of appeal.

II. Analysis

On appeal, CVS argues that the trial court erred in granting the developers' motion for summary judgment since the trial court should have held that the proposed use of the Carpenter tract as a parking lot and access easement for Walmart would violate the restrictive covenant. We disagree and hold that the parking lot is a permitted use and does not violate the particular restrictive covenant.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c) (2013). In the instant case, the parties agree that there is no genuine issue of material fact because the facts themselves are not in dispute. Instead, the parties disagree on the legal significance of the established facts. *See*, *e.g.*, *Alchemy Communications Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 222, 558 S.E.2d 231, 233 (2002) (Plaintiff's claim that whether defendant violated a lease presented "a matter of contract interpretation and thus, a question of law."). We must only consider whether the trial court correctly determined that plaintiffs are entitled to a judgment as a matter of law.

North Carolina courts employ a strict construction rule when interpreting restrictive covenants:

> [W]hile the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.
>
> The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that *nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.*
>
> [C]ovenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous[.] This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. *Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.*

Wein II, LLC v. Porter, 198 N.C. App. 472, 480, 683 S.E.2d 707, 712–13 (2009) (quotations and citations omitted) (emphasis added). "The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). "Restricted property cannot be made to serve a forbidden use even though the enterprise is situated on adjacent or restricted land." *Id.* at 269, 156 S.E.2d at 239.

The covenant at issue provides that the Carpenter tract shall not "be used for the purpose of a health and beauty aids store, a drug store, a vitamin store or a pharmacy." This covenant must be construed according to the plain ordinary meaning of its words. CVS argues that the restrictive covenant on the Carpenter track prohibits the construction of a parking lot that would serve Walmart. It is CVS's position that the purpose of the restrictive covenant is to prohibit the construction of a pharmacy on the restricted parcel that would compete with CVS—this

includes the prohibition of a parking lot which would serve a prohibited use. CVS notes that because the city of Charlotte's ordinance requires Walmart to provide parking for its customers, parking is integral to the store's operation and therefore falls within the purview of the restrictive covenant.

To support its position, CVS primarily relies on case law from jurisdictions outside of North Carolina. For example, in *H.E. Butt Grocery Co. v. Justice*, 484 S.W.2d 628 (Tx. Civ. App. 1972), appellee Coleridge sold appellant Butt (HEB) a parcel of land and at the same time placed a restriction on adjacent land owned by Coleridge "against the use of any portion thereof for the purpose of conducting thereon a foodstore [sic] or food department for the storage or sale for off-premises consumption of groceries, meats, produce, dairy products, frozen foods, [or] baking products[.]" *Id.* at 629. Thereafter, Coleridge sold the adjacent land to plaintiff Justice, who proposed to erect a grocery store on the land not covered by the restriction, and proposed to use the restricted parcel for parking and access to the grocery and other stores in the shopping center. *Id.* Justice sued HEB for declaratory judgment and sought a declaration that a use restriction upon the property encumbered by the restrictive covenant would not preclude the property's use for parking, ingress and egress for a grocery store to be located on unrestricted land, adjacent to the restricted tract. *Id.* In construing the restriction, the Texas court gave effect to the express language, together with that which was necessarily implied, to ascertain the intention of the parties. *Id.* at 630. The Texas Court noted that any ambiguity was to be resolved against favoring the restriction. *Id.* Ultimately, the Texas court determined that constructing a parking lot on the restricted lot to benefit the grocery store violated the restrictive covenant because the parking lot is "an integral part of the proposed operation. The foodstore cannot be conducted without it." *Id.* at 631. CVS contends that the factual situation presented in *Justice* is analogous to the situation at bar and therefore we should adopt the Texas court's holding.

We agree that the factual situation in *Justice* is similar to the situation at issue. However, the express language of the restrictive covenant in this case differs from the restriction in *Justice* such that we cannot adopt the Texas court's holding. Here, the restrictive covenant prohibits the building of a health and beauty aids *store*, a drug *store*, a vitamin *store* or a pharmacy. The covenant goes so far as to describe what constitutes each type of prohibited use *store*. A "store" is defined as a "place where goods are deposited for purchase or sale." BLACK'S LAW DICTIONARY 1460 (8th ed. 2004). Alternatively, the restrictive covenant in *Justice*

prohibited potential buyers from using the property "for the purpose of conducting thereon a foodstore or food department[.]" Thus, the restrictive covenant in *Justice* contemplated and banned the business *activity* of operating a food store, which, as mandated by ordinance, included providing consumer parking.

In the instant case, we interpret the restrictive covenant to prohibit exactly what it purports to ban on the face of the restriction—the erection of a *structur*e on the Carpenter tract that operates as a prohibited type of retail store, namely a pharmacy. Thus, a developer may not build a store—four walls and a roof—that constitutes a vitamin store, beauty aid store, or pharmacy. We do not believe that the intent of the grantor, Mr. Carpenter, was to outlaw the construction of those things which are integral or essential to the *operation* of a retail business. If such prohibition was intended, the drafter could have said as much by incorporating phrases such as "used for store purposes" or "used for purposes incidental to a store." However, without more, we conclude the construction of a parking lot and access easement on the restricted property is not a prohibited use. Accordingly, this Court must affirm the trial court's decision to grant the developer's motion for offensive summary judgment.

Affirmed.

Judges BRYANT and ERVIN concur.

TRACEY CLINE, Plaintiff-Appellant
v.
DAVID HOKE, Individually and as the Custodian of the Public Records Pursuant to N.C.G.S. § 132-2, Defendant-Appellee

No. COA14-428

Filed 16 December 2014

1. Public Records—action to compel production of emails—defendant named in individual capacity—action properly dismissed

The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts in his individual capacity for the production of emails pursuant to North Carolina's Public Records Act. To compel a custodian of public records to permit inspection of those records, a party must sue the custodian in his or her official capacity.

2. Public Records—action to compel production of emails—assistant director not custodian of records

The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts (AOC) in his official capacity for the production of emails pursuant to North Carolina's Public Records Act. Because the public official in charge of an office having public records is the custodian of those records, the *assistant* director of AOC was not the proper party to sue to compel production of the emails.

Appeal by Plaintiff from order entered 1 November 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 25 September 2014.

Tracey Cline, Plaintiff-Appellant, pro se.

Attorney General Roy Cooper, by Special Deputy Attorneys General Melissa L. Trippe and Amar Majmundar, for Defendant-Appellee.

McGEE, Chief Judge.

Tracey Cline ("Plaintiff") filed an action against David Hoke ("Defendant"), individually and in his official capacity as assistant director of the North Carolina Administrative Office of the Courts ("AOC"), in order to obtain certain AOC emails pursuant to North Carolina's public

records law. The trial court dismissed Plaintiff's case, in part, for failure to state a claim upon which relief could be granted. We conclude that Defendant is not the designated custodian of the AOC's public records, and thus we affirm the trial court's dismissal.

I. Background

Plaintiff, a former Durham County district attorney, sought to obtain some emails related to her service as district attorney in preparation to defend a complaint filed against her by the North Carolina State Bar. In the present action, Plaintiff sought certain email exchanges that she alleged were in Defendant's custody. Plaintiff made repeated requests to Defendant and to AOC's general counsel, Pamela Weaver Best ("General Counsel"), between June and December of 2012 to obtain these emails. Although Plaintiff initially corresponded with both Defendant and General Counsel regarding her public records request, Plaintiff eventually corresponded almost exclusively with General Counsel. During that period of time, Defendant did send Plaintiff a number of the emails she had requested. However, Plaintiff always contended there were additional relevant emails that Defendant had not sent her. Plaintiff filed this action against Defendant, individually and in his official capacity as the purported custodian of the public records she was seeking.

Defendant moved to dismiss Plaintiff's case pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), in part, on the grounds that Plaintiff had failed to state a claim upon which relief could be granted. The trial court granted Defendant's motion to dismiss by order entered 1 November 2013. Plaintiff appeals.

II. Standard of Review

> The standard of review of an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(6) is whether, as a matter of law, 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. In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of [her] claim which would entitle [her] to relief.

Grant v. High Point Reg'l Health Sys., 184 N.C. App. 250, 252, 645 S.E.2d 851, 853 (2007) (citations and internal quotation marks omitted).

Moreover, the North Carolina Supreme Court held in *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010), that

> the policy rationale underpinning the Public Records Act . . . strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that . . . public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.
>
> The only task at hand for purposes of Rule 12(b)(6) is to test the legal sufficiency of the complaint.

(citation omitted).

III. Suing Defendant in His Individual Capacity

[1] N.C. Gen. Stat. § 132-6(a) (2013) provides that a custodian of public records has a statutory duty to permit reasonable inspection of those records by the public. In order to compel an unresponsive custodian to fulfill this statutory duty, a party must sue the custodian of those records in the custodian's official capacity. *See Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) ("If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity."); *cf. Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 223, *supersedeas and disc. review allowed on other grounds*, __ N.C. __, 758 S.E.2d 862 (2014) (plaintiffs suing the director of the AOC in his official capacity for public records); *State Employees Ass'n of N.C.*, 364 N.C. at 206, 695 S.E.2d at 93 (plaintiff suing the Treasurer of the State of North Carolina in his official capacity for public records). In the present case, if Plaintiff wanted to sue Defendant specifically as a custodian of AOC's public records, she must have sued him in his official capacity. Therefore, Plaintiff's suit against Defendant in his individual capacity was properly dismissed under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013).

IV. Suing Defendant in His Official Capacity

[2] Plaintiff next contends that she properly sued Defendant in his official capacity as the custodian of some of the AOC's public records. As

already discussed, if Defendant was the custodian of the AOC's public records, Plaintiff could sue him in his official capacity to obtain access to the public records she was seeking. *See generally* N.C. Gen. Stat. §§ 132-1 *et seq*. (2013). If Defendant was not the custodian, however, he could not be compelled by law to provide access to public records as the custodian.

Plaintiff contends that Defendant was the custodian of all public records responsive to her public records request. Defendant, both in his emails to Plaintiff and in his brief before this Court, contends that he was the custodian of some, but not all, of the public records Plaintiff was seeking. General Counsel, generally acting on Defendant's behalf, informed Plaintiff, on several occasions, that "the AOC is not the custodian" of its employee's emails, but rather that "[u]nder [North Carolina's] Public Records law, each individual employee is the custodian of his/her emails." At times, General Counsel's stated opinion to Plaintiff was that it was only "the individual *writer* of [a requested] email who is the custodian" and that "requests for emails or correspondence should be made of each person [who created those public records] individually." (emphasis added).

The AOC made an analogous argument earlier this year in *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 225, *supersedeas and disc. review allowed*, __ N.C. __, 758 S.E.2d 862 (2014), involving the AOC's administration, support, and maintenance of the state's Automated Criminal/Infraction System database ("ACIS"), a "real-time criminal records database" that compiles the criminal court records for all of the superior courts in North Carolina. In response to a public records request for a copy of all the records within the ACIS database, the AOC erroneously contended that it was not the custodian of the records within ACIS and, instead, argued that each county clerk of court who input data into ACIS was the custodian of the individual records created by that respective county clerk of court; thus, the plaintiffs would need to contact every county clerk of court in the state in order to obtain the records they were seeking. *Id.* at __, 754 S.E.2d at 225–26. However, this Court held that, because the AOC "created, maintains, and controls ACIS and is the only entity with the ability to copy the database[,] . . . ACIS is a record *of the AOC* and *in the AOC's custody*." *Id.* at __, 754 S.E.2d at 228.

Similarly, in the present case, Defendant contends that the emails of AOC employees are not within the custody of the AOC. Instead, Defendant essentially argues that these emails are the responsibility of a multitude of "custodians" — individual employees who created emails,

and who are diffused throughout the AOC. In support of this position, Defendant directs this Court to materials developed by the North Carolina Department of Cultural Resources ("DCR"), which state that

> [i]n most cases, the author, or originator, of [an] e-mail message is responsible for *maintaining* the "record" copy. However, cases in which the recipient has altered the message (made changes, added attachments, etc.), or when the message is coming from outside the agency (and therefore not documented anywhere within the agency); the recipient is the one responsible for *retaining* the message.

Who is Responsible for That E-mail Message?, State Archives of North Carolina, www.history.ncdcr.gov/SHRAB/ar/tutorials/Tutorial email_20120501/index.html (from DCR's online e-mail management training tutorial for state employees) (emphasis added). However, Defendant appears to have confused the duty of public records custodians to *provide access to* public records with the rules that state employees must follow to *preserve* those records.

N.C. Gen. Stat. § 132-8.1 (2013) designates the DCR as the agency that oversees the state's records management program, but only for the "creation, utilization, maintenance, retention, preservation, and disposal of official records[.]" According to the DCR, "individual [employees] are responsible for managing state records[.]" Dep't of Cultural Res., E-mail as a Pub. Record in N.C.: A Policy for Its Retention and Disposition 4 (July 2009). However, the DCR also has expressly stated that "[l]egal custody of [state employees'] electronic mail rests with *the office* of the sender or recipient." *Id.* at 10 (emphasis added). Thus, each individual state employee who creates a public record is not automatically the custodian thereof.

Instead, N.C. Gen. Stat. § 132-2 (2013) provides that "[t]he public official in charge of an office having public records shall be the custodian thereof." N.C.G.S. § 132-2 has rarely been interpreted by our appellate Courts. However,

> [i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

Frye Reg'l Med. Ctr. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990)). By using the singular word "[t]he" public official and in connection with that public official being "*in charge* of an office having public records," the statute designates a particular person within an office as being the designated custodian for that office's public records. *Accord generally* N.C. Att'y Gen. Office, Guide to Open Gov't and Pub. Records 4 (2008) ("Each office should have a 'custodian' of public records who is required to allow those records to be inspected."). As the *assistant* director of the AOC, Defendant is not *the person* in charge of the AOC and thus not the designated custodian of the AOC's records per N.C.G.S. § 132-2. *Cf. State Employees Ass'n of N.C.*, 364 N.C. at 206, 695 S.E.2d at 93 (noting that the Treasurer of the State of North Carolina is the designated custodian for public records of the North Carolina Department of State Treasurer). Thus, the parties herein have misinterpreted North Carolina's public records law. Moreover, Plaintiff failed to pursue her action against the public official in charge of AOC's public records, who is the custodian thereof. Plaintiff's suit against Defendant in his official capacity is without merit and was properly dismissed.

Affirmed.

Judges GEER and STROUD concur.

COX v. COX

[238 N.C. App. 22 (2014)]

DAVID COX, PLAINTIFF/FATHER
v.
MICHELLE COX, DEFENDANT/MOTHER
v.
BETTY JO LAYNE, INTERVENOR/PATERNAL GRANDMOTHER

No. COA14-314

Filed 16 December 2014

1. Appeal and Error—preservation of issues—constitutional issues not considered for first time on appeal

Although defendant argued that the trial court violated her constitutional right to due process in a child custody case by failing to allow her a full opportunity to be heard at trial, this issue was dismissed because constitutional issues are not considered for the first time on appeal. Further, defendant failed to preserve her statutory argument that the trial court failed to control the presentation of evidence during trial in violation of N.C.G.S. § 1A-1, Rule 611.

2. Child Custody and Support—findings of fact—sufficiency

The trial court's 19 November 2013 permanent child custody and visitation order was supported by adequate findings of fact. The Court of Appeals addressed and overruled defendant's challenges to the pertinent findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody within the restrictions placed upon plaintiff was in the best interests of the minor children.

3. Child Custody and Support—future modifications-improper waiver of analysis

The trial court erred in a child custody case by issuing an order waiving analysis for future modifications. That portion of the order was contrary to law as it predetermined what amounted to a substantial change in circumstances. Therefore, this portion of the order was remanded to the trial court to strike the improper language.

4. Appeal and Error—preservation of issues—failure to argue judicial bias

The trial court did not abuse its discretion in a child custody case by awarding joint custody to plaintiff father, by denying defendant mother's request to return to California, and by elevating intervenor grandmother to parental status based on alleged judicial bias. Defendant failed to preserve her argument of judicial bias because

she has not argued that the trial court had any sort of personal bias or prejudice against her, nor did she move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor grandparent visitation order.

Appeal by defendant from order entered 19 November 2013 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 9 September 2014.

Arnold & Smith, PLLC, by Matthew R. Arnold and Kyle A. Frost, for plaintiff-appellee.

Church Watson Law, PLLC, by Kary C. Watson and Seth A. Glazer, for defendant-appellant.

Weaver, Bennett & Bland, P.A., by William G. Whittaker, for intervenor-appellee.

BRYANT, Judge.

Where defendant-mother raises a constitutional argument for the first time on appeal, we dismiss the argument. Where the trial court's findings of fact are adequately supported by the record, we uphold the findings of fact. Where the trial court's order includes language establishing what would amount to a preemptive modification to custody of the minor children, we remand for the trial court to strike the improper language from the order. And, where defendant-mother's argument of judicial bias was not raised before the trial court, we dismiss this argument on appeal.

On 14 August 2012, in Iredell County District Court, plaintiff-father David Cox filed a verified complaint for child custody and motion for an emergency *ex parte* custody order. The complaint named as defendant the children's mother, Michelle Cox. In his allegations, plaintiff-father stated that from December 2010 to 3 June 2012, he and defendant-mother resided in Mooresville, North Carolina with their two minor children. Plaintiff-father alleged that on 3 June 2012, defendant-mother and their two minor children (born in 2008 and 2009) flew to California under a pretext of attending a family wedding. Defendant-mother had been scheduled to return to North Carolina on 10 June but failed to do so. On 3 August 2012, plaintiff-father was served with defendant-mother's request for a domestic-violence restraining order and a petition

for separation and request for child custody and visitation order.[1] In her request for a domestic violence restraining order, defendant-mother alleged that plaintiff-father struggled with thoughts of suicide. In his complaint, plaintiff-father acknowledged that he was under the treatment of a therapist and a psychiatrist, and he attended weekly group therapy sessions. However, plaintiff further asserted that he never told defendant-mother or either of the minor children he had thoughts of hurting them. Plaintiff-father sought a temporary order compelling defendant-mother to return the children to North Carolina. Defendant-mother filed a motion for *ex parte* temporary emergency custody relief as well as her answer, counterclaims, and a response to plaintiff-father's motion for an emergency *ex parte* custody order.

On 24 August 2012, the trial court entered a memorandum of judgment/order memorializing a temporary agreement between the parties wherein defendant-mother would have temporary custody of the minor children and plaintiff-father would have supervised visitation. A consent order regarding temporary child custody was entered 18 October 2012.

On 1 October 2012, the minor children's paternal grandmother Betty Jo Layne filed a motion for permission to intervene and for visitation. Intervenor-paternal grandmother requested that she be granted visitation with the minor children and that she be the minor children's day-care provider. On 3 January 2013, the trial court granted intervenor-grandmother's motion to intervene.

On 19 November 2013, following a hearing during which all parties were present and represented by counsel, the trial court entered an order on permanent child custody and grandparent visitation. The trial court concluded that both plaintiff-father and defendant-mother were fit and proper persons to share joint legal and physical custody and that the intervenor-grandmother had a substantial relationship with the minor children. The trial court awarded defendant-mother permanent primary joint custody and plaintiff-father secondary joint physical custody which he could exercise through visitation. If plaintiff-father could not exercise his parenting time, intervenor-grandmother could exercise time in his stead. Further, the trial court ordered that plaintiff-father's custodial schedule was to be dependent on his residing with intervenor-grandmother.

Defendant-mother appeals.

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1. The California court declined to exercise jurisdiction over child custody under the UCCJEA and no custody order was ever entered in California.

On appeal, defendant raises the following issues: whether the trial court (I) violated defendant's due process rights; (II) entered an order establishing permanent custody and grandparent visitation not supported by adequate findings of fact; (III) erred in issuing an order waiving analysis for future modifications of the order; and (IV) abused its discretion in awarding joint custody to plaintiff.

I

[1] Defendant first argues that the trial court violated her constitutional right to due process by failing to allow her a full opportunity to be heard at trial. Specifically, defendant contends the trial court failed to intervene when plaintiff's counsel effectively limited her testimony. We dismiss this argument.

Despite defendant's contention that she was denied her constitutional due process rights, we note that defendant did not raise such an objection or argument at trial. Defendant is raising her constitutional argument for the first time on appeal.

"A constitutional issue not raised at trial will generally not be considered for the first time on appeal. Furthermore, the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citations omitted). Therefore, we will not address defendant's constitutional argument.

Defendant also contends the trial court failed to fulfill its statutory duty to control the presentation of evidence during trial in violation of our Rules of Civil Procedure, Rule 611.

Pursuant to our Rules of Civil Procedure, "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . . and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2013). As noted previously, defendant failed to note an objection or preserve this argument before the trial court. *See* N.C. R. App. P. 10(a) (2014) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) ("This subsection of Rule 10 is directed to matters which occur at trial

and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." (citation omitted)). Accordingly, because defendant's constitutional and statutory arguments were not properly preserved for our review, they are hereby dismissed.

II

[2] Next, defendant argues that the trial court's 19 November 2013 permanent custody and visitation order is not supported by adequate findings of fact. We disagree.

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotations omitted).

A.

As to findings of fact 23, 24, 28, and 30, defendant contends that these are mere recitations of testimony and cannot be used to support the trial court's conclusions of law. Pursuant to Civil Procedure Rule 52, "[i]n all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2013). Defendant cites *Long v. Long*, for the proposition that "findings that merely recapitulate the testimony or recite what witnesses have said do not meet the standard set by the rule." 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (citation omitted).

Finding 23 summarizes some testimony from plaintiff's witnesses regarding his demeanor prior to and after the parties' separation, but essentially the same information is included in detail in other findings of fact which defendant has not challenged, so to the extent that this finding is simply a "recitation," it is not necessary to support the trial court's conclusions of law. Defendant also challenges Finding 24, which is odd, since this finding is entirely favorable to her. It states that "all of

the plaintiff's and defendant's witnesses testified as to the fact that the Defendant is a very good mother who takes very good care of the minor children. There is no dispute that the Defendant has been the minor children's primary caregiver." But again, this finding is simply a summary of evidence which has been set forth in more detail in other findings of fact and even if it is a recitation, it is not necessary to support the trial court's conclusions. Finding 28 is not a recitation of evidence but is a finding regarding the Intervenor's assistance and care for the minor children which is supported by the testimony of several witnesses. Finding 30 is a summary of testimony of Plaintiff's step-father, but again, other extensive and detailed findings of fact which are not challenged support the trial court's conclusions of law.

In addition, despite defendant's assertion that these findings of fact cannot be used to support the trial court's conclusions of law or decree, defendant fails to identify or argue what, if any, particular conclusion of law would be unsupported if findings of fact 23, 24, 28, and 30 were stricken. Regardless, these findings provide a summary of witness observations which give background information about plaintiff and defendant that is valuable in a determination of child custody and visitation. Defendant's argument is overruled.

B.

Defendant contends that findings of fact 8, 10, 25, 27, and 28 are not supported by evidence presented at trial. These findings indicate that after the birth of plaintiff and defendant's first child, other than feedings, plaintiff "share[d] in all other child rearing aspects, such as bathing, diaper changing, etc. [] Plaintiff was also primarily responsible for cooking the family meals." The findings also indicate that while plaintiff and defendant lived in North Carolina, the intervenor aided in the care of the minors: babysitting during plaintiff's "numerous doctor visits," reading to them, taking them to the movies, and taking them on outdoor adventures. A review of the record provides ample support for the trial court's findings of fact. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Therefore, defendant's arguments are overruled.

C.

Defendant challenges the trial court's findings of fact 12, 16, 17, 21, 22, and 25. These findings of fact revolve around plaintiff's treatment for his mental health issues.

As to finding of fact 16, defendant contends the trial court's findings failed to reflect the severity of plaintiff's suicidal ideation. Defendant

contends the trial court found plaintiff was admitted to the hospital on two occasions but that plaintiff testified it was at least three occasions. Defendant contends that the trial court found that plaintiff was "simply seeking attention from [defendant] by stating he had a 'bad day.' However, . . . [plaintiff] repeatedly expressed detailed suicide plans, including driving off a bridge and shooting himself." We note that the trial court's finding of fact 16 acknowledges that plaintiff felt despondent "and had racing thought patterns and thoughts of suicide." The trial court also found that the evidence disclosed a pattern of behavior: "Plaintiff would seek attention from the Defendant by saying he was 'having a bad day' and thinking of harming himself. The Defendant would then insist that [plaintiff] check himself into a psychiatric facility or have his [psychiatrist] change his medications." We note testimony that prior to one commitment to a psychiatric center plaintiff informed defendant he was "having a real bad day"; plaintiff then swallowed four magnesium pills. Upon review, the trial court's finding of fact 16 appears to focus on plaintiff's pattern of conduct. Also, throughout the order, it is clear the trial court acknowledged plaintiff's history of suicidal ideation; therefore, we find defendant's contention that the trial court minimized the significance of this unsustainable. Thus, as to this contention, defendant is overruled.

Defendant further challenges finding of fact 17. Defendant argues the trial court's findings indicate that plaintiff's mental illness was "manufactured by [defendant]." Finding of fact 17 states that defendant accompanied plaintiff to the majority of his psychiatric appointments and "tended to do most of the talking," and when plaintiff's psychiatrist failed to diagnose plaintiff in accordance with defendant's conclusions as to plaintiff's illness, "Defendant found another psychiatrist . . . to treat [] Plaintiff." The record provides testimony that defendant noted events that led her to believe plaintiff was bi-polar "[a]nd she was looking for this sort of diagnosis . . . ." There was also testimony that defendant attended almost all of plaintiff's psychiatric counseling sessions. However, in the context of the trial court's order, this finding was less relevant to a diagnosis of plaintiff's mental illness than it was illustrative of the relationship between the parties. We overrule defendant's contention.

Defendant also challenges the trial court's finding of fact number 22 which states that after plaintiff and defendant separated, plaintiff and intervenor "decided to start weaning [] Plaintiff off his psychiatric medications. By December 2012, [] Plaintiff reported feeling like his old self, and with the concurrence of Dr. Masters, he discontinued all

medications." We note that the record does not reflect any testimony by Dr. Masters. Plaintiff testified that the general consensus in intervenor's family was that plaintiff was over-medicated. Plaintiff further testified that during a conversation with his mother, intervenor informed him that she had been stepping down his medication. Plaintiff admitted to being shocked and reluctant, but testified "she would say: Just try it. Just do it for this amount of time. If it works, it works. If it doesn't, we'll go back on it, whatever. Just do this." Plaintiff testified that he began seeing Dr. Masters for treatment in December 2012, after this weaning process had begun. By July 2013, plaintiff had stopped taking medication. He testified absent objection that Dr. Masters was aware of this and did not object but rather wanted to see how plaintiff was managing without the medication. We hold that the evidence of record sufficiently supports the trial court's finding of fact. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Thus, defendant's argument is overruled.

As to the remaining findings of fact listed in this subsection of defendant's argument, defendant does not specifically support her challenge with any contention, and we deem those arguments abandoned. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

D.

Defendant challenges the trial court's finding of facts 13, 14, and 31 which generally state that plaintiff and defendant's move from California to North Carolina was intended to be permanent. Defendant contends the evidence establishes this move was intended to be temporary. Plaintiff's testimony, however, supports the trial court's findings of fact.

> Q. Now, when y'all decided to move to North Carolina was that intended to be a temporary thing?
>
> A. No, not at all.

Testimony from plaintiff also states that he and defendant looked at several houses. The house they selected to purchase was right down the street from both an elementary and middle school and within three miles of a high school. "And we thought that would be a great location because [the elder child, (age 5 at the time of trial)] wouldn't have to drive far to school and – when she did get her license." As the record provides substantial evidence in support of the trial court's finding, we overrule defendant's argument. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733.

E.

Next, defendant contends that finding of fact 38 is not supported by evidence. Finding of fact 38 includes five subparagraphs and over a page of single-spaced text. Defendant challenges only one small portion of this finding, which addresses the *Ramirez-Diaz* factors in considering the best interests of the children as to defendant's relocation to California. Defendant challenges the trial court's finding that she is "manipulative and controlling" and that there is little likelihood that she would comply with the trial court's order if allowed to relocate her family to California. In essence, defendant's argument attacks the trial court's assessment of her credibility and weighing of the evidence of both parties. However, there is abundant evidence in the record to support the trial court's findings and numerous unchallenged findings which also support the trial court's characterization of plaintiff as unlikely to comply with the court's orders.

We note that defendant does not challenge the trial court's finding that she "took the minor children to California on the false pretense of attending a wedding. . . . Defendant kept her intentions to divorce a secret for several months after she left for California, and did not admit her intentions until [] Plaintiff was served with the paperwork from California." Moreover, defendant failed to challenge the trial court's finding that "Defendant refused to return the minor children to North Carolina, despite [the trial court's order], until [] Plaintiff agreed to sign a Consent Order [regarding temporary child custody granting plaintiff only supervised visitation.]" We also note the trial court's unchallenged finding that plaintiff's therapist testified that after defendant left for California, she saw improvement in plaintiff: he lost weight, was more energetic, smiled more, and began looking for jobs. "[Plaintiff's therapist] attributed the change to the discontinuance of the medications, the change in Plaintiff's environment, and [plaintiff] being able to take control over his own life rather than being controlled and manipulated by [] Defendant." This argument is overruled.

F.

Defendant next challenges the trial court's finding of fact 37.

> Both [] Plaintiff and [] Defendant are fit and proper persons to have the care and custody of their minor children, and at this time it is in the best interest and welfare of said children that their custody be granted jointly to both [] Plaintiff and Defendant with [] Defendant having the

> primary physical custody of the children, and [] Plaintiff having secondary joint custody of the children.

Defendant argues that the evidence does not support a finding that plaintiff is a fit and proper person to care for the minor children or that it is in their best interest for plaintiff to have joint legal and physical custody, since plaintiff suffers from an untreated bi-polar disorder and has been repeatedly hospitalized for suicidal ideation.

First, we note that finding 37 is actually a conclusion of law and, despite its label, we review it as such; so, we review it to determine if the findings of fact support this conclusion of law. *See In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) ("We note the trial court classified multiple conclusions of law as 'findings of fact.' We have previously recognized the classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact. When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." (internal citations and quotations omitted)).

Again, defendant's argument attacks the trial court's assessment of the credibility of various witnesses and of the severity of plaintiff's mental illness and capacity to care for the minor children. The order's extensive findings, most of which are unchallenged, show that the trial court carefully considered plaintiff's history of mental illness and concluded that he has improved sufficiently enough to care for the children with Intervenor's assistance.

The trial court's unchallenged findings of fact indicate that plaintiff was not on medication at the time of the custody proceeding and, based on defendant's testimony, he had improved appearance, communication skills, and interaction with his minor children. Based on the testimony of plaintiff's therapist, the trial court found that by January 2013, plaintiff was no longer reporting thoughts of suicide and the therapist "had no concerns about [] Plaintiff being a threat to himself or the minor children." As previously discussed, the trial court also found that there was evidence of a close, loving, and caring relationship between plaintiff and his minor children. We note that the trial court granted defendant primary physical custody and plaintiff secondary physical custody. The

terms of plaintiff's secondary joint physical custody established visitation with the understanding that plaintiff was to reside with intervenor so that should plaintiff's mental condition deteriorate, intervenor would be present to monitor and care for the minor children. These unchallenged findings support the trial court's conclusion of law that its award of custody is in the best interest of the minor children. Therefore, we overrule defendant's argument.

G.

Defendant argues that absent the challenged findings of fact, the trial court had no basis to determine that plaintiff is a fit and proper parent and that the minor children's best interests are served by granting him joint custody. As we have addressed and overruled defendant's challenges to the aforementioned findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody (within the restrictions placed upon plaintiff) was in the best interests of the minor children, we overrule defendant's argument.

III

[3] Defendant argues that the trial court committed error by issuing an order waiving the requirement of further analysis before the order can be modified. Specifically, defendant contends the trial court erred by including a provision in its order wherein a showing that plaintiff's therapist "has no concerns about his mental health or his ability to care for the minor children if living on his own" is predetermined to be a substantial change in circumstances. We agree.

In paragraph 22 of the decretal portion of its order, the trial court stated the following:

> [Plaintiff] is presently residing with the Intervenor. The custodial schedule set forth herein is dependent upon [plaintiff] continuing to reside with Intervenor. [Plaintiff] shall reside with Intervenor and although [plaintiff] may take short outings during the day with the children (i.e., pool, movies, shopping, park) the Court wants to ensure that should Plaintiff's [sic] mental health deteriorate, that Intervenor is present to monitor and care for the minor children. [Plaintiff] may petition the Court for a hearing to lift this residency requirement thus permitting, him to continue this custodial schedule after no longer living with Intervenor, and it shall be lifted pursuant to an Order

> of the Court upon a showing by [plaintiff] that a therapist who has currently evaluated [plaintiff] has no concerns about his mental health or his ability to care for the minor children if living on his own. *If [plaintiff] makes such a showing then it is hereby deemed to be a substantial change in circumstances affecting the well-being of the minor children and warranting the lifting of this residency requirement.*

(Emphasis added).

Pursuant to General Statutes, section 50-13.7, "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2013). "A 'change of circumstances,' as applied to N.C. Gen. Stat. § 50–13.7 means such a change as affects the welfare of the child." *Balawejder v. Balawejder*, 216 N.C. App. 301, 308, 721 S.E.2d 679, 684 (2011) (citation and quotations omitted).

> This Court has held that the trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child. A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact.

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443-44 (2011) (citations and quotations omitted). To predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any findings of fact. *See generally Register v. Register*, 18 N.C. App. 333, 335, 196 S.E.2d 550, 551 (1973) ("It is error to modify or change a valid prior order with respect to support or custody absent findings of fact of changed circumstances."). The italicized portion of decretal paragraph 22 of the trial court's order in effect allows for a preemptive modification of custody. That portion of the order is contrary to law as it predetermines what amounts to a substantial change in circumstances. Therefore, we remand this order to the trial court to strike the aforementioned language.

IV

[4] Defendant argues the trial court abused its discretion in awarding joint custody to plaintiff, in denying defendant's request to return to

California, and elevating intervenor to parental status. Defendant contends that the trial court "entered her order with a clear bias against [defendant]." She contends "[t]he presence of this bias, coupled with the numerous erroneous Findings and Conclusions discussed above, calls into question whether [the trial court's] decision was in fact the product of logical reasoning and the proper application of law to fact." We dismiss this argument.

Defendant's argument confuses the trial court's duty to weigh the credibility of the evidence and to resolve the disputes raised by the evidence with improper judicial bias. *See Carpenter v. Carpenter*, ___ N.C. App. ___, ___, 737 S.E.2d 783, 790 (2013) ("The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state. *See Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) ("As is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. . . ."). The findings of fact should resolve the disputed issues clearly and relate these issues to the child's welfare; the conclusions of law must rest upon the findings of fact.").

Defendant bases her argument of bias primarily on a colloquy that occurred between the trial court, counsel, and defendant during her testimony when the trial court overruled an objection by her counsel and directed her to answer a question. Defendant has not challenged the trial court's ruling on this evidentiary issue on appeal. Defendant also bases her argument on the fact that the trial court ruled against her by granting plaintiff primary custody and not permitting her to take the children to live in California. This is not the sort of "judicial bias" that is prohibited by law; in fact, trial judges are required to rule on evidentiary issues, to assess the credibility of witnesses, and to make rulings which will, in most cases, be adverse to one party or the other. The type of judicial bias which is considered to be improper is bias based upon the judge's "personal bias or prejudice concerning a party."

> Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518, specifically states that
>
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

> (a) The judge has a personal bias or prejudice concerning a party.

Sood v. Sood, ___ N.C. App. ___, ___, 732 S.E.2d 603, 608, *cert. denied*, *review denied*, *appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336, 339 (2012).

> This Court has held that an alleged failure to recuse is not considered an error automatically preserved under N.C. R. App. P. 10(a)(1). . . . Where appellant failed to move that the trial judge recuse himself, [she] cannot later raise on appeal the judge's alleged bias based on an undesired outcome.

Id. at ___, 732 S.E.2d at 608 (citation omitted).

Defendant has not argued that the trial court had any sort of personal bias or prejudice against her; she did not move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor-grandparent visitation order. Defendant has failed to preserve her argument of judicial bias. Accordingly, this argument is dismissed.

The order of the trial court is affirmed in part and remanded in part.

Affirmed in part; remanded in part.

Chief Judge McGEE and Judge STROUD concur.

BRYAN DEBAUN, PLAINTIFF
v.
DANIEL J. KUSZAJ, ALSO KNOWN AS D.J. KUSZAJ, A DURHAM POLICE OFFICER IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; CITY OF DURHAM, NORTH CAROLINA, DEFENDANTS

No. COA12-1520-2

Filed 16 December 2014

Civil Rights—direct claim under North Carolina Constitution—action permitted only when no adequate remedy under state law—tort claims provided adequate remedy—affirmative defense does not negate adequacy

In an action for plaintiff's injuries resulting from an encounter with a police officer, the trial court did not err by granting summary judgment for defendants on plaintiff's claim under the North Carolina Constitution. A cause of action under the state Constitution is permitted only when there is no adequate remedy under state law. Even though plaintiff would have to overcome the affirmative defense of public officer immunity for his common law tort claims, his claim under the state Constitution was barred because he could seek a remedy on the common law tort claims.

Appeal by plaintiff from order entered 5 September 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 April 2013. Unpublished opinion filed 6 August 2013. Petition for discretionary review allowed by the North Carolina Supreme Court for remand to this Court for reconsideration 23 December 2013.

M. Alexander Charns, for plaintiff-appellant.

Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellee City of Durham.

Kennon Craver, PLLC, by Joel M. Craig, for defendant-appellee Daniel J. Kuszaj.

CALABRIA, Judge.

Bryan DeBaun ("plaintiff") appeals from the trial court's order granting summary judgment in favor of Daniel J. Kuszaj ("Officer Kuszaj") and the City of Durham (collectively "defendants") with respect to plaintiff's claims for assault and battery, use of excessive force, malicious

prosecution, and violation of plaintiff's rights under the North Carolina Constitution. Initially, this Court filed an unpublished opinion which affirmed the trial court's order. *Debaun v. Kuszaj*, ___ N.C. App. ___, 749 S.E.2d ___, 2013 N.C. App. LEXIS 795, 2013 WL 4007747 (2013) (unpublished). Plaintiff then filed a petition for discretionary review ("PDR") with the North Carolina Supreme Court, which entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)." Upon reconsideration, we affirm.

On the evening of 23 July 2009 and in the early morning hours of 24 July 2009, Officer Kuszaj of the Durham Police Department ("DPD") was on patrol and observed plaintiff standing or walking in a turning lane, carrying a twelve-pack of beer. Officer Kuszaj approached plaintiff and asked him for identification, which plaintiff provided. Since plaintiff appeared to Officer Kuszaj to be intoxicated, Officer Kuszaj decided to take plaintiff into custody for his own safety. When Officer Kuszaj began to restrain plaintiff with handcuffs, plaintiff asked whether he was under arrest, and Officer Kuszaj said no. Officer Kuszaj then continued trying to restrain plaintiff, but plaintiff attempted to run away. Officer Kuszaj then directed his electronic impulse device ("taser") into plaintiff's back. As a result, plaintiff immediately fell down, hitting his face on the concrete and breaking his nose and jaw. Plaintiff incurred medical and dental expenses in excess of $30,000.00 for permanent injuries he sustained in the fall.

Plaintiff was transported to Duke Hospital, where Officer Kuszaj issued plaintiff a citation for impeding the flow of traffic, drunk and disorderly conduct, and resisting, delaying or obstructing an officer ("resisting an officer"). After a trial in Durham County District Court, plaintiff was found not guilty of drunk and disorderly conduct and resisting an officer, but found guilty of impeding traffic.

On 14 July 2011, plaintiff filed a complaint seeking damages and permanent injunctive relief. Plaintiff asserted claims of assault and battery, use of excessive force, and malicious prosecution against the City of Durham and against Officer Kuszaj in both his official and individual capacities. In the alternative, plaintiff claimed defendants violated his rights under Article I, Sections 19, 20, 21, and 35 of the North Carolina Constitution. Defendants filed an answer denying the material allegations of the complaint and asserting the affirmative defenses of governmental immunity and public officer immunity.

On 25 July 2012, defendants filed a motion for summary judgment. After a hearing, the trial court granted defendants' motion with respect to all of plaintiff's claims. The court based its ruling on the "insufficiency of the forecast of evidence as to the elements of each such claim" and made no ruling with respect to Officer Kuszaj's affirmative defense of public official immunity. Plaintiff appealed the trial court's ruling to this Court, which on 6 August 2013 filed an opinion affirming the trial court's order. Plaintiff then filed a PDR with the North Carolina Supreme Court on 6 September 2013. On 23 December 2013, our Supreme Court entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)."

The *Craig* decision is relevant to only one of plaintiff's arguments from his initial appeal to this Court. Specifically, *Craig* would apply to plaintiff's contention that the trial court erred by granting summary judgment in favor of defendants with respect to plaintiff's direct claim for relief under the North Carolina Constitution. Accordingly, we limit our analysis in this opinion to that issue.

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

"[A] direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state remedy.' " *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). In *Craig*, our Supreme Court considered whether a separate constitutional claim was available when the plaintiff's common law negligence claim was barred by the absolute defense of sovereign immunity. 363 N.C. at 338, 678 S.E.2d at 354. The Court held that "plaintiff's common law negligence claim is not an 'adequate remedy at state law' because it is entirely precluded by the application of the doctrine of sovereign immunity. To hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury." *Id.* at 342, 678 S.E.2d at 356-57.

In *Wilcox v. City of Asheville*, ___ N.C. App. ___, 730 S.E.2d 226 (2012), *disc. rev. denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d

363 (2013), this Court applied *Craig* in the context of excessive force claims against law enforcement officers who asserted the defense of public official immunity. The decedent in *Wilcox* was shot and killed while traveling as a passenger in an automobile that was involved in a high speed chase with law enforcement officers, and the appeal involved the plaintiff's claims against the law enforcement officers in their individual capacities. *Id.* at ___, 730 S.E.2d at 229. The trial court had denied the defendant-law enforcement officers' motion for summary judgment with respect to these claims based upon the existence of a genuine issue of material fact regarding whether the officers acted with malice, but granted their motion for summary judgment with respect to the plaintiff's constitutional claim pursuant to *Corum* and *Craig*. *Id.* at ___, 730 S.E.2d at 229-30.

On appeal, this Court reversed the trial court's ruling as to the individual capacity claim against one officer, and affirmed the denial of summary judgment with respect to the remaining officers. *Id.* at ___, 730 S.E.2d at 236. The Court then considered the plaintiff's appeal regarding her constitutional claim. Specifically, the Court addressed "whether a state common law claim that *may*, at trial, ultimately fail based on a defense of public official immunity is an adequate remedy." *Id.* at ___, 730 S.E.2d at 237. The *Wilcox* Court concluded that the common law claims were adequate, even if public official immunity was available as a defense to the claims:

> Our Supreme Court stated in *Craig* that an adequate remedy must give the plaintiff "at least the *opportunity* to enter the courthouse doors and present his claim" and must "provide the *possibility* of relief under the circumstances." *Id.* at 339-40, 678 S.E.2d at 355 (emphasis added). Thus, adequacy is found not in success, but in chance. Further, when discussing the *inadequacy* of the remedy in that case, the Supreme Court used the language of impossibility, noting that governmental immunity stood as "an absolute bar" to the plaintiff's claim, "entirely" and "automatically" precluded recovery, and made relief "impossible." *Id.* at 340-41, 678 S.E.2d at 355-56. As we have concluded that there is a genuine issue of material fact as to the applicability of public official immunity, it follows that Wilcox still has a chance to obtain relief and that her claims against the Individual Defendants in their individual capacities are not absolutely, entirely, or automatically precluded. Therefore, because the Supreme

> Court's decision in *Craig* indicates that such a possibility warrants a finding of adequacy, we conclude that Wilcox's claims against the Individual Defendants in their individual capacities serve as an adequate remedy.

Id. (footnote omitted). The Court further explained that

> while the Individual Defendants have not lost their ability to assert the immunity defense at trial, the normal effect of the immunity — to deny a plaintiff the opportunity to present her claim — is lost. As this "effectively lost" immunity defense is not operating to prevent Wilcox from presenting her claim, but only as a usual affirmative defense, it cannot be said that the Individual Defendants' assertion of the public official immunity defense entirely precludes suit and renders Wilcox's common law claims inadequate.

Id. Finally, this Court held that the additional requirement of demonstrating malice that is necessary to overcome public official immunity did not render common law tort claims inadequate: "this Court has already rejected a similar argument in a similar case, holding that a remedy is still an adequate alternative to state constitutional claims where the plaintiff must show that the defendant acted with malice, despite the fact that 'such a showing would require more evidence.' " *Id.* at ___, 730 S.E.2d at 238 (quoting *Rousselo v. Starling*, 128 N.C. App. 439, 448-49, 495 S.E.2d 725, 731-32, *disc. rev. denied*, 348 N.C. 74, 505 S.E.2d 876 (1998)).

In *Rousselo*, which the *Wilcox* Court specifically relied upon to reach its holding regarding malice, this Court upheld the trial court's grant of summary judgment in favor of the defendant-law enforcement officer with respect to the plaintiff's state constitutional claim, despite the plaintiff's inability to overcome the defense of public official immunity. 128 N.C. App. at 448-49, 495 S.E.2d at 730-31. The *Rousselo* Court concluded:

> In the present case, however, there is not an absence of a remedy -- the common law action of trespass to chattel provides a remedy to the wrong of an unlawful search. We decline to hold that Rousselo has no adequate remedy merely because the existing common law claim might require more of him. As the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches, we hold

> that the trial court did not err in granting summary judgment to [defendant] on this claim.

Id. at 449, 495 S.E.2d at 732 (internal citation omitted). Thus, pursuant to *Rousselo*, a common law claim that also requires the plaintiff to demonstrate that the defendant acted with malice is still considered an adequate remedy which precludes a state constitutional claim.

While we recognize that *Rousselo* predated our Supreme Court's opinion in *Craig*, the *Wilcox* Court specifically held that "we are bound by this previous decision[.]" *Wilcox*, ___ N.C. App. at ___, 730 S.E.2d at 238. Based upon this holding, we are compelled to also conclude that the *Rousselo* Court's holding that the affirmative defense of public official immunity does not render common law tort claims inadequate remains good law after *Craig*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Ultimately, since plaintiff could seek a remedy for his alleged injuries through his claims of assault and battery, use of excessive force, and malicious prosecution, he cannot bring a cause of action under the State Constitution against either the City of Durham or Officer Kuszaj. Pursuant to *Rousselo* and *Wilcox*, the fact that plaintiff must overcome the affirmative defense of public officer immunity to succeed on his tort claims does not negate their adequacy as a remedy. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants as to plaintiff's claim under the State Constitution.

Affirmed.

Judges ERVIN and DILLON concur.

EASTERN CAROLINA REGIONAL HOUSING AUTHORITY, PLAINTIFF
v.
SHERBREDA LOFTON, DEFENDANT

No. COA14-212

Filed 16 December 2014

1. Appeal and Error—standard of review—ejectment—federally subsidized housing

In cases involving federally subsidized housing, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible. The trial court's findings are binding on appeal if supported by competent evidence, while trial court's conclusions are subject to de novo review.

2. Landlord and Tenant—ejectment—federal subsidized housing—unconscionable

In an action for summary ejectment from a federally subsidized apartment after marijuana and other drug-related materials belonging to defendant's babysitter were found in her apartment, plaintiff did not establish that summarily ejecting defendant from the apartment would not produce an unconscionable result. After analyzing the totality of the surrounding facts and circumstances, the Court of Appeals concluded that evicting defendant based solely upon the actions of her babysitter would be excessive and shockingly unfair or unjust, where defendant had no knowledge of her babysitter's actions, did nothing to encourage or even tolerate them, and eviction would put defendant and her small children on the street.

3. Landlord and Tenant—summary ejectment—unconscionability requirement—not preempted by federal statute

North Carolina's unconscionability requirement in its summary ejectment statute is not preempted by federal law, and the trial court here did not err by concluding that plaintiff had failed to establish the existence of a right to have defendant summarily ejected from her apartment. Although plaintiff argued that *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, recognized the existence of a strict liability rule that cannot be reconciled with a prohibition against unconscionable evictions, *Rucker* specifically stated that 42 U.S.C. § 1437d(l)(6) did not require eviction but left that decision to the local public housing authority.

Appeal by plaintiff from order and judgment entered 29 August 2013 by Judge David B. Brantley in Wayne County District Court. Heard in the Court of Appeals 11 August 2014.

Ward and Smith, P.A., by Thomas E. Stroud, Jr., E. Bradley Evans, and Cheryl A. Marteney, for Plaintiff.

Legal Aid of North Carolina, Inc., by John R. Keller, Theodore O. Fillette, III, and Andrew Cogdell, for Defendant.

ERVIN, Judge.

Plaintiff Eastern Carolina Regional Housing Authority appeals from a judgment denying its motion for summary judgment and its request to summarily eject Defendant Sherbreda Lofton from an apartment that she occupied under a lease agreement between herself and Plaintiff. On appeal, Plaintiff argues that the trial court erred by denying its request to summarily eject Defendant from the premises in question and by refusing to order that Plaintiff be put into possession of the premises instead. After careful consideration of Plaintiff's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual Background

A. Substantive Facts

Defendant is a resident of Brookside Manor, which is owned and operated by Plaintiff. Defendant began renting an apartment located in Brookside Manor, in which she lived with her three minor children, from Plaintiff in November 2011. Defendant regularly relied upon her friend, Corey Smith, to babysit for her children while she was at work.

On 26 April 2013, Defendant was scheduled to begin work at 11:00 p.m. As a result, Defendant asked Mr. Smith to babysit for her children. Mr. Smith arrived at Defendant's apartment several hours before 11:00 p.m. in order to permit Defendant to get some sleep before going to work. After his arrival, Defendant went to sleep in her bedroom while Mr. Smith and her children remained in the living room.

At approximately 8:30 p.m., Defendant was awakened by her daughter, who informed her that officers from the Goldsboro Police Department had arrested Mr. Smith. The officers in question had come to Defendant's apartment for the purpose of serving outstanding child support warrants upon Mr. Smith. In the course of serving these

warrants, the police officers searched Mr. Smith and found marijuana on his person.

After the officers discovered marijuana on Mr. Smith's person, Defendant authorized the officers to search her apartment. During the ensuing search, the police officers found marijuana and several plastic baggies with torn corners of a type regularly used in drug transactions in the kitchen. According to Mr. Smith, the marijuana and other drug-related materials found in Defendant's apartment belonged to him. In light of Mr. Smith's admission, the officers charged him with possession of marijuana with the intent to sell and deliver.

At trial, Defendant testified that she did not know that Mr. Smith had brought marijuana into her apartment or that Mr. Smith was involved in any drug-related activity. In view of the fact that the officers believed that Defendant had no involvement in Mr. Smith's marijuana-related activities, she was not charged with having committed any crime.

The rental payments that Defendant made in order to occupy her apartment were federally subsidized. Paragraph 16(a) of the lease that governed the circumstances under which the lease could be terminated provided that Plaintiff had the right to terminate Defendant's lease in the event that "any drug-related criminal activity[1] [occurred] on or off the premises by Tenant . . . or another person under Tenant's control."[2] In addition, the lease provided that "Tenant will be obligated to Management . . . [t]o assure that person(s) under Tenant's control will not engage in . . . [a]ny drug-related criminal activity on the premises."

Yolanda Bell, a housing manager employed by Plaintiff, received a police report stemming from the discovery of marijuana and other drug-related items in Defendant's apartment and talked with law enforcement officers about the incident. After concluding that drug-related criminal activity by a person under Defendant's control had occurred in Defendant's apartment, Plaintiff notified Defendant on 22 May 2013 that her lease would be terminated. According to the termination notice, Defendant was required to either vacate her apartment by 1 June 2013 or be subject to an eviction proceeding. After Defendant failed to vacate

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1. The lease defined "[d]rug-related criminal activity" as "the illegal manufacture, sale, distribution, or use of a drug, or possession of a drug with intent to manufacture, sell, distribute, or use" the drug.

2. The lease defined a "[p]erson under Tenant's control" as "a person not staying as a guest in the dwelling unit, but [who] is or was present on the premises at the time of the activity in question because of an invitation from Tenant or other member of the household with authority to consent on behalf of Tenant."

her apartment on or before the date specified in the termination notice, Plaintiff initiated the present summary ejectment proceeding.

B. Procedural History

On 3 June 2013, Plaintiff filed a complaint seeking to have Defendant summarily ejected from her apartment. On 13 June 2013, Magistrate C.R. Howard entered a judgment ordering that Defendant be summarily ejected from the apartment. Defendant noted an appeal from the Magistrate's judgment to the District Court on 21 June 2013.

On 12 July 2013, Defendant filed a responsive pleading in which she denied the material allegations of Plaintiff's complaint, asserted a number of affirmative defenses stemming from Defendant's lack of control over Mr. Smith and lack of knowledge of his activities, and sought an award of damages from Plaintiff based upon an alleged failure on Plaintiff's part to adjust her rent after Defendant lost her job. On 22 July 2013, Plaintiff filed a reply to Defendant's counterclaim in which it denied the material allegations of Defendant's counterclaim and asserted as an affirmative defense that it had properly adjusted Defendant's rent following her loss of employment. On 20 August 2013, Defendant voluntarily dismissed her counterclaim with prejudice.

On 6 August 2013, Plaintiff filed a motion seeking the entry of summary judgment in its favor. Plaintiff's summary judgment motion came on for hearing before the trial court at the 20 August 2013 civil session of the Wayne County District Court. Following the conclusion of the summary judgment hearing, a trial on the merits of the remaining issues raised by the pleadings was conducted before the trial court. On 29 August 2013, the trial court entered a judgment denying Plaintiff's motion for summary judgment and rejecting Plaintiff's request that Defendant be summarily ejected from her apartment. Plaintiff noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

In its brief, Plaintiff argues that the trial court erred by denying Plaintiff's request that Defendant be summarily ejected from her apartment on the grounds that this result was sanctioned by federal law and the United States Supreme Court's decision in *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). Defendant, on the other hand, argues that Plaintiff failed to meet the requirements established in N.C. Gen. Stat. § 42-26(a)(2) that must be met as a prerequisite for the termination of Defendant's lease. We find Defendant's argument to be the more persuasive of the two.

A. Standard of Review

[1] "In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible." *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555, 464 S.E.2d 68, 71 (1995). "A trial court's findings of fact are binding on appeal if supported by competent evidence." *Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011). A trial court's conclusions of law, on the other hand, are subject to *de novo* review. *Id.* at 592, 720 S.E.2d 427. " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Controlling Law

[2] 42 U.S.C. § 1437d(l)(6) provides that each "public housing agency shall utilize leases . . . provid[ing] that . . . any drug-related criminal activity on or off [federally assisted low-income housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination[3] of tenancy."[4] In *Rucker*, the Oakland Housing Authority threatened to evict the plaintiffs from their federally subsidized housing unit as a result of the fact that household members or guests engaged in drug-related criminal activity. *Rucker*, 535 U.S. at 128, 122 S. Ct. at 1232, 152 L. Ed. 2d at 265. In response, the plaintiffs argued that 42 U.S.C. § 1437d(l)(6) did not permit evictions based on drug-related criminal activity engaged in by a tenant's household members, guests or other persons under the tenant's control in the absence of a showing that the tenant knew that such activity was occurring. The United States

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3. In its brief, Plaintiff repeatedly asserts that the language to the effect that activities of the nature described in the relevant lease provision "shall be grounds for termination" indicates that termination would be mandatory in the event that such conduct occurred. The fact that a particular development constitutes "grounds for termination" does not, however, mean that termination becomes obligatory in the event that the specified development actually occurs. Instead, the fact that something is a "grounds for termination" simply means that the landlord is empowered, if it otherwise chooses to do so, in the event that development in question takes place.

4. Plaintiff and Defendant agree that Mr. Smith was a "person under [Defendant]'s control" who engaged in "drug-related criminal activity" on the premises.

Supreme Court rejected the plaintiffs' argument, holding that "42 U.S.C. § 1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." *Rucker*, 535 U.S. at 130, 122 S. Ct. at 1233, 152 L. Ed. 2d at 266. In spite of its admission that Defendant had no knowledge of or involvement in Mr. Smith's drug-related activity, Plaintiff argues that 42 U.S.C. § 1437d(l)(6) as construed in *Rucker* authorized, and in fact required, Defendant's eviction.

Defendant, on the other hand, asserts that the trial court's decision to reject Plaintiff's request that Defendant be summarily ejected from her apartment was correct on the basis of principles of North Carolina law, which provides that the basis for and scope of summary ejectment proceedings is established and governed by N.C. Gen. Stat. § 42-26. *Morris v. Austraw*, 269 N.C. 218, 221, 152 S.E.2d 155, 158 (1967). According to N.C. Gen. Stat. § 42-26(a)(2), a tenant may be summarily ejected from a particular premises when the tenant has "done or omitted any act by which, according to the stipulations of the lease, his estate has ceased." "In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable." *Charlotte Hous. Auth. v. Fleming*, 123 N.C. App. 511, 513, 473 S.E.2d 373, 375 (1996) (citing *Morris*, 269 N.C. at 223, 152 S.E.2d at 159). In view of the fact that "[o]ur courts do not look with favor on lease forfeitures," *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988), this Court has required public housing authorities to comply with the requirements of N.C. Gen. Stat. § 42–26(a)(2) in order to summarily eject a tenant. *Lincoln Terrace Associates, Ltd. v. Kelly*, 179 N.C. App. 621, 623, 635 S.E.2d 434, 436 (2006); *Fleming*, 123 N.C. App. at 513, 473 S.E.2d at 375.

In its judgment, the trial court concluded that Plaintiff had failed to prove by a preponderance of the evidence that it was entitled to summarily eject Defendant pursuant to N.C. Gen. Stat. § 42–26(a)(2). Although the lease between the parties gave Plaintiff the right to evict Defendant based upon the undisputed evidence that Mr. Smith was a "person under [Defendant]'s control" who engaged in "drug-related criminal activity" on the premises, Defendant argues that Plaintiff has failed to show that summarily ejecting Defendant would not be unconscionable.

Neither this Court nor the Supreme Court have defined the circumstances under which it would or would not be unconscionable for a landlord to summarily eject a tenant who was otherwise subject to eviction. In fact, we have not been able to identify any case in which the extent to which a landlord did or did not satisfy the fourth criteria set out in *Morris* and its progeny has been directly addressed by either of North Carolina's appellate courts. Under such circumstances, we are entitled to look to a reputable dictionary in order to understand the reference to "unconscionability" as it appears in our summary ejectment jurisprudence. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993) (stating that "[c]ourts may use the dictionary to determine the definition of words"). As a result, after consulting such a reference, we conclude that the term "unconscionable" as used in *Morris* and similar decisions means "excessive, unreasonable" or "shocklingly unfair or unjust." *Merriam–Webster Online Dictionary* 2014 .[5]

As we have already noted, the undisputed record developed at trial tends to show that Defendant was not aware that Mr. Smith was involved in any drug-related criminal activity in her apartment, with the police having accepted her denials of involvement in Mr. Smith's conduct in the course of deciding not to charge her with the commission of any criminal offense. Instead of attempting to conceal any evidence relating to the drug-related activities in which Mr. Smith engaged in her apartment, Defendant cooperated with the investigating officers by consenting to a search of her residence, an action that led to the discovery of additional evidence upon which the charge subsequently brought against Mr. Smith was, at least in part, predicated. As the trial court found, the undisputed evidence tends to show that Defendant had not been accused of any criminal conduct, much less convicted of any criminal charges, while she occupied her apartment in Brookside Manor or of violating any lease provision during the term of the lease agreement between the parties. In fact, Defendant had never even been the subject of any complaints from the occupants of nearby units during the time that she resided in the Brookside Manor complex. Since the date of Mr. Smith's arrest, Defendant has not had any contact with Mr. Smith or invited him to enter her apartment. Finally, Defendant was unemployed on the date that Plaintiff initiated this action, having lost her job due to the inability to obtain care for her children, has three small children who live with her, and has no ability to move in with relatives in the area in the event that she and her children are evicted.

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

Ms. Bell testified that, given the fact that Mr. Smith had engaged in criminal activity in Defendant's apartment, she had no alternative except to seek Defendant's removal from the apartment regardless of other surrounding facts and circumstances.[6] As a result, the trial court found as a fact that Plaintiff decided to evict Defendant based solely on the fact that Mr. Smith had engaged in criminal activity in the apartment without giving any consideration to any of the surrounding facts and circumstances that tended to mitigate, if not completely excuse, her conduct in allowing Mr. Smith to enter the premises. After analyzing the totality of the surrounding facts and circumstances, we have no hesitation in concluding that evicting Defendant based solely upon the actions of Mr. Smith, of which Defendant had no knowledge and which she had done nothing to encourage or even tolerate when doing so would put Defendant and her three small children "on the street," would be "excessive" and "shockingly unfair or unjust" and that Plaintiff has not, for that reason, established that summarily ejecting Defendant from the apartment would not produce an unconscionable result.

C. Preemption

[3] Although Plaintiff does not dispute the fact that it must establish that summarily ejecting Defendant from her apartment pursuant to N.C. Gen. Stat. § 42-26(a)(2) requires a showing that the proposed eviction is not unconscionable,[7] it does argue that the necessity for

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6. Although Plaintiff repeatedly asserts that Ms. Bell did, in fact, make a discretionary decision concerning whether to evict Defendant based upon a consideration of all relevant factors, the trial court found that Ms. Bell treated the fact that Mr. Smith had engaged in drug-related activity in Defendant's apartment as rendering Defendant's eviction mandatory and the record contains evidence that supports this determination.

7. Plaintiff does, however, argue that N.C. Gen. Stat. § 42-63(a) (providing that "the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit" where "[c]riminal activity has occurred on or within the individual rental unit leased to the tenant"; "[t]he individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity"; or "[t]he tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises") indicates that North Carolina mandates the eviction of tenants in or near whose apartments drug-related activity occurs. The force of Plaintiff's argument as applied to situations like the one at issue here is, however, completely undercut by N.C. Gen. Stat. § 42-64(a)(1), which provides that "[t]he court shall refrain from ordering the complete eviction of a tenant" where "[t]he tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises."

a showing that the eviction would not be unconscionable has been preempted by the applicable provisions of federal law.[8] We do not find this argument persuasive.

A principle of state law is subject to preemption by federal law in situations in which (1) Congress explicitly provides for the preemption of state law; (2) Congress implicitly indicates the intent to occupy an entire field of regulation to the exclusion of state law; or (3) the relevant state law principle actually conflicts with federal law. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S. Ct. 1145, 1150-51, 99 L. Ed. 2d 316 (1988). "Whether federal law preempts state law under any of these theories is essentially a question of Congressional intent." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 45, 681 S.E.2d 465, 476 (2009) (citing *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509, 109 S. Ct. 1262, 1273, 103 L. Ed. 2d 509, 527 (1989)).

In this case, Plaintiff argues that the North Carolina state law requirement that Plaintiff prove that summarily ejecting Defendant would not be unconscionable conflicts with 42 U.S.C. § 1437d(l)(6) as construed in *Rucker* and is, for that reason, preempted in situations like this one. "Conflict preemption exists when compliance with both state and federal requirements is impossible, or 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990)). We do not believe that the provisions of North Carolina summary ejectment law conflict with or stand as an obstacle to the achievement of the purpose and objectives sought to be achieved by 42 U.S.C. § 1437d(l)(6) as construed in *Rucker*.

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8. Defendant has filed a motion in this Court seeking to have the portion of Plaintiff's brief addressing the preemption issue stricken on the grounds that Plaintiff did not raise the issue of preemption at any time prior to the filing of its reply brief and was, for that reason, precluded from advancing this argument on appeal by virtue of N.C.R. App. P. 10(a)(1) (stating that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). However, given the fact that our review of the record demonstrates that the issue of whether state or federal law controlled the resolution of this case was the subject of extensive discussion before the trial court, we conclude that the preemption issue has been properly presented for our consideration. As a result, Defendant's motion is hereby denied.

Congress enacted the Anti–Drug Abuse Act of 1988 for the purpose of reducing the amount of drug-related crime in public housing projects and ensuring the availability of "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, 535 U.S. at 134, 122 S. Ct. at 1235, 152 L. Ed. 2d at 268 (quoting 42 U.S.C. § 11901(1)). In order to achieve this objective, the Act requires public housing agencies to "utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(l)(6). As we have already noted, the United States Supreme Court has interpreted this statutory language to mean that local public housing authorities have "the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." *Rucker*, 535 U.S. at 130, 122 S. Ct. at 1233, 152 L. Ed. 2d at 266. As a result, *Rucker* stands for the proposition that the relevant statutory provisions authorize public housing authorities to evict "innocent" tenants on whose premises criminal activity occurred even though those tenants were not aware that the criminal activity in question was occurring.

In seeking to persuade us that North Carolina's state law "unconscionability" requirement is subject to conflict preemption, Plaintiff argues that *Rucker* recognizes the existence of a strict liability rule that cannot be reconciled with a prohibition against "unconscionable" evictions. The fundamental problem with Plaintiff's argument is the fact that *Rucker* specifically states that "[42 U.S.C. § 1437d(l)(6)] does not *require* the eviction of any tenant who violated the lease provision" and, instead, "entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' . . . 'the seriousness of the offending action,' . . . and 'the extent to which the leaseholder has [] taken all reasonable steps to prevent or mitigate the offending action.' " *Rucker*, 535 U.S. at 133-34, 122 S. Ct. at 1235, 152 L. Ed. 2d at 268 (emphasis in original). In addition, Plaintiff has not provided any additional support for its assertion that Congress and the United States Department of Housing and Urban Development require housing authorities to evict any and all tenants whose household members or guests engage in the types of criminal activity enumerated

in 42 U.S.C. § 1437d(l)(6), including unlawful drug activity.[9] On the contrary, HUD appears to encourage local housing authorities to engage in an individualized consideration of the surrounding circumstances in each instance in which eviction is being considered and "to be guided by compassion and common sense in responding to cases involving the use of illegal drugs," with eviction being "the last option explored, after all others have been exhausted."[10] As a result, given this emphasis on the need for local housing authorities to make individualized eviction determinations and the absence of evidence tending to show the existence of any sort of *per se* eviction requirement in the relevant statutory provisions or administrative rules, we are unable to see how North Carolina's unconscionabilty requirement "stands as an obstacle to the accomplishment and execution," *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476, of the established federal policy of ensuring the availability of "federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, 535 U.S. at 134, 122 S. Ct. at 1235, 152 L. Ed. 2d at 269.

In seeking to persuade us to reach a different result, Plaintiff argues that compliance with both state and federal law is impossible in instances like this one because there is no distinction between the innocent tenant defense rejected in *Rucker* and the unconscionability requirement that exists under North Carolina law. We do not find this argument persuasive, however, given that *Rucker* merely authorizes the

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9. Plaintiff does, on a number of occasions, argue that the fact that evictions for drug-related activities are exempt from the usual internal dispute resolution process available to public housing tenants indicates that drug-related lease violations are subject to a strict liability rule under which eviction is mandatory in the event that such a lease violation occurs. However, we do not find this argument persuasive given that the availability of an alternative remedy under which a tenant is entitled to contest a proposed eviction says nothing about the nature of the conduct for which eviction is an appropriate response.

10. The statements quoted in the text of this opinion were contained in a 16 April 2002 letter from HUD Secretary Mel Martinez to local public housing authorities that was sent in the aftermath of *Rucker* in which he urged local public housing authorities to exercise the right to evict innocent tenants in a responsible manner and to avoid a rigid application of the relevant lease provision. In addition, Assistant HUD Secretary Michael Liu corresponded with local public housing authorities on 9 June 2009 for the purpose of noting that they were not required to evict an entire household every time a violation of the relevant lease provision occurs and were free to consider a wide range of factors in making eviction-related decisions, including "the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy," and "urg[ing local public housing authorities] to consider such factors and to balance them against the competing policy interests that support the eviction of the entire household."

eviction of an "innocent" tenant while the fact that the tenant is unaware of the criminal activity being engaged in in his or her apartment is only one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an "innocent" tenant. For example, we are unable to see how it would be unconscionable for a local public housing authority to evict a tenant who, despite an initial lack of awareness of the fact that criminal activity was occurring in his or her unit, refused or failed to cooperate with any subsequent investigation into the drug-related criminal activity in question. As a result, given our determination that simultaneous compliance with both state and federal law is not impossible in this instance and that enforcement of North Carolina's unconscionability requirement does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476, we conclude that North Carolina's unconscionability requirement is not preempted by federal law and that the trial court did not err by concluding that Plaintiff had failed to establish the existence of a right to have Defendant summarily ejected from her apartment pursuant to N.C. Gen. Stat. § 42-26(a)(2).[11]

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

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11. As a result of our determination that North Carolina law governs the resolution of this case and that Plaintiff has not established that it was entitled to have Defendant summarily ejected pursuant to N.C. Gen. Stat. § 42-26(a)(2), we need not consider the extent, if any, to which "good cause" must be shown as a matter of federal law before a tenant can be evicted from a federally subsidized housing unit or the extent to which the trial court erred by determining that Plaintiff was required to consider any applicable mitigating factors prior to seeking to have Defendant evicted from her apartment.

GEORGE GILBERT, PLAINTIFF
v.
GUILFORD COUNTY; GUILFORD COUNTY BOARD OF COMMISSIONERS; LINDA O. SHAW, CHAIR; BILL BENCINI, VICE-CHAIR; ALAN BRANSON; KAY CASHION; CAROLYN Q. COLEMAN; BRUCE E. DAVIS; HANK HENNING; JEFF PHILLIPS; AND RAY TRAPP, EACH SUED IN HER OR HIS OFFICIAL CAPACITY AS A MEMBER OF THE GUILFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA14-523

Filed 16 December 2014

Public Officers and Employees—county director of elections—salary—statutory requirements

There was sufficient evidence to support the trial court's conclusion that the Guilford County Board of Elections failed to comply with N.C.G.S. § 163-35(c) in setting the salary of its former Director of Elections (Plaintiff). The statute requires that the salary of a county director of elections "be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." The evidence showed that, among the seven largest counties in North Carolina, Guilford County ranked third in voter population, third in voter registration, and first in election complexity; Plaintiff ranked highest in years of service; and Plaintiff's salary ranked last from 2006 to 2012.

Appeal by Defendants from judgment entered 12 December 2013 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 7 October 2014.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for Plaintiff-appellee.

Office of the Guilford County Attorney, by County Attorney J. Mark Payne, for Defendants-appellants.

DILLON, Judge.

Guilford County, the Guilford County Board of Commissioners, and the nine individual members of that Board in their official capacities ("Defendants") appeal from the trial court's judgment in favor of its former Director of Elections, George Gilbert, ("Plaintiff"), in the amount of $38,503.00, plus interest and costs. For the following reasons, we affirm the trial court's judgment.

I. Summary

Plaintiff was employed by Guilford County as its Director of Elections. He brought this action claiming that Defendants breached his employment contract because his salary did not comply with N.C. Gen. Stat. § 163-35(c). A county is afforded some measure of discretion to set the salary of its director of elections; however, the salary must be in accordance with State law. State law requires, in part, that the salary of a county director of elections "shall be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." *Id.* We believe there was sufficient evidence in the record to sustain the decision of the trial court who, sitting as a jury, found for Plaintiff.

II. Background

Plaintiff brought this action claiming Defendants breached his employment contract by not meeting the requirements of N.C. Gen. Stat. § 163-35(c). At a bench trial on the matter, the evidence presented tended to show as follows: Plaintiff was Director of Elections for Guilford County for twenty-five years, from 1988 until his retirement in 2013. His salary was set by the Guilford County Board of Commissioners based on a recommendation by the local board of elections after the local board performed a performance review of his work. From 2008 through 2012, Plaintiff received the highest rating in his performance reviews, a "5[,]" meaning that his work "[c]onsistently exceeds expectation for [his] job[.]"

Plaintiff presented evidence using eight tables he had prepared from data comparing salary information for the election directors of the seven largest counties in the state, which included Guilford County.

Gary Bartlett, the former Executive Director for the North Carolina State Board of Elections, who served from 1993 to 2013, testified for Plaintiff. After counsel questioned him regarding his resume and qualifications, Mr. Bartlett was tendered as an expert in North Carolina elections law and procedure. He stated that during his tenure he had daily contact with various county election directors and opined that Plaintiff was the "best county director" in the State. Mr. Bartlett received numerous contacts from various county officials regarding the salary provision in N.C. Gen. Stat. § 163-35(c) and, in answering those concerns, he relied upon a 1987 opinion letter from the North Carolina Attorney General's Office which recited factors to be considered in setting the salary of a county election director. Mr. Bartlett applied these factors in making recommendations to county officials regarding the salaries of election

directors and their adherence to G.S. 163-35(c). He opined that Guilford County was similar in complexity to Wake and Mecklenburg Counties. He stated that it was his opinion that Plaintiff's salary was paid much lower than it should have been paid.

Defendants did not present any evidence at trial.

On 12 December 2013, the trial court entered a written judgment finding that Plaintiff's salary was not commensurate with those of other directors in counties similarly situated and similar in population and number of registered voters for fiscal years 2010 through 2012, in violation of N.C. Gen. Stat. § 163-35(c), and ordered Defendants to pay the amount of $38,503.00, plus interest and costs "as provided by law." Defendants filed timely notice of appeal from the trial court's judgment.

III. Standard of Review

The standard of review of a judgment rendered following a bench trial is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted). "Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Id.*

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a), a trial court need not make "a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[;]" however, "it does *require specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (emphasis in original).

IV. N.C. Gen Stat. § 163-35(c)

The key issue in this case is whether the trial court erred in its conclusion that Plaintiff's salary was not in accord with N.C. Gen. Stat. § 163-35(c), which sets forth mandatory guidelines which counties must follow in setting the compensation of their election directors.

G.S. 163-35(c) is divided into three paragraphs. The first paragraph provides that a county which maintains full-time registration (five days per week), such as Guilford, must provide a salary to its director of elections (1) "in an amount recommended by the county board of elections and approved by the Board of County Commissioners" and (2) which

"shall be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." N.C. Gen. Stat. § 163-35(c) (2013).

The second paragraph of G.S. 163-35(c) states, *inter alia*, that the compensation must be "at a minimum rate of twelve dollars ($ 12.00) per hour[.]" *Id.*

The final paragraph of G.S. 163-35(c) provides that a county shall also provide its election director with "the same vacation leave, sick leave, and petty leave as granted to all other county employees." *Id.*

There is little case law interpreting G.S. 163-35, and no case law explaining the salary requirements of the current version of subsection (c).[1] Accordingly, we must apply our rules of statutory interpretation. "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (citation omitted).

We find the portion of subsection (c) of the statute in question to be clear and unambiguous; therefore, we will give effect to its plain meaning.

We agree with the trial court that an intent or "purpose of N.C.G.S. § 163-35[c] is to ensure the integrity of elections in North Carolina[]" by preventing fluctuations in election directors' salaries based on political reasons by requiring that the election director's salary be based on the salary of election directors in similar counties and setting a minimum salary for that position in the amount of $12.00 per hour. The language, counties "similar in population and number of registered voters[,]"

1. Defendants cite to *Goodman v. Wilkes County Board of Commissioners*, 37 N.C. App. 226, 245 S.E.2d 590 (1978) as interpreting G.S. 163-35(c). This case interpreted a prior version of subsection (c). Also, *Goodman*, did not interpret the key phrase of subsection (c) before us but merely determined that this statute did not provide for overtime pay and it was up to the board of commissioners to determine the salary of the election secretary once the minimum limit of $20 per day was met. *Id.* at 227-28, 245 S.E.2d at 591. The current version of subsection G.S. 163-35(c) addresses overtime. Therefore, *Goodman* is inapplicable.

has a clear meaning. While the term "similarly situated" is less clear, we believe that the factors in the Attorney General's 1987 opinion letter clarifying the term "similarly situated," which Plaintiff relied upon in his evidentiary presentation, is instructive. *See Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681-82, 652 S.E.2d 251, 252-53 (2007). We believe, therefore, that in adhering to the salary mandate of G.S. 163-35(c), counties should consider — in addition to comparison of county population and registered voters — other factors, which may include the county's electoral "situation[,]" including the "percentage of population registered; the unusual degree of transience of population; the relative strength of political parties and the level of dissention between or among them; the complexity of the electoral districts for state, county and municipal offices; and generally speaking, the comparable sophistication, politically and otherwise, of population" and "the degree of experience, effectiveness of work, and level of dedication exhibited by particular affected supervisors in this and in all future situations."

The trial court considered many of these factors in making its ruling, as the judgment states it considered "specifically the testimony of [Plaintiff] and Mr. Bartlett, [P]laintiff's expert witness, Exhibit 3 (a series of tables generated by [Plaintiff]) and [P]laintiff's Exhibit 4, (an affidavit of Mr. Bartlett, which included his expert report and an opinion from the North Carolina Attorney General dated July 31, 1987.)"

We note that the order contains findings which appear to be recitations of some of the evidence presented by Plaintiff or, at best, ultimate findings of fact without any specific findings of fact regarding the similarity of population or voter registration or any of the similarly situated factors from the opinion letter. *See Quick*, 305 N.C. at 452, 290 S.E.2d at 658. "[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (emphasis in original). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000) (citation omitted). However, "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999). The

better practice would have been for the trial court to make specific findings regarding the evidence and testimony it considered. Here, however, Defendants did not present any evidence, and only one inference can be drawn from applying these factors to Plaintiff's evidence; therefore, we need not remand for further findings.

Regarding the evidence, Plaintiff presented a series of tables which compared the data from the seven largest counties in North Carolina, which includes Guilford County. One table showed that Guilford County was ranked third in both population and voter registration, behind Mecklenburg and Wake counties. Moving to the "similarly situated" factors, Plaintiff presented another table which showed that Guilford County ranked first in election complexity, and Mr. Bartlett added more complexity considerations relating to Guilford County that would support this conclusion. Evidence showed that Plaintiff ranked highest in years of service among the seven county directors, and Mr. Bartlett opined that Plaintiff was the "best" county director in the State. Evidence showed that Plaintiff was paid at the midpoint of his salary range and that five of the other compared directors were paid above the midpoint salary range. One of Plaintiff's tables showed that Guilford County ranked third for election director's salary in 2006-2007 but fell to fifth from 2008 until 2012. From 2006 until 2012, Guilford County ranked last in the annual average salary growth over this period of time. Mr. Bartlett opined that Plaintiff was paid much lower than he should have been paid.

After considering Guilford County's population and the number of registered voters, and weighing the "similarly situated" factors, the evidence supports the trial court's ultimate finding that Plaintiff's "salary for fiscal years 2010-2012 was not commensurate with the salaries paid to directors in counties similarly situated and similar in population and number of registered voters" and the conclusion that Plaintiff's salary for 2010 to 2012 violated the requirements of G.S. 163-35(c).[2]

We are not persuaded by Defendants' argument that they were only required to pay Plaintiff the minimum $12.00 per hour as set forth in the second paragraph of G.S. 163-35(c) because there was no county which was "similar" enough to Guilford County to make a salary comparison.

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2. N.C. Gen. Stat. § 1-52(2)(2013) sets a three year statute of limitation "[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." Accordingly, the trial court's damages were limited to only three years, from 2010 to 2012.

First, Defendant's interpretation goes against the plain meaning of the statute. "Similar" does not mean identical. Second, Defendants' interpretation would lead to absurd results: If a large county was determined to be far and away much more complex than any other, then that county could legally pay its director of elections $12.00 per hour, even if all other directors in large counties made substantially more.

Likewise, we are not persuaded by Defendants' argument regarding Plaintiff's car allowance not being considered as part of his salary. The trial court was free to consider this information and Plaintiff's explanation in making its determination as to whether Plaintiff's salary complied with the statute.

Finally, we address Defendants' argument that G.S. 163-35(c) gives each county discretion to set the compensation for its director of elections. We agree that a county is afforded some measure of discretion in that the statute does not provide the specific salary or a definitive formula for fixing the salary. However, a county's discretion must be exercised within the parameters set forth in the statute. *See*, *e.g.*, *Sanders v. State Personnel Director*, 197 N.C. App. 314, 320-21, 677 S.E.2d 182, 187 (2009) (holding that the laws and regulations concerning State employees become part of the State employees' employment contracts), *disc. review denied*, 363 N.C. 806, 691 S.E.2d 19 (2010). For instance, no county has the discretion to pay its director less than $12.00 per hour since State law mandates that the salary must be at least $12.00 per hour. Here, the Defendants did not present any evidence showing how Plaintiff's salary complied with G.S. 163-35(c). Accordingly, Defendants' arguments are overruled.

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

MONTAGUE v. MONTAGUE

[238 N.C. App. 61 (2014)]

HARVEY LYNWOOD MONTAGUE, JR., PLAINTIFF
v.
TERESA MONTAGUE, DEFENDANT

No. COA14-382

Filed 16 December 2014

1. Divorce—equitable distribution—LLC—post-separation distributions from LLC to husband

In an equitable distribution action involving an LLC and a commercial building, the trial court erred by characterizing two post-separation distributions from the LLC to the husband as management fees and treating them as the husband's separate property The husband was bound by the manner in which these distributions were characterized on the LLC tax returns.

2. Divorce—equitable distribution—commercial building—post-separation appreciation—separate property—parties bound by tax returns

In an equitable distribution action involving an LLC and a commercial building, the trial court's findings supported its treatment of a portion of an LLC's post-separation appreciation as the husband's separate property. Although there is a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property, in this case the wife and the husband were bound by the manner in which the distributions to the husband were treated on the LLC tax returns.

3. Divorce—equitable distribution—LLC—lawn mower—loan payments—distribution from corporation—sufficiency of evidence

In an equitable distribution action involving an LLC and a commercial building, the trial court did not err by treating loan payments on a mower as distributions to the husband from the LLC. There was no evidence of the amount of debt still owed on the mower at the date of distribution or of how much the mower had depreciated in value; without those valuations in the record, the trial court was not required to distribute the mower and did not abuse its discretion in not including it within the equitable distribution scheme.

4. Divorce—equitable distribution—estate plans—donor's intention

In an equitable distribution action involving an LLC and a commercial building, it was within the trial court's discretion to consider the husband's parents' estate plans in making its equitable distribution determination. A trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations.

5. Divorce—equitable distribution—LLC—distributed to husband

In an equitable distribution action involving an LLC and a commercial building, the court's distribution of the LLC to the husband was supported by the trial court's application of the distribution factors and its findings, which were supported by the evidence. Although the wife challenged the trial court's finding that she did not contribute to the LLC, noting that she signed a loan guaranty along with the husband for the loan which financed the purchase of the building from the husband's parents, the trial court's reference to contributions was read as equity contributions toward the LLC.

6. Divorce—equitable distribution—weight given to factors—explanation of balance

In an equitable distribution action involving an LLC and a commercial building, the trial court was not required to show how it balanced the distribution factors. The weight given to each factor is in the trial court's discretion and there is no need to show exactly how the trial court arrived at its decision regarding unequal division.

7. Divorce—equitable distribution—assets co-owned by husband—motion in limine

In an equitable distribution action in involving an LLC and a commercial building, the trial court did not abuse its discretion by granting the husband's motion in limine to prohibit the introduction of evidence regarding assets the husband co-owned with his father. The trial court found that there was not sufficient evidence to value these assets.

Appeal by Defendant from judgment entered 15 August 2013 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 21 October 2014.

Sandlin Family Law Group, by Deborah Sandlin, for Plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for Defendant-appellant.

DILLON, Judge.

Defendant Teresa Montague appeals from a trial court's equitable distribution judgment which awarded an unequal division of marital and divisible assets. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

In 1986, Harvey Lynwood Montague, Jr. ("Husband") and Teresa Montague ("Wife") were married. Husband is active in the commercial real estate business.

In 2010, Husband commenced this action seeking absolute divorce and equitable distribution. Wife filed her answer and asserted counterclaims. The parties were granted a divorce.

In 2012, a bench trial on the equitable distribution claim was conducted with the parties presenting testimony and evidence regarding certain assets. On 15 August 2013, the trial court entered its equitable distribution judgment/order granting unequal distribution in favor of Husband. Wife filed timely notice of appeal from this judgment.

II. Standard of Review

In its judgment, the trial court entered extensive findings of fact and conclusions of law with regard to the classification, valuation, and distribution of assets. Our standard of review of such judgments is well-settled: "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and quotation marks omitted). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Id.* (citation omitted). The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Best v. Gallup*, ___ N.C. App. ___, ___, 715 S.E.2d 597, 598 (2011) (citation omitted), *appeal dismissed and disc. review*

denied, 365 N.C. 559, 724 S.E.2d 505 (2012). The trial court is the sole judge of the weight and credibility of the evidence. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). "[W]hen reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359-60 (citations omitted), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

III. Analysis

"The trial court must classify, value, and distribute marital property and divisible property in equitable distribution actions." *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 353-54, 588 S.E.2d 905, 907 (2003). On appeal, Wife argues that the trial court erred in its judgment in its classification and distribution of certain property. We address each one in turn below.

A. L.T. Montague Properties, LLC

In Wife's first two arguments, she contends that the trial court misclassified as Husband's separate property certain property associated with a limited liability company, known as L.T. Montague Properties, LLC (the "LLC"). This LLC was formed by Husband and Wife during their marriage — with Husband owning 51% and Wife owning 49% — for the purpose of owning and operating a multi-tenant commercial building known as the Montague Center which was being transferred to them by Husband's parents.

Specifically, Wife argues that the trial court misclassified two assets. She contends that the trial court erred in treating two post-separation distributions made by the LLC to Husband totaling $31,210.00 as Husband's separate property. Further, she contends that the trial court erred in classifying $32,063.53 of the post-separation appreciation of the Montague Center (and, therefore, of the LLC)[1] as Husband's separate property.

1. Post-Separation Distributions to Husband

[1] Wife contends that the trial court erred in treating two post-separation distributions made to Husband by the LLC as his separate property by

1. The trial court found that the Montague Center appreciated $127,063.53 post-separation; that $95,000.00 of this appreciation was passive and, therefore, divisible property; but that $32,063.53 was due to Husband's efforts and, therefore, his separate property.

characterizing these distributions as "management fees" he earned for managing the Montague Center after the parties separated. Specifically, the trial court treated as Husband's separate property a $5,010.00 distribution made to him in 2009 and a $26,200.00 distribution made to him in 2010. The key finding in the judgment with regard to these distributions states as follows:

> 48. [Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any "fit-up" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. *Plaintiff pays himself a management fee for this work in the form of a distribution.*

(Emphasis added.)

We agree with Wife that our holding in *Hill v. Hill*, ___ N.C. App. ___, 748 S.E.2d 352 (2013), compels us to conclude that the trial court should have classified these distributions as divisible property rather than treating them as Husband's separate property. As divisible property, they must be distributed by the trial court. Accordingly, we reverse the trial court's classification of these distributions and remand the matter, directing the trial court to reclassify these distributions as divisible property and to make a distribution of this property.

In *Hill*, the parties set up a Subchapter S corporation as a vehicle for the wife's speech pathology practice. *Id.* at ___, 748 S.E.2d at 357. The corporate tax returns showed that the wife took money from her practice in two ways: (1) in the form of a low salary; and (2) in the form of shareholder distributions. *Id.* at ___, 748 S.E.2d at 358. Evidence was presented that she took shareholder distributions for the purpose of avoiding federal taxes for Social Security and Medicare. *Id.* The trial court re-characterized the post-separation shareholder distributions to the wife as salary that she earned and, therefore, classified them as her separate property. *Id.* On appeal, however, our Court reversed, stating that "[t]he parties are bound by their established methods of operating the corporation." *Id.* Our Court essentially determined that since the parties elected to treat a portion of the money paid to the wife as shareholder distributions, rather than treating it as salary expenses of the corporation, these funds were part of the retained earnings of the corporation. *Id.* Our Court then held that since "[t]he retained earnings of a Subchapter S corporation, upon distribution to shareholders, are

marital property[,]" the wife was bound by the treatment of these shareholder distributions to her as divisible property. *Id.*

In the present case, the LLC is taxed as a partnership. The two distributions to Husband at issue here are treated on the LLC's 2009 and 2010 federal tax returns as withdrawals of partnership capital, and *not* as expenses of the partnership for property management services. Therefore, these distributions were part of the capital of the LLC and, therefore, belonged to the LLC. Had the distributions been treated as "management fees" on the federal tax returns, they would have been LLC expenses, which would have reduced the LLC's net income for 2009 and 2010 by $31,210.00, which potentially would have reduced Wife's personal tax liability.[2]

We note that Husband may have, in fact, earned these distributions as management fees; however, we are compelled by *Hill* to conclude that Husband, being the majority owner and a manager of the LLC, is "bound" by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. Accordingly, we strike the trial court's finding that Husband was paid for his efforts in managing the LLC, reverse the portion of the judgment treating the post-separation distributions from the LLC to Husband as his separate property, and remand the matter to the trial court to classify them as divisible property and to distribute this property.

2. Post-Separation Appreciation of the Montague Center

[2] Wife argues that the trial court erred in classifying a portion of the post-separation appreciation of the Montague Center (and, therefore, of the LLC) as Husband's separate property. We disagree.

Our General Assembly has determined that all appreciation of marital property which occurs "after the date of separation" shall be classified as "divisible property" EXCEPT that any appreciation resulting from the post-separation "actions or activities of a spouse" shall not be classified as divisible property. N.C. Gen. Stat. § 50-20(b)(4)(a) (2011). We have recognized that this statute creates a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property:

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2. We note that, like in *Hill*, Husband's motivation here to treat the distributions as withdrawals of capital rather than as earned management fees may have been to avoid payment of federal taxes for Social Security and Medicare.

> [A]ll appreciation and diminution in value of marital and divisible property is *presumed* to be divisible property *unless the trial court finds* that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control.

Wirth v. Wirth, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original).

In the present case, the trial court found that Husband had rebutted this presumption in that $32,063.59 of the post-separation appreciation of the Montague Center "was due to [post-separation] activities" of Husband. The only post-separation "activities" of Husband described in the judgment are contained in the trial court's Finding of Fact No. 48, in which the court found that Husband "actively manages the [Montague Center] (negotiates all leases, collects all rent payments, arranges for "fit-ups" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation."

In the context of N.C. Gen. Stat. § 50-20(b)(4)(a), active appreciation "refers to the 'financial or managerial [post-separation] contributions' of one of the spouses" and would not be classified as divisible property. *Brankney v. Brankney*, 199 N.C. App. 375, 386, 682 S.E.2d 401, 408 (2009). We note that in the present case, though, the trial court also found that the Husband was paid "a management fee for *this work*." We further note that there is no finding that Husband performed any post-separation activities for which he was not paid a fee or that the amount of the fee did not represent fair compensation to perform these services. However, it is not necessary to determine whether under N.C. Gen. Stat. § 50-20(b)(4)(a) the post-separation appreciation of a marital asset caused by the activities of a spouse should be treated as the separate property of that spouse *where the spouse was paid a fee from marital assets to perform the very services causing the post-separation appreciation to occur*. Rather, we believe that in this case Wife — like Husband — is "bound" by the manner in which these distributions to Husband were treated on the LLC tax returns. Specifically, as the trial court found, Wife is a manager of the LLC; and, further, Wife has only argued in this appeal that the post-separation distributions to Husband should *not* be treated as fees he earned for managing the LLC, but rather as unearned distributions of LLC capital.

Accordingly, after striking the trial court's finding that Husband was paid for his efforts in managing the LLC, we are left with the trial court's findings that Husband performed post-separation activities with respect to the Montague Center – without any finding that he was paid to perform these activities - and that his activities resulted in a portion of the LLC's post-separation appreciation. We believe that these findings support the trial court's treatment of a portion of the LLC's post-separation appreciation as Husband's separate property, and, therefore, Wife's argument is overruled.

B. Classification of Lawnmower

[3] Wife argues that the trial court erred classifying the Kubota lawnmower as Husband's separate property because it found that the mower was paid for with LLC funds.

Here, the trial court found that the mower was purchased post-separation in Husband's name for $14,433.12, with the entire purchase price being financed. The trial court also found that the LLC made the loan payments for the mower. "Under the source of funds rule, an asset purchased after separation with marital funds is marital property to the extent that marital funds were used toward its purchase." *Freeman v. Freeman*, 107 N.C. App. 644, 657, 421 S.E.2d 623, 630 (1992) (citation omitted). Therefore, as the LLC was marital property, it might appear that at least some portion of the mower would qualify as divisible property since the loan payments were made from marital funds. However, missing from the evidence is the amount of debt still owed on the mower at the date of distribution. Further, there was no evidence as to how much the mower had depreciated in value. In an equitable distribution action, the court is required to classify, value, and distribute marital and divisible property. *Ubertaccio*, 161 N.C. App. at 353-54, 588 S.E.2d at 907. We have also noted that "divisible property must be valued *as of the date of distribution.*" *Helms v. Helms*, 191 N.C. App. 19, 31, 661 S.E.2d 906, 914, (citing N.C. Gen. Stat. § 50-21(b) and emphasis in original), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008). Without these valuations in the record, the trial court was not required to distribute the mower and, accordingly, did not abuse its discretion in not including it within the equitable distribution scheme, as he testified that it was titled in his name. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83 (1993) (holding that the burden of proof on valuation rests on the spouse seeking to have the property classified as marital or divisible property); *Grasty v. Grasty*, 125 N.C. App. 736, 738-39, 482 S.E.2d 752, 754 (1997) (holding that to meet her burden the spouse must offer credible evidence of value and if fails to do so, the trial court has no

obligation to find the value). The trial court did not err in treating the loan payments on the mower as distributions to Husband from the LLC from which *he* made the loan payments on the mower. We note that the trial court considered in its judgment as a distributional factor under N.C. Gen. Stat. § 50-20(c)(12) that the LLC had "paid certain personal expenses of Husband since the parties separated."

C. Distributional Factor-Transfer by Husband's parents

[4] Next, Wife contends that the trial court erred in considering the intent of Husband's parents to transfer the Montague Center commercial building to the LLC as part of their estate planning as a distributional factor. We disagree.

Our General Assembly has provided by statute that a trial court shall divide the net value of marital and divisible property equally between divorcing spouses "unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c). This statute also provides that if the trial court "determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably" and "shall consider" the distributive factors enumerated therein. *Id.* We have held that where a trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010).

Here, the trial court determined that an unequal distribution was equitable and applied several statutory distributional factors in reaching its award. In this appeal, Wife challenges the trial court's application of the factors contained in N.C. Gen. Stat. § 50-20(c)(10) and (12) regarding the Montague Center and the LLC:

> e. **N.C. Gen. Stat § 50-20(c)(10). The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.** Specifically, the Court considered . . . [t]he history and acquisition of the building call for [Husband] to retain this asset rather than [Wife].
>
> . . . .
>
> g. **N.C. Gen. Stat. § 50-20(c)(12). Any other factor which the court finds to be just and proper.** Specifically, the Court considered the following:

> i. The commercial building owned by [the] LLC was conveyed to the LLC by the [Husband's] parents. The conveyance of the commercial building owned by the LLC was intended to be part of [Husband's] parents' estate planning. The purchase price [paid by the LLC for] the property was significantly less than the appraised value of the property at the time of the conveyance.
>
> ii. [Wife] did not make any contributions to or provide services to the acquisition of [the] LLC and its assets. The equity in the building was a gift from [Husband's] parents . . . .

(Emphasis in original.)

This Court has determined that a trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations. For instance, in *Hunt v. Hunt*, in determining whether checks written by a wife's grandmother to both the wife and her husband used to purchase a home was the wife's separate property, this Court held that the trial court could consider the origin of the funds and the donor's intent in determining whether an equal division would be equitable. 85 N.C. App. 484, 488-89, 355 S.E.2d 519, 522 (1987). Therefore, we believe that it was within the trial court's discretion to consider Husband's parents' estate plans in making its equitable distribution determination.

[5] Wife further challenges the trial court's finding that she did not "contribute" to the LLC, noting that she signed a loan guaranty along with Husband for the loan which financed the purchase of the Montague Center from Husband's parents. However, we read the trial court's reference to "contributions" in this finding as "equity" contributions toward the LLC. It is undisputed that neither party made any equity contributions to effect the acquisition of the Montague Center from Husband's parents. Notwithstanding, we believe the trial court's application of the factors and the findings it made, which are supported by record evidence, supported the trial court's distribution of the LLC to Husband in the equitable distribution order.

[6] Wife also makes a general argument that the trial court did not fully explain in its findings its unequal distribution in favor of Husband. However, the trial court is not required to show how it balanced the factors; the weight given to each factor is in the trial court's discretion;

and there is no need to show exactly how the trial court arrived at its decision regarding unequal division. *Fox v. Fox*, 103 N.C. App. 13, 21-22, 404 S.E.2d 354, 358 (1991). After thorough review of the trial court's order and the eighty-nine findings of fact, including those specific findings related to the unequal division of marital property, we find that the trial court properly considered and balanced the factors upon which evidence was presented supporting an unequal division. Wife's arguments are overruled.

D. Distributional Factor of Husband's interest in certain assets

[7] Lastly, Wife contends that the trial court erred in failing to distribute the value of Husband's interest in two entities he co-owns with his father, namely HLM Builder Group and Braxton Village. The trial court found that there was not sufficient evidence for it to value these assets. However, as stated above, it was Wife's burden of proof to value these companies to have the property classified as marital or divisible property. *Albritton*, 109 N.C. App. at 40-41, 426 S.E.2d at 83. Contrary to her arguments, the record shows that throughout this proceeding Wife failed to list a value for these companies on her Equitable Distribution Inventory Affidavit and failed to supplement discovery requests with these valuations. Even after continuances and the filing of motions to compel, she failed by the time of trial to offer a value of these businesses during argument on the motion *in limine*. Even in her amended equitable distribution affidavit, served four days before trial, she failed to provide estimated values for these assets. Wife failed to meet her burden in valuing these companies, and the trial court did not abuse its discretion in granting Husband's motion *in limine* to prohibit the introduction of evidence regarding these assets.

In conclusion, we note that the trial court did account for these assets in its unequal division. Accordingly, Wife's arguments are overruled.

For the foregoing reasons, the trial court's order is

AFFIRMED in part, and REVERSED AND REMANDED in part.

Judge HUNTER, Robert C. and Judge DAVIS concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
ANDREW BURNS, GRAYSON BURNS, AND JACKSON BURNS, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, JOEL GATES HARRIS, DEFENDANTS

No. COA14-741

Filed 16 December 2014

Declaratory Judgments—liability insurance—summary judgment—voluntary worker

The trial court did not err in a declaratory judgment action requesting that the court declare the rights and obligations of the parties pursuant to a Commercial General Liability Insurance Policy by granting defendant Jackson Burns' motion for summary judgment, denying plaintiff's motion for summary judgment, and concluding that Jackson Burns was not a "volunteer worker" as a matter of law. Because eleven-year-old Jackson was compelled by parental authority to sweep the grain bin, and did so not out of his own free will but out of obligation and obedience, he was not considered to have "donated" his work.

Appeal by plaintiff from order entered 1 May 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 17 November 2014.

Young Moore and Henderson, P.A., by Robert C. deRosset and Brian O. Beverly, for Plaintiff-Appellant.

Coy E. Brewer, Jr. for Defendant-Appellee Jackson Burns.

BELL, Judge.

Plaintiff filed a declaratory judgment action against Defendants, requesting that the court declare the rights and obligations of the parties pursuant to a Commercial General Liability Insurance Policy, including that Defendant Greyson Burns[1] was not an insured under the policy for any personal injury claim made against him by Defendant Jackson Burns in relation to an accident that occurred on 13 February 2009. The trial

1. Defendant's name is spelled "Grayson" in this case caption pursuant to Court policy requiring case captions to reflect the caption of the judgment or order appealed from. We do, however, note the correct spelling of Greyson's name.

court granted Defendant Jackson Burns' motion for summary judgment and denied Plaintiff's motion for summary judgment, concluding that Jackson Burns was not a "volunteer worker" as a matter of law. Plaintiff gave timely appeal to this Court. After a careful review of the record and the applicable law, we affirm the decision of the trial court.

I. Factual Background

A. Substantive Facts

Defendant Andrew Burns is married to Brenda Burns and the two have three sons: Greyson, the oldest, Dillon, the middle child, and Jackson, the youngest. Andrew and Brenda Burns own J-Ham Farms, a business started by Andrew Burns' parents. J-Ham Farms engages primarily in the purchasing and re-selling of grain. Andrew Burns is the named insured of Plaintiff's Commercial General Liability Insurance policy number GL0446104.

In 2009, twenty-year-old Greyson was employed by J-Ham Farms. His job duties included, among other duties, cleaning grain bins. Although both sixteen-year-old Dillon and eleven-year-old Jackson helped out around the business, neither was paid for any labor provided in 2009.

On 13 February 2009, Greyson went inside one of the business's grain bins to clean it out. The grain bin was designed with three holes in the floor. Grain would be pulled through the open holes by an auger[2] below the bin. Between 5:00 p.m. and 6:00 p.m., Mr. Burns told Jackson "to go around and help his brothers finish up the grain bin because [they were] going to have to leave shortly to go to [a] meeting" that was scheduled to begin at 6:00 p.m. Greyson did not have to give any instructions to his brothers on cleaning the bin other than telling them on which side of the bin to begin cleaning because all of the brothers had been trained by their father and had helped sweep the bins in the past. It was typical for Jackson to be asked to help clean the grain bins.

As Jackson was sweeping, he accidentally stepped into one of the holes in the floor of the bin. Jackson's left foot and leg became caught in the auger and it began pulling him down. Dillon grabbed Jackson, while Greyson leaped out of the bin to turn off the auger. Jackson's leg was torn off from below the knee. Mr. and Mrs. Burns heard a commotion from inside the house and ran outside. Mrs. Burns called 911 while Mr. Burns tied his belt around Jackson's leg as a tourniquet. Mr. Burns and Greyson returned to the grain bin and began to tear apart the auger in

2. An auger is a device that moves material by means of a rotating helical part.

an attempt to retrieve the amputated portion of Jackson's leg. Jackson was transported by ambulance to a local high school football field, then airlifted to UNC Chapel Hill Hospital. Efforts to retrieve the severed leg were unsuccessful and Mr. Burns eventually received a phone call from the hospital telling him to not continue efforts to recover Jackson's leg because it had been "too long" and, even if found, the leg could not be reattached. As a result of his injuries, Jackson has undergone extensive medical treatment, including multiple surgeries, and has been provided multiple prosthetic legs.

B. Procedural Facts

Plaintiff filed a complaint on 14 May 2013 in Wake County Superior Court seeking a declaration of the parties' rights and obligations under the insurance policy, including that Greyson was not an insured under the policy with respect to any cause of action brought against him by Jackson arising out of the 13 February 2009 accident. Through his Guardian *ad Litem*, Jackson filed an answer and counterclaim on 13 June 2013, also seeking a declaration of the parties' rights and obligations under the policy, including that Greyson qualified as an insured under the policy for any claim made by Jackson stemming from his 2009 injuries.

Jackson, through his Guardian *ad Litem*, filed a separate action on 7 November 2013 in Robeson County Superior Court against Greyson, seeking damages under the theory that his injuries were the direct and proximate result of Greyson's negligence. In response, Plaintiff amended its initial complaint on 12 December 2013 to reflect that it was providing Greyson with a defense under a reservation of rights and further seeking a declaration that it owed no duty to defend Greyson in the action brought by Jackson. Plaintiff moved for summary judgment on 4 April 2014. Defendant filed a cross-motion for summary judgment on 11 April 2014.

The motions for summary judgment were heard by the trial court on 15 April 2014. The court entered an order 1 May 2014 concluding as a matter of law that Jackson was not a volunteer worker under the policy, denying Plaintiff's motion for summary judgment, and granting summary judgment in favor of Jackson Burns.

II. Legal Analysis

A. Standard of Review

Summary judgment may be granted in favor of a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). This Court reviews an order granting summary judgment utilizing a *de novo* standard of review. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

B. Substantive Legal Analysis

The insurance policy in place at the time of the accident was for a coverage period of 20 January 2007 to 30 January 2010. In it, Plaintiff contracted to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' " except those "to which [the] insurance does not apply." The policy defines the term "insured" to include both employees and volunteer workers. However, under Section II(2)(a)(1) of the policy, neither are considered to be an "insured" for bodily injury to " 'volunteer workers' while performing duties related to the conduct of [the] business." The policy defines "volunteer worker" as

> a person who is not your "employee", [sic] and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

"In interpreting insurance policies, our appellate courts have established several rules of construction. Of these, the most fundamental rule is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994) (citation omitted), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). Our Supreme Court has stated:

> As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved

> against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy 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.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06, 246 S.E.2d 773, 777 (1978). Utilizing this framework, we first look to the definition provided by the policy itself. *See id.* (stating that "[w]here a policy defines a term, that definition is to be used"). The policy defines the term "volunteer worker" as an individual that (1) is not an "employee"; (2) "donates his or her work"; (3) "acts at the direction of and within the scope of duties determined by" the named insured; and (4) "is not paid a fee, salary or other compensation" for his work performed for the business. It is undisputed that Jackson was not paid for his work, acted at the direction of Mr. Burns and was not an employee. The issue for this Court is whether or not Jackson *donated* his work to the business and whether, under the terms of the policy, "donate" means simply "to give without pay or compensation," as Plaintiff argues.

The policy does not define the term "donate." This Court has noted that "nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Id.* at 506, 246 S.E.2d at 777. We recognize that the term "donate" can be defined as to perform work "without receiving consideration." Black's Law Dictionary 526 (8th ed. 2004). However, we also note that the policy uses conjunctive language, stating, "donates his work . . . *and* is not paid a fee, salary or other compensation" (emphasis added). Therefore, if the "various terms of the policy are to be harmoniously construed, and if possible, every word and every provision . . . given effect," *Woods*, 295 N.C. at 506, 246 S.E.2d at 777, we conclude that the term "donate" must encompass more than working without receiving payment. Otherwise, the policy language that the work must be without "fee, salary or other compensation" would be superfluous and the term "donate" would have no effect.

Having determined that the term "donate" as used in the policy must mean more than "without compensation," and in order to give effect to every provision of the policy definitions, we consider the context in which the term is used: defining "volunteer worker." We note that the common everyday meaning of the word "volunteer" is characterized by

not only lack of compensation, but also choice and free will.[3] Therefore, considering its common definitions, its use in the context of working as a volunteer, and the policy language as a whole, we conclude that to "donate" one's work under the terms of the policy at issue necessitates the presence of choice and free will.

The evidence in this case tended to establish that Jackson acted not of his own free will but in response to parental instruction. Jackson's deposition reflects the following exchange:

> [Mr. Brewer]: All right. Jackson, on the day that the accident happened, when your father told you to go work in the grain bin, did you believe you had any choice but to obey him and go work in the grain bin?
>
> [Jackson]: No.

When asked if he had ever been asked to help out with the family business and refused, Jackson stated that he had not, and that if his father and brothers asked him to help, he would do it. When asked why he had not worked in the grain bin since the accident, Jackson stated, "they haven't told me to, so I haven't."

It is clear from reviewing the entire record that Jackson's "work" on 13 February 2009 was performed at the direction of his father. Because eleven-year-old Jackson was compelled by parental authority to sweep the grain bin, and did so not out of his own free will but out of obligation and obedience, we do not consider him to have "donated" his work. Therefore, the trial court correctly concluded that, as a matter of law, Jackson was not a volunteer worker and that he was entitled to summary judgment.

III. Conclusion

For the reasons set forth above, we conclude that the trial court did not err in granting summary judgment in favor of Defendant Jackson Burns and denying Plaintiff's motion for summary judgment. Therefore, the trial court's order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

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3. "Volunteer" is defined as "[a] person who performs or gives his services of his own free will. A person who . . . performs a service . . . voluntarily." "Voluntary" is defined as "[a]rising from one's own free will. Acting on one's initiative." The American Heritage Dictionary 1355 (Second College Edition 1982).

PRUETT v. BINGHAM

[238 N.C. App. 78 (2014)]

SAMMY R. PRUETT, PLAINTIFF
v.
JOEL D. BINGHAM AND JEAN'S BUS SERVICE, INC.,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
GREGORY ALAN WIGGINS, MATTHEW BRACKETT AND MOUNTAIN HOME FIRE & RESCUE DEPARTMENT, INC., THIRD-PARTY DEFENDANTS.

No. COA14-191

Filed 16 December 2014

1. Immunity—governmental immunity—emergency medical services—claim barred

The trial court did not err by dismissing an action for claims against a fire department and its employee resulting from an automobile accident. The claims were barred by governmental immunity because the fire department was providing emergency medical services pursuant to its contract with the county.

2. Immunity—governmental immunity—action dismissed—failure to allege waiver of immunity through purchase of insurance

The trial court did not err by dismissing an action for claims against a fire department and its employee. Plaintiff failed to allege that the department waived governmental immunity by purchasing insurance.

3. Immunity—governmental immunity—defense adequately pleaded

The trial court did not err by dismissing an action for claims against a fire department and its employee. Defendants adequately pleaded the affirmative defense of governmental immunity by stating in their answer and motion to dismiss that, as a fire and rescue department and its employee, they were entitled to governmental or sovereign immunity.

4. Immunity—governmental immunity—oral motion to amend complaint—properly denied

The trial court did not err by denying plaintiffs' oral motion to amend their third-party complaint in an action against a fire department and its employee. The fire department raised the defense of governmental immunity in its answer, giving plaintiffs notice of the defense. Moreover, plaintiff could have obtained the fire department's contract with the county from the public record.

Judge STROUD dissenting.

Appeal by third-party plaintiffs from order entered 8 October 2013 by Judge Hugh B. Lewis in Rutherford County Superior Court. Heard in the Court of Appeals 12 August 2014.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr., and Katherine M. Barber-Jones, for defendant and third-party plaintiff-appellants.

Meghann K. Burke and Michael E. Casterline for third-party defendant-appellees Matthew Brackett and Mountain Home Fire & Rescue Department, Inc.

BRYANT, Judge.

Because incorporated fire departments contracted to provide fire prevention, emergency medical, rescue, and ambulance services are granted governmental immunity, we affirm the trial court's dismissal of claims as to Mountain Home Fire & Rescue Department, Inc., and Brackett based on governmental immunity and public official immunity. Where plaintiffs had adequate notice of defendants' affirmative defenses but failed to timely amend their complaint accordingly, plaintiffs' oral motion to amend their complaint was properly denied.

On 28 January 2013, plaintiff Sammy R. Pruett brought suit against defendants Joel D. Bingham and Jean's Bus Service, Inc. The allegations in the complaint assert that on 8 February at 7:00 a.m., Pruett was driving a pickup truck in Hendersonville along I-26 West approaching the U.S. Highway 25 intersection. At the same time, defendant Joel Bingham was driving a commercial bus owned by defendant Jean's Bus Service, also traveling west on I-26 approaching the U.S. Highway 25 intersection. Plaintiff alleged that Bingham's commercial bus rear-ended Gregory Wiggins' 2009 GMC pickup truck. Wiggins' truck was then propelled forward and into the back of a 2006 Ford pickup driven by Edward Burnett. Bingham's bus and Wiggins' truck travelled into the right lane of I-26 where they then collided with plaintiff Pruett's vehicle. Pruett sought a recovery against Bingham and Jean's Bus Service (Bingham and Jean) for damages as a result of the collision.

Bingham and Jean answered Pruett's complaint and filed a third-party complaint against Gregory Wiggins, Matthew Brackett, and Mountain Home Fire & Rescue Department, Inc., as third-party defendants. Bingham and Jean alleged that at the time of the collision,

third-party defendant Brackett was operating a vehicle owned or leased by Mountain Home Fire & Rescue Department. Just prior to the collision, Brackett entered onto I-26 and moved his vehicle into the far left lane. Brackett then stopped his vehicle in the left hand lane in order to make a left turn onto a section of the median. The vehicles traveling in the left hand lane behind Brackett attempted to stop suddenly, resulting in several collisions.

Brackett and Mountain Home Fire & Rescue Department responded that Brackett was driving a fire department vehicle owned by Mountain Home Fire & Rescue Department in the course and scope of his employment and was responding to an emergency call when he positioned the vehicle in the "emergency use" median. Brackett and Mountain Home Fire & Rescue Department made a motion to dismiss contending that the claims were barred by governmental or sovereign immunity and by "public officer / official immunity."

On 26 August 2013, third-party defendants Brackett and Mountain Home Fire & Rescue Department ("defendants") moved for summary judgment. Hearings were held on 26 May and 30 September 2013, during which counsel for defendants indicated that Brackett was responding to an emergency call indicating a motorist was suffering chest pains. By order entered 17 October, the trial court granted defendants' motion to dismiss with prejudice. Bingham and Jean appeal.

On appeal, Bingham and Jean raise the following issues: whether the trial court erred in (I) granting defendants' motion to dismiss; and (II) failing to allow Bingham and Jean's oral motion to amend the third-party complaint.[1]

I

[1] Bingham and Jean first argue the trial court erred in granting defendants' motion to dismiss. Specifically, Bingham and Jean claim the trial court erred in granting defendants' motion to dismiss because: (1) defendants are not governmental entities and, thus, not entitled to such immunity; (2) even if defendants were subject to governmental immunity, such immunity was waived by defendants' liability insurance; and (3) defendants failed to timely produce documents concerning their immunity defense. We disagree.

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1. We note that Bingham and Jean's appeal is properly before us where the trial court entered a final judgment as to some but not all of the parties and pursuant to Rule 54(b) certified there was no reason for delay.

> [Summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "We review an order allowing summary judgment *de novo*." *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 108, 664 S.E.2d 326, 328 (2008) (citation omitted).

Bingham and Jean contend that because of the negligent act alleged in the third-party complaint, defendants are not entitled to immunity.

"In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999) (citations omitted). "One cannot recover for personal injury against a government entity for negligent acts of agents or servants while they are engaged in government functions." *Id.* at 585, 518 S.E.2d at 524 (citations omitted). "Historically, government functions are those activities performed by the government which are not ordinarily performed by private corporations." *Id.* at 586, 578 S.E.2d at 525 (citation omitted). "The test to determine if an activity is governmental in nature is whether the act is for the common good of all without the element of pecuniary profit." *Id.* at 587, 518 S.E.2d at 525 (citation and quotations omitted). "Activities which can be performed *only* by a government agency are shielded from liability, while activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity." *Id.* at 587, 518 S.E.2d at 526 (citation omitted).

"[T]he organization and operation of a fire department is a governmental function." *Willis v. Town of Beaufort*, 143 N.C. App. 106, 109, 544 S.E.2d 600, 603 (2001) (quoting *Ins. Co. v. Johnson, Com'r. of Revenue*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)) (considering the affirmative immunity defense of a town fire department).

Within Chapter 153A of our General Statutes ("Counties"), our legislature has established that "[a] county may establish, organize, equip, support, and maintain a fire department . . . [or] may contract for fire-fighting or prevention services with . . . incorporated volunteer fire departments . . . ." N.C. Gen. Stat. § 153A-233 (2013) ("Fire-fighting and prevention services"). The county board of commissioners may define

service districts for the purpose of fire protection. *See id.* § 153A-301(a)(2). "If a service district is established . . . for fire protection purposes . . . the board of county commissioners may, by resolution, permit the service district to provide emergency medical, rescue, and/or ambulance services . . . ." *Id.* § 153A-309(a).

In *Luhmann v. Hoenig*, 358 N.C. 529, 597 S.E.2d 763 (2004), our Supreme Court addressed the question of whether the defendant, Cape Carteret Volunteer Fire and Rescue Department, was immune from suit for injuries the plaintiff sustained while the defendant's fire fighters were fighting a brush fire. The plaintiff brought a claim for negligence. A trial court found the defendant liable and awarded the plaintiff damages. On appeal, a divided panel of this Court reversed the trial court's judgment on the basis that General Statutes, section 58-82-5 limited the liability of rural fire departments.[2] In pertinent part, the dissent argued that the defendant was entitled to immunity conferred under section 69-25.8 "which provides sovereign immunity for fire protection districts." *Id.* at 531, 597 S.E.2d at 764 (citation omitted). The plaintiff appealed to our Supreme Court, which looked to the relationship between the County and the defendant fire department. The Court observed that pursuant to Chapter 69, a county's board of commissioners was authorized to provide fire protection services for a district by contracting with an incorporated nonprofit volunteer fire department and that the board was authorized to fund its fire protection services by a tax levy. *Id.* at 533, 597 S.E.2d at 765 (citing N.C. Gen. Stat. §§ 69-25.4(a), 69-25.5(1) (2003)). The Carteret County Board of Commissioners had contracted the defendant fire department to provide fire protection services within the Cape Carteret Fire and Rescue Service District in exchange for compensation generated by the levy of an ad valorem tax on property within the district. *Id.* Our Supreme Court held that the defendant constituted a fire protection district within the meaning of General Statutes, Chapter 69. *Id.* And, "[a]s such, the fire department [was] entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8." *Id.*

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2. "A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman . . . ." *Id.* at 531-32, 597 S.E.2d at 764-65 (quoting N.C. Gen. Stat. § 58-82-5(b) (2003)).

Pursuant to General Statutes, Chapter 69 ("Fire Protection"), Article 3A ("Rural Fire Protection Districts"), section 25.8 ("Authority, rights, privileges and immunities of counties, etc., performing services under Article"),

> [a]ny county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county[.]
>
> . . .
>
> Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights . . . when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county . . . .

Id. § 69-25.8.[3,4]

The record before us reflects that Henderson County established the Mountain Home Fire Protection District in 1965. On 22 May 2002, Henderson County contracted Mountain Home Fire & Rescue Department to provide fire protection services in the district. Per the contract, "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina nonprofit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." Based on this agreement, defendant Mountain Home Fire & Rescue Department—a

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3. N.C. Gen. Stat. § 69-25.4 (Tax to be levied and used for furnishing fire protection). "For purposes of this Article, the term 'fire protection' and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death[.]" N.C. Gen. Stat. § 69-25.4(b) (2013).

4. N.C. Gen. Stat. § 58-82-5 (entitled "Liability limited" within Article 82—"Authority and Liability of Fireman," of Chapter 58—"Insurance"). "Any member of a volunteer fire department or rescue squad who receives no compensation for his services as a fire fighter or emergency medical care provider, who renders first aid or emergency health care treatment at the scene of a fire to a person who is unconscious, ill, or injured as a result of the fire shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to gross negligence, wanton conduct or intentional wrongdoing." N.C. Gen. Stat. § 58-82-5(c) (2013).

nonprofit corporation—constitutes a fire protection district within the meaning of Chapter 69. *See Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

Bingham and Jean contend that while *Luhmann* supports the proposition that section 69-25.8 confers immunity on a fire department and its agents for conduct occurring during the course of fighting a fire, Chapter 69 does not provide immunity for a fire department and its agents when providing emergency medical and rescue services outside of the context of fighting fires. *Compare Geiger v. Guilford Coll. Cmty. Volunteer Firemen's Ass'n, Inc.*, 668 F. Supp. 492 (M.D.N.C. 1987) (holding the defendant fire department was immune from liability for injury caused in the course of providing a rescue service not in conjunction with fighting a fire as the rescue service was within the scope of activities fire departments engaged in as recognized by General Statutes, Chapter 69 ("Fire prevention")).

Bingham and Jean direct our attention to section 69-25.4, also within Article 3A ("Rural Fire Protection Districts") of Chapter 69 ("Fire Protection"), which states that a county's Board of Commissioners may levy a tax for "the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death[.] . . . *In providing these services the fire district shall be subject to G.S. 153A-250* [('Ambulance services')]." N.C. Gen. Stat. § 69-25.4(b) (2013) (emphasis added).

While General Statutes, section 153A-250 does not specifically confer immunity, this Court has held that a county-operated ambulance service providing for the health and care of the citizenry was performing a historically governmental function. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. Thus, the ambulance service was engaged in "a governmental activity shielded from liability by governmental immunity." *Id.*

Here, Henderson County has the authority to contract for fire prevention and emergency medical, rescue, and ambulance services. *See* N.C.G.S. §§ 153A-233, 153A-309(a). Henderson County contracted with defendant Mountain Home Fire & Rescue Department to provide fire protection services, including "such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina nonprofit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." In accordance with *Luhmann*, Mountain Home Fire & Rescue Department "[is] entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8." *Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

It is undisputed that Mountain Home Fire & Rescue Department is entitled to governmental immunity for conduct performed in the course of fighting a fire. *See id.* Also, this Court has held that a county-operated ambulance service was entitled to governmental immunity for providing a historically governmental function to citizens. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. To hold that Mountain Home Fire & Rescue Department is not entitled to governmental immunity while providing emergency medical services to the extent supported by its license and training when Henderson County contracted with defendant for such services would be inconsistent with our common law and unsupportable. For these reasons, we overrule Bingham and Jean's argument that defendant Mountain Home Fire & Rescue Department and its agents are not entitled to immunity.

[2] Bingham and Jean further contend the trial court erred in granting defendants' motion for summary judgment because even if defendants were entitled to sovereign immunity, defendants waived their immunity through purchasing liability insurance. However, Bingham and Jean have failed to raise this argument before the trial court. "If a plaintiff [fails] to allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000) (citation omitted).

[3] Additionally, Bingham and Jean argue that defendants failed to adequately plead or produce documents related to defendants' claim of immunity. Bingham and Jean's argument is without merit, for defendants clearly stated in their answer and motion to dismiss that defendants, as a fire and rescue department, were entitled to governmental or sovereign immunity.[5] As such, there was sufficient information in defendants' answer to give Bingham and Jean adequate notice of defendants' affirmative defense. Bingham and Jean's arguments are, therefore, overruled.

II

[4] Bingham and Jean also contend the trial court erred in failing to allow their oral motion to amend the third-party complaint. We disagree.

5. It appears the entire premise on which the dissent is based concerns an acknowledgment that, even though defendants did plead the affirmative defense of governmental immunity, they "did not reveal any specific reason for governmental immunity" and that "the legal basis for [the] claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss." The majority, however, notes that this pleading was sufficient to put plaintiffs on notice of the defense of governmental immunity and the trial court's denial of plaintiff's motion to amend the pleadings, raised almost three months after the immunity was asserted, was not an abuse of discretion by the trial court.

When reviewing the denial of a motion to amend, the standard of review is whether the trial court's denial amounted to a manifest abuse of discretion. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). A trial court's denial of a motion to amend a complaint can only be reversed upon proof by "a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

Bingham and Jean argue that the trial court erred by not permitting their oral motion to amend their complaint. Specifically, Bingham and Jean assert that because they did not have adequate or proper notice of the basis of the alleged immunity for defendants, who were not a government entity or a public official, they should have been allowed to amend their complaint. Plaintiffs cite *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994), in support of their argument.

In *Gunter*, the plaintiffs sued the Surry County Board of Education. After the trial court granted the Board of Education's motion to dismiss and denied the plaintiffs' motion to amend, the plaintiffs appealed. *Id.* at 64, 441 S.E.2d at 169. This Court held that the order dismissing the action was proper because the plaintiffs had adequate notice during the filing of their original complaint that the Board of Education had liability insurance, and that the plaintiffs could have amended their complaint but failed to do so in a timely fashion. *Id.* at 65, 441 S.E.2d at 170.

We agree that *Gunter* is applicable to the instant case, as Bingham and Jean had the opportunity to amend their complaint but failed to do so. Despite the contention that they received defendants' insurance policy only a month prior to the hearing and were made aware of the legal basis for asserting governmental immunity only days before the hearing, Bingham and Jean still had adequate notice to respond to the motion to dismiss. As stated previously, Mountain Home Fire & Rescue Department answered the third-party complaint by moving to dismiss the action as to them based on the affirmative defenses of governmental/sovereign immunity and public officer/official immunity, and these defenses were repeated throughout the answer. *See supra* note 5. As such, Bingham and Jean had adequate notice of defendants' affirmative defenses such that an issue of waiver by purchase of insurance could have been timely raised as a matter of due course. Moreover, Mountain Home Fire & Rescue Department's contract with the county was a matter of public record and could therefore have been obtained even prior to the filing of Bingham and Jean's third-party complaint. Therefore, the trial court's denial of the oral motion to amend was not an abuse of discretion. Accordingly, Bingham and Jean's argument is overruled.

Affirmed.

Chief Judge McGEE concurs.

STROUD, Judge, dissenting.

In their third-party complaint, defendants, Joel D. Bingham and Jean's Bus Service, Inc. ("third-party plaintiffs"), sued Mountain Home Fire and Rescue Department, Inc., ("MHFR") and Matthew Brackett, collectively ("third-party defendants"), and identified MHFR as "a non-profit corporation duly organized in the laws of the State of North Carolina with its principal place of business in Henderson County, North Carolina."[1] MHFR admitted this allegation in third-party defendants' "Motion to Dismiss, Motion for Change of Venue, and Answer to Third-Party Complaint" filed on or about 5 June 2013. Third-party defendants' motion to dismiss was based upon North Carolina Rule of Civil Procedure 12(b)(6) and stated that third-party plaintiffs' action failed "to state a claim upon which relief can be granted on the grounds that [third-party plaintiffs'] claims are barred by governmental or sovereign immunity and by public officer/official immunity." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). But MHFR failed to provide any factual or legal basis for this claim of immunity. Mountain Home is not an incorporated municipality, and MHFR at this point was identified only as a "non-profit corporation" and not as having any sort of association with a governmental entity that could confer some form of immunity. Third-party defendants' answer also alleges that third-party defendant, Matthew Brackett, drove MHFR's "fire department vehicle" in the course and scope of his employment, on an "emergency call."

On 20 June 2013, MHFR served its responses to interrogatories and requests for production from third-party plaintiffs. These responses made no mention of any basis for immunity but did identify the liability insurance policy for MHFR. A copy of the insurance policy was provided in a supplement to the discovery responses on or about 11 July 2013. On 26 August 2013, third-party defendants moved for summary judgment on the basis that the pleadings and discovery raised no genuine issue of material fact. See N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). On the same day, they filed a notice of hearing upon their motion to dismiss and motion for summary judgment, which was set for 30 September 2013.

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1. Third-party plaintiffs also sued Gregory Alan Wiggins, but Wiggins is not a party to this appeal.

On 23 September 2013, third-party plaintiff Bingham filed an affidavit describing how the accident occurred. He claimed that the MHFR vehicle gave "no observable signal" and no warning before slowing down from about 65 miles per hour "suddenly and abruptly[,]" causing three vehicles and his bus to slam on their brakes, resulting in the collision. North Carolina law requires that an emergency vehicle that is on an emergency call to use its lights and audible signal to alert other drivers that it is on an emergency call:

> The driver of a vehicle upon the highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances . . . when the operators of said vehicles are giving a warning signal by appropriate light and by bell, siren or exhaust whistle audible under normal conditions from a distance not less than 1,000 feet. When appropriate warning signals are being given, as provided in this subsection, an emergency vehicle may proceed through an intersection or other place when the emergency vehicle is facing a stop sign, a yield sign, or a traffic light which is emitting a flashing strobe signal or a beam of steady or flashing red light.

N.C. Gen. Stat. § 20-156(b) (2009). Bingham's affidavit raises the question whether the MHFR vehicle was actually on an "emergency call" at the time of the accident, since he claimed that the vehicle did not give any signal or warning of an intention to stop suddenly and cut through the median. An ambulance with flashing lights and sirens is clearly on an emergency call, whereas an ambulance driving down the road with lights and sirens off is just another vehicle. *See id.*

On 30 September 2013, the trial court heard third-party defendants' motions. Just five days before this, on 25 September 2013, third-party defendants served on third-party plaintiffs, as an attachment to a memorandum in support of their motion to dismiss and motion for summary judgment, MHFR's "Contract for Fire Protection" dated 22 May 2002, which third-party defendants claim establishes their right to governmental immunity based upon MHFR's provision of emergency medical and fire services for Henderson County. Our record does not include any affidavits other than Bingham's and no documentary evidence other than the responses to third-party plaintiffs' discovery requests, MHFR's liability insurance policy, and the Contract for Fire Protection. Third-party plaintiffs objected to the trial court's consideration of the Contract.

At the hearing, the trial court told counsel that he wanted to take the motions one by one, so as not to "blur" the issues. Third-party defendants' motion to dismiss, which was a motion under Rule 12(b)(6) contained in its answer, was the first and only motion addressed, since the trial court found it to be dispositive. Third-party defendants' counsel argued that governmental immunity applied based upon the Contract and counsel's oral description of the facts surrounding the accident, most of which do not appear to be contained in our record on appeal. Counsel concluded by noting that third-party plaintiffs' complaint "does not specifically plead that [MHFR has] waived [its] governmental immunity by purchase of insurance. And for that reason, [third-party defendants are] entitled to be dismissed from this case on those grounds."

But, when the third-party complaint was filed, there was no reason for the complaint to specifically plead governmental immunity, since no governmental entity was named as a party. In addition, third-party plaintiffs' counsel objected to consideration of the Contract because it was not properly before the court, as it had not been previously produced in discovery and was not attached to any affidavit that had been filed with the court. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218-19, 706 S.E.2d 310, 314-15 (2011) (holding that, under North Carolina Rule of Civil Procedure 56(e), the trial court could not consider unauthenticated documents at a summary judgment hearing). From the transcript, it appears that third-party defendants' counsel simply handed up the Contract during the hearing, and the trial court accepted it without comment despite third-party plaintiffs' objection. Third-party plaintiffs' counsel also noted that there was no witness testimony presented regarding the contract. Third-party plaintiffs' counsel asked that if the court were to consider the Contract, that it also allow his oral motion to amend the complaint to allege waiver of governmental immunity by purchase of liability insurance. The liability insurance policy was already in the record before the court, as it had previously been provided in discovery, long before the Contract had been provided to third-party plaintiffs.

Basing its ruling entirely upon the Contract and third-party plaintiffs' failure to "specifically plead that the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of 'governmental immunity' by purchasing liability insurance[,]" the trial court dismissed the complaint as to third-party defendants "pursuant to Rule 12(b)(6)." The trial court did not reach the motion for summary judgment, since the trial court held that dismissal based upon governmental immunity was proper.

Despite the trial court's admirable attempt not to "blur" the issues raised by the various motions, the parties' arguments and even the trial court's order did in fact blur the issues to the point that bringing them into focus is the first challenge in this case. I must determine the legal basis for third-party defendants' motion to dismiss and the basis upon which the trial court ruled, since that will control the standard of review and what information the trial court should have considered. In ruling upon a Rule 12(b)(6) motion, the trial court may consider only the pleadings and cannot make any findings of fact. *See Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). In ruling upon a motion for summary judgment, the trial court may consider discovery responses, affidavits, and other information, but all must be viewed in the light most favorable to the non-moving parties, here the third-party plaintiffs. *See In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); N.C. Gen. Stat. § 1A-1, Rule 56(c). And, in any event, a motion to dismiss based on governmental immunity normally is not based upon Rule 12(b)(6); it is based upon Rule 12(b)(1) or (2). *M Series Rebuild v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012).

The correct standard of review should guide appellate review of the issues. This Court is not reviewing an order for summary judgment, as the majority opinion has done, because the trial court's order very specifically addressed only the motion to dismiss based upon governmental immunity.[2] It is true that in some cases, a hearing upon a motion to dismiss may be converted into a summary judgment hearing, where the trial court has considered documents outside the pleadings, but that did not happen in this case.

> When a trial court converts a party's 12(b)(6) motion to dismiss into one for summary judgment under Rule 56, all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. This is because Rule 12(b) clearly contemplates the case where a party is "surprised" by the treatment of a Rule 12(b)(6) motion as one for summary judgment; it

2. Third-party defendants contend that we must review the order as a motion to dismiss based upon Rule 12(b)(6) and argue that the complaint on its face fails to plead waiver of governmental immunity. But third-party plaintiffs did not sue a governmental entity and thus were not on notice that they must plead waiver of governmental immunity. Third-party defendants also argue that the trial court's consideration of the Contract, which was not included in the pleadings, was proper. But on a Rule 12(b)(6) motion, we consider only the pleadings. *Guyton*, 199 N.C. App. at 33, 681 S.E.2d at 469.

> affords such a party a reasonable opportunity to oppose the motion with her own materials made pertinent to such a motion.

Timber Integrated Investments, LLC v. Welch, ___ N.C. App. ___, ___, 737 S.E.2d 809, 815 (2013) (citations and quotation marks omitted).

Here, the trial court was explicit that it was considering only the motion to dismiss, and the order says the same. Also, it would be improper for the trial court to make findings of fact in a summary judgment order, especially since some of the findings here did not reflect the evidence in the light most favorable to the non-moving party, which would be appropriate for a summary judgment ruling. *See Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

The trial court was actually addressing a motion to dismiss based upon governmental immunity.

> A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina. N.C. Gen. Stat. § 1A–1, Rule 12(b)(1) permits a party to move for dismissal based on lack of jurisdiction over the subject matter, and Rule 12(b)(2) permits dismissal based on lack of jurisdiction over the person.
>
> Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court. The standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate.

M Series Rebuild, ___ N.C. App. at ___, 730 S.E.2d at 257 (citations, quotation marks, and footnote omitted).

Here, third-party defendants' motion to dismiss referred to Rule 12(b)(6), which is "[f]ailure to state a claim upon which relief can be granted," although this motion would properly fall under subsections (1) or (2) of Rule 12(b). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. The trial court also specifically announced when rendering judgment in open court that

the dismissal was based on Rule 12(b)(6)and mentioned this rule in its order. But since we treat motions as to their substance, and this motion was clearly based upon a claim of governmental immunity, I would treat it as a motion under Rule 12(b)(1) or (2), despite its lack of any factual allegations to demonstrate why the private entities claiming immunity would be entitled to it. *See Lee v. Jenkins*, 57 N.C. App. 522, 524, 291 S.E.2d 797, 798 (1982) (treating a motion as to its substance, rather than form). Unfortunately, it is unclear whether we should review the trial court's order under Rule 12(b)(1) or (2), and the standards of review are different for these two subsections. *See M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. But either way, under *de novo* review as applicable to 12(b)(1) or under review of the record evidence to support the trial court's ruling as applicable to 12(b)(2), I would come to the same conclusion and would reverse.

First, there was no need for third-party plaintiffs to specifically plead waiver of governmental immunity in their third-party complaint against third-party defendants because they did not sue a governmental entity that would have immunity. In addition, a defendant should plead the affirmative defense of governmental immunity with some specificity. *See Bullard v. Wake County*, ___ N.C. App. ___, ___, 729 S.E.2d 686, 689, *disc. rev. denied*, 366 N.C. 409, 735 S.E.2d 184 (2012). Even after third-party defendants' answer, the pleadings did not reveal any specific reason for governmental immunity. At that point, the pleadings revealed only that a vehicle owned and operated by a "non-profit corporation" that claimed to be on "emergency call" was involved in the automobile accident. There was no mention of provision of emergency services for any governmental entity or any other factual or legal basis for governmental immunity.

The trial court can rule only upon the pleadings or evidence which have been properly submitted to the court and which may legally be considered for the purposes of the motion before the court. Here, the motion at issue was third-party defendants' motion to dismiss and not a motion for summary judgment. The legal basis, if any, for MHFR's claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss, when third-party defendants' counsel emailed a copy of the Contract to third-party plaintiffs' counsel. The only "evidence" relevant to the trial court's ruling was this Contract, and it was not properly before the trial court. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Third-party defendants seem to recognize this problem in their appellate brief and argue that the trial court could take judicial notice of the Contract under North Carolina Rule of

Evidence 201, because it is "a publicly available record." Rule 201 actually provides, in relevant part, as follows:

> (b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . . .
>
> (e) Opportunity to be heard. — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201 (2013).

Even assuming that this Contract was "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"—a proposition I would question—it is clear that the trial court did not take judicial notice of the Contract and that plaintiff had no "opportunity to be heard as to the propriety of taking judicial notice." *See id.* § 8C-1, Rule 201(b), (e). In fact, judicial notice was never mentioned, and third-party plaintiffs objected to the trial court's consideration of the Contract, which had just been provided by email only five days prior to the hearing. In addition, the Contract itself was entered in 2002 and was effective for one year, subject to automatic annual renewals. It also included provisions for cancellation by either party on eight months' written notice. Even if the Contract were properly before the trial court, there is no evidence to indicate that the Contract was still effective on the date of the accident which is the basis of the claims raised. In addition, third-party plaintiffs asked to amend the complaint to allege the waiver of immunity by purchase of liability insurance, and if the trial court were going to consider documents outside the pleadings, despite the fact that the transcript indicates that the court was considering only the motion to dismiss under Rule 12(b)(6), the liability insurance policy could properly be considered by the court as part of the responses to discovery. *See id.* § 1A-1, Rule 56(c). I cannot discern why the trial court would consider one document outside the pleadings but not the other.

In its order, the trial court made findings of fact, which would seem to support review of the order as an order under Rule 12(b)(2). The standard of review for a Rule 12(b)(2) order is "whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. The findings are as follows:

> 1. That on February 8, 2010 the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were responding to a medical emergency when the motor vehicle accident at issue in this case occurred;
>
> 2. That the Third-Party Defendant, Matthew Brackett, was operating the Mountain Home Fire & Rescue Department emergency vehicle within the course and scope of his employment with said department and in his official capacity;
>
> 3. That there exists a contract between the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., and Henderson County under which Mountain Home Fire & Rescue Department, Inc. operates and said contract contains provisions detailing the fire protection services to be provided by Mountain Home Fire & Rescue Department, Inc.;
>
> 4. That Paragraph 3 of the above-referenced contract states; "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the Fire Department is licensed and trained to provide in order to protect the persons within the District from injury or death.";
>
> 5. That at the time of the motor vehicle accident at issue in this lawsuit the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were engaged in a recognized and legitimate governmental function;
>
> 6. That the Third-Party Plaintiff[s] did not specifically plead that the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of "governmental immunity" by purchasing liability insurance[.]

Finding 1 purports to resolve a factual dispute in favor of third-party defendants. Bingham's affidavit seems to indicate that MHFR was not responding to an "emergency call" since the vehicle did not have its lights and siren on at the time. But even if this is correct, Findings 3, 4, and 5 are based upon the Contract, which was not properly before the court as noted above. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Also, even if the Contract could be considered by the trial court, there was still no evidence that the Contract was in effect on the date of the incident, other than third-party defendants' counsel's representations in his argument to the trial court. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004). Finding 6 is based upon an assumption that third-party plaintiffs should have known before receiving the Contract that MHFR, a "non-profit corporation," would have governmental immunity.

But it is undisputed that Mountain Home is not an incorporated municipality possessing governmental immunity. Third-party plaintiffs thus had no way to discern, from the pleadings alone, that MHFR, a "non-profit corporation," had any sort of relationship with a governmental entity that could confer governmental immunity. To require that third-party plaintiffs affirmatively allege that MHFR, a non-governmental entity, had waived its governmental immunity by the purchase of liability insurance even before MHFR had provided any factual or legal basis for this defense defies logic.

Under these unusual circumstances, I would also find that the trial court's implicit denial of third-party plaintiffs' motion to amend was an abuse of discretion. Contrary to third-party defendants' assertion, we have jurisdiction to review a trial court's implicit denial of a party's motion. *See Zagaroli v. Pollock*, 94 N.C. App. 46, 52, 379 S.E.2d 653, 656-57 (reviewing the trial court's denial of the defendants' motion to set aside the verdict implicit in its judgment against the defendants), *disc. rev. denied*, 325 N.C. 437, 384 S.E.2d 548 (1989). By granting third-party defendants' motion to dismiss, the trial court implicitly denied third-party plaintiffs' oral motion to amend.

> Our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and

> repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Williams v. Owens, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011). None of these reasons apply here. Third-party defendants disclosed the basis for their defense of governmental immunity only five days before the hearing, so third-party plaintiffs did not cause undue delay or unfairly prejudice third-party defendants by moving to amend. Amending their pleadings to add the allegation that MHFR had purchased liability insurance would not have been futile, as it would have immediately cured the defect in their pleadings. Because amendments to pleadings are to be freely allowed and we are to decide cases on substantive grounds instead of technicalities, I would reverse the trial court's order. *See Chicora Country Club, Inc. v. Town of Ervin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) ("Our courts have consistently held that a motion to amend a pleading should be freely allowed by the trial court."), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("An appellate court has a strong preference for deciding cases on their merits."). Accordingly, I dissent from the majority opinion and would reverse the trial court's order of dismissal.

STATE OF NORTH CAROLINA
v.
DARRETT CROCKETT

No. COA14-403

Filed 16 December 2014

1. Appeal and Error—petition for certiorari—insufficient

Defendant's petition for certiorari was denied because it did not meet the requirements of Rule 21 of the Rules of Appellate Procedure. Defendant merely stated that he had identified potentially meritorious issues to present to the Court of Appeals, including issues involving the judgment for attaining the status of habitual felon, but he did not explain what those issues were or address them.

2. Indictment and Information—sexual offenders—registration—changing address—not properly notifying sheriff

The trial court did not err by denying defendant's motion to dismiss two charges of failing to register as a sex offender where defendant argued that the State did not present sufficient evidence that defendant changed his address and did not provide proper written notice to the sheriff. N.C.G.S. §§ 14-208.9 and 14-208.11 are properly read together when charging a defendant with a violation of the sex offender registration statute.

3. Sexual Offenders-registration—change of address—willfulness—email notice to sheriff—Urban Ministry

N.C.G.S. § 14-208.11(a) is a strict liability offense if analyzed under the 2005 version of the statutes; however, in 2006, the General Assembly amended the statute to add the requirement that the State must show that defendant willfully failed to comply with the registration requirements. Although defendant argued that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address, an email in lieu of defendant completing and signing paperwork with his address was not sufficient to constitute registration as statutorily prescribed. Even if the email had been sufficient to constitute registration, Urban Ministry (where defendant claimed residence) was not a valid address for compliance with the sex offender registration statute because Defendant could not live there.

4. Sexual Offenders—registration—subsequent release from jail—change of address

A registered sex offender's January 2011 release from jail was a change of address falling within the purview of N.C.G.S. § 14-208.9 rather than § 14-208.7 because defendant had been a registered sex offender since April 1999.

5. Sexual Offenders—registration—change of address—willful failure to notify sheriff

The record contained sufficient evidence that a registered sex offender changed his address and failed to notify the sheriff's office and sufficient evidence defendant willfully failed to report his changes of address.

6. Evidence—relevance—sheriff's office policy—sexual offender registration

There was no prejudicial error in a prosecution for violating the sexual offender registration statutes from the admission of the

Mecklenburg County Sheriff's Office policy that Urban Ministry was not a valid address for compliance with the sex offender registration. The sheriff's office policy was relevant in that it tended to show that no one could live at Urban Ministry and that defendant's actual address was not the one he had registered. Even assuming that this policy lacked relevance, defendant did not show that the error was prejudicial.

7. Sexual Offenders—registration—jury unanimity

The requirement of jury unanimity was satisfied in a prosecution for violating the sexual offender registration statutes where any of several alternatives satisfied the third element of the jury instruction, that defendant changed his address and failed to notify the sheriff within the requisite time period.

Appeal by Defendant from judgment entered 3 July 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2014.

Roy Cooper, *Attorney General*, *by Catherine F. Jordan*, *and Kimberly N. Callahan*, *Assistant Attorneys General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Jason Christopher Yoder*, *Assistant Appellate Defender*, *for defendant-appellant.*

BELL, Judge.

Darrett Crockett ("Defendant") appeals from his conviction of two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11.[1] Defendant argues on appeal that the trial court erred by

1. **[1]** We note that Defendant also filed a petition for writ of certiorari seeking review of that part of the judgment relating to his guilty plea for having attained habitual felon status on the grounds that he failed to give timely notice of appeal on this issue. Rule 21 of the North Carolina Rules of Appellate Procedure provides that a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (2013). However, a petition for writ of certiorari must contain "a statement of the reasons why the writ should issue." N.C.R. App. P. 21(c) (2013). Here, Defendant merely states in his petition for writ of certiorari that he "has identified potentially meritorious issues to present to this Court in a brief, including issues that involve the judgment for attaining the status of habitual felon" but does not explain what these issues are nor does he address them in his brief. As such, Defendant's petition for writ of certiorari fails to meet the requirements of Rule 21.

(1) denying his motion to dismiss based on the State's failure to prove the offenses alleged in the indictment; and (2) admitting irrelevant evidence that the Mecklenburg County Sheriff's Office had a policy that the Urban Ministry Center for the Homeless was not a valid address for the purpose of statutorily required sex offender registration. He also argues that the trial court violated his right to a unanimous jury verdict under Article I, § 24 of the North Carolina Constitution. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

Defendant stipulated at trial that on 8 October 1997, he was convicted of a reportable offense for which he was required to register as a sex offender and comply with the North Carolina Sex Offender Registration requirements, including the time period on and between 20 January 2011 and 23 February 2012. The State's evidence at trial tended to establish the following facts: On 9 April 1999, Defendant signed initial registration paperwork at the Mecklenburg County Sheriff's Office entitled "Requirements for Sex Offender and Public Protection Registration." This paperwork was provided to Defendant to assist him in understanding his registration requirements throughout the registration period. One of the statutory requirements listed on the registration form states that

> [w]hen an offender required to register changes address, he/she must provide written notification of this address change to the Sheriff in the county where he/she most currently registered. This notification must be sent to the Sheriff within 10 days of the address change. This written notification may be made in the form of a letter, or by going personally to the Sheriff's department and completing a Change of Address Form.

Defendant completed a similar registration form again on 10 December 2004. In compliance with the statute, Defendant reported changes of address in writing to the Mecklenburg County Sheriff's Office on the following dates: 1 March 2005, 30 May 2006, and 4 October 2006.

Accordingly, Defendant's petition for writ of certiorari is denied. *State v. McCoy*, 171 N.C. App. 636, 638-39, 615 S.E.2d 319, 321, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005) (holding that the Rules of Appellate Procedure are mandatory and failure to comply with Rule 21 subjects a petition to dismissal).

On 27 June 2007, Defendant returned an "Address Verification Notice" form[2] to the Mecklenburg County Sheriff's Office indicating that he had changed his address to 945 North College Street, Charlotte, North Carolina. 945 North College Street is the address of the Urban Ministry Center ("Urban Ministry"), a non-profit organization that provides various services to the homeless community. The facility is open from 8:30 a.m. until 4:00 p.m. during the week and 9:00 a.m. until 12:30 p.m. on weekends. It provides services such as food, shower facilities, counseling, restrooms, laundry, phones, changing rooms, a post office box, and transportation. However, there are no beds at Urban Ministry and visitors are prohibited from staying there overnight. At trial, Laura Stutts ("Ms. Stutts"), an administrative assistant with the Mecklenburg County Sheriff's Office, testified that the Mecklenburg County Sheriff's Office does not allow sex offenders to use Urban Ministry as an address for registration purposes.

From 15 April 2009 through 20 January 2011, Defendant was incarcerated in Mecklenburg County. Upon his release, he refused to sign a "Notice of Duty to Register" form and did not provide the sheriff's office with written confirmation of an address at which he would reside. The sheriff's office received an email from the Mecklenburg County jail stating that Defendant was going to live at 945 North College Street. That was the last time the sheriff's office received any information concerning Defendant's address until 7 November 2011.

On 11 February 2011, Defendant filed a Petition and Order for Termination of Sex Offender Registration on which he listed 945 North College Street as his current mailing address. The petition was dismissed when Defendant failed to appear for court.

On 7 November 2011, Defendant was arrested and incarcerated in Mecklenburg County. On 17 November 2011, he was released from the Mecklenburg County jail and signed a "Notice of Duty to Register" form, on which he listed 945 North College Street as his address. Defendant reported his address as 945 North College Street again on 17 January 2012.

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2. N.C. Gen. Stat. § 14-208.9A provides that, beginning on the date of his initial registration and every six months thereafter, a person required to register under the Sex Offender Registration Act must submit a verification form to the sheriff of his county of residence within three business days of receiving it. The form must be signed and must indicate "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A (2013).

Defendant mailed a letter postmarked 15 February 2012 to the Honorable Yvonne Evans, Resident Superior Court Judge at the Mecklenburg County Courthouse. The envelope listed the York County Detention Center in South Carolina as Defendant's return address. In the letter, Defendant mentioned that he had been living at his cousin's house in Rock Hill, South Carolina. The Mecklenburg County Sheriff's Office did not receive any written notification from Defendant informing them of this change of address.

On 28 November 2011, Defendant was indicted on one count of failing to register as a sex offender, as required by N.C. Gen. Stat. § 14-208.11, for the time period from 24 January 2011 until 6 November 2011. On 9 January 2012, Defendant was indicted for attaining habitual felon status. On 12 March 2012, Defendant was indicted on a second count of failing to register as a sex offender for the time period from 1 December 2011 until 23 February 2012.

A jury trial commenced on 1 July 2013 in Mecklenburg County Superior Court. On 3 July 2013, the jury returned a verdict finding defendant guilty of both counts of failing to register as a sex offender. Defendant pled guilty to attaining habitual felon status. The trial court sentenced Defendant to an active term of 60 to 81 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

I. Motion to Dismiss

[2] Defendant first contends that the trial court erred by denying his motion to dismiss both charges of failing to register as a sex offender because the State did not present sufficient evidence to prove that Defendant committed the offenses charged in the indictments. We disagree.

The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33, (2007). When ruling on a motion to dismiss for insufficient evidence, "[t]he only issue before the trial court . . . is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (citation and internal quotation marks omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*,

355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

The North Carolina Sex Offender Registration Program is codified in Article 27A of Chapter 14 of the North Carolina General Statutes (hereinafter "Article 27A" or "the sex offender registration statute"). N.C. Gen. Stat. § 14-208.9 sets forth the requirements with which a registered sex offender must comply should he change his address. N.C. Gen. Stat. § 14-208.9 provides, in pertinent part, as follows:

> [i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. . . .
>
> If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least three business days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

N.C. Gen. Stat. § 14-208.9(a),(b) (2013).

N.C. Gen. Stat. § 14-208.11 enumerates the offenses with which a person may be charged for failing to comply with certain sections of the sex offender registration statute. N.C. Gen. Stat. § 14-208.11 states, in pertinent part, that

> [a] person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.
>
> . . . .

> (7) Fails to report in person to the sheriff's office as required by G.S. 14-208.8, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11 (2013).

Defendant was charged with two counts of violating N.C. Gen. Stat. § 14-208.11. Both indictments alleged that during the dates listed in each indictment Defendant

> fail[ed] to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Defendant argues that the State only offered evidence of statutory violations not charged in the indictment. Specifically, Defendant contends that although the State presented evidence that he failed to register upon release from a penal institution, in violation of N.C. Gen. Stat. § 14.208.7, and that he failed to report to the sheriff of the county of his current residence at least three days prior to the date he intended to leave the state, in violation of N.C. Gen. Stat. § 14-208.9(b), the State did not offer evidence proving Defendant had violated N.C. Gen. Stat. § 14-208.11, as alleged in the indictments. This argument is without merit.

This Court has previously determined that because N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 "deal with the same subject matter, they must be construed in *pari materia* to give effect to each." *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (citation omitted).

[3] Having established that N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 are properly read together when charging a defendant with a violation of the sex offender registration statute, we turn to Defendant's argument that the State failed to prove that he changed his address and did not provide proper written notice to the sheriff.

Our Supreme Court has held that a conviction for failing to notify the appropriate sheriff of a change of address pursuant to N.C. Gen. Stat. § 14-208.11(a) requires proof of three essential elements: "(1) the defendant is a person required . . . to register; (2) the defendant change[d] his address; and (3) the defendant [willfully[3]] [f]ail[ed] to notify the last

3. We recognize that in *Abshire*, our Supreme Court held that "[t]he crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a) is a strict liability offense" because the case was analyzed under the 2005

registering sheriff of [the] change of address, not later than the tenth day after the change." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (omission, third, and fifth alteration in original)(citations and internal quotation marks omitted).

In the case at hand, the parties stipulated at trial that upon his 8 October 1997 conviction of a reportable offense, Defendant became a person required to register as a sex offender and comply with the requirements of the North Carolina Sex Offender Registration Program. Pursuant to N.C. Gen. Stat. § 14-208.7(a), on 9 April 1999, Defendant signed sex offender registration paperwork and registered his address for the first time.

Defendant was incarcerated from 15 April 2009 until 20 January 2011. On 20 January 2011, Defendant was released from incarceration. He did not register his new address with the Mecklenburg County Sheriff's Office in writing within three days of his change of address when he left the Mecklenburg County jail, as required under N.C. Gen. Stat. § 14-208.9.[4] Defendant was arrested again on 7 November 2011 and released ten days later, on 17 November 2011. Upon his release, Defendant registered Urban Ministry as his address.

Defendant argues that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address on 20 January 2011 because Ms. Stutts testified that she "received an e-mail from release stating that [Defendant] was going to live at 945 North College Street," the street address for Urban Ministry, although "he didn't list it on the paper." However, we believe that this email, in lieu of Defendant completing and signing paperwork with his address, is insufficient to constitute "registration" as statutorily prescribed in Article 27A.

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version of the statutes. However, in 2006, the General Assembly amended § 14-208.11, adding the requirement that the State must show that the defendant "willfully" failed to comply with the requirements of the sex offender registration statute. The change to the quoted language from *Abshire* in this opinion reflects the addition of the *mens rea* requirement in the amended version of the statute. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009).

4. **[4]** We view Defendant's January 2011 release from jail as a change of address falling within the purview of N.C. Gen. Stat. § 14-208.9 rather than § 14-208.7 because Defendant had been a registered sex offender since April 1999. Based on the language of N.C. Gen. Stat. § 14-208.7, we believe this section pertains to a defendant's *initial* registration upon release from a penal institution.

Even assuming *arguendo* that the email was sufficient to constitute "registration," Urban Ministry is not a valid address at which Defendant could register in compliance with the sex offender registration statute because Defendant could not *live* there. Although "address" is not a term defined in the statute itself, our Supreme Court has held that "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary." *Abshire*, 363 N.C. at 331, 677 S.E.2d at 451.

> [M]ere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

Id. at 332, 677 S.E.2d at 451.

Yet in *Abshire*, our Supreme Court declined to "add[] any further nuance" to what it means to "live" in a place. *Id.* In the context of the case law, the place where a person lives is where a person "resides" and performs his activities of daily living, such as sleeping and eating. These activities also require that a person keep his personal belongings at his residence. Although Defendant could perform at Urban Ministry some activities which a person normally does at his residence, such as bathing or eating, these activities can also be done at many public locations at which one cannot "live." For example, individuals may shower at the gym or eat in a restaurant. Critical to our holding in the present case that Defendant did not "live" at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to "reside" at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his "residence" because he cannot "live" there.

Urban Ministry's operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is "to assist law

enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." *Id.* Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute. *See* N.C. Gen. Stat. § 14-208.5 (2013).

[5] The State also presented evidence that Defendant was living in South Carolina during the second indictment period of 1 December 2011 through 23 February 2012. In a letter addressed to Mecklenburg County Superior Court Judge Yvonne Evans, Defendant wrote that his cousin had permitted him to live in one of his houses in Rock Hill, South Carolina. The envelope of the letter was postmarked 15 February 2011 and the return address was listed as York County Detention Center in South Carolina.

The record also contained sufficient evidence that a jury could find Defendant *willfully* failed to report his changes of address. " 'Wilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (citation omitted). Because willfulness is a mental state, it often must be inferred from the surrounding circumstances rather than proven through direct evidence. *Id.* Here, there was ample evidence to show that Defendant had complied with the registration requirements between 1999 and 2006. Additionally, Defendant had signed forms acknowledging the requirements for sex offenders under the statute and his understanding of these requirements.

The State presented sufficient evidence that Defendant (1) was required to comply with the sex offender registration act; (2) changed his address; and (3) willfully failed to notify the sheriff within three days' time. Thus, we conclude that, taken in the light most favorable to the State, the record contained sufficient evidence that a jury could find Defendant changed his address and failed to notify the sheriff's office, in violation of N.C. Gen. Stat. § 14-208.11, during both indictment periods. Thus, the trial court properly denied his motion to dismiss. This argument is overruled.

II. Evidence Regarding the Mecklenburg County Sheriff's Office Policy

[6] Defendant next argues that the trial court erred by admitting evidence that the Mecklenburg County Sheriff's Office had a policy that Urban Ministry was not considered a valid address for the purposes of compliance with the sex offender registration statute. Defendant contends that the admission of this policy was not only irrelevant, but

"created the real risk that the jury would convict [Defendant] based solely on a 'violation' of the Mecklenburg County Sheriff's Office policy."

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. This Court gives a trial court's relevancy determinations great deference on appeal. *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C. R. Evid. 403. It is within the trial court's sound discretion to decide whether to exclude evidence under Rule 403, and its ruling will not be reversed absent a showing of abuse of that discretion. *State v. Lloyd*, 354 N.C. 76, 108, 552 S.E.2d 596, 619 (2001) (citations omitted).

The policy of the Mecklenburg County Sheriff's Office that prohibits sex offenders from registering Urban Ministry as their address was relevant in that it tended to show that no one could "live" at Urban Ministry. Evidence that Defendant registered an address at which he could not live suggests that his actual address, for purposes of complying with the sex offender registration statute, was not the one he had registered. "The State can show that defendant changed his address simply by showing that he was no longer residing at the last registered address . . . ." *State v. McFarland*, __ N.C. App. __, __, 758 S.E.2d 457, 463 (2014) (citation omitted).

Even assuming, without deciding, that this policy lacked relevance, Defendant has failed to show that any such error was prejudicial. *State v. Oliver*, 210 N.C. App. 609, 615, 709 S.E.2d 503, 508 ("The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. Further, it is the defendant's burden to show prejudice from the admission of evidence." (citations and quotation marks omitted)), *disc. review denied*, 365 N.C. 206, 710 S.E.2d 37 (2011). The State presented additional evidence at trial that showed Defendant did not live at 945 North College Street, indicating that he had changed his address and failed to notify the Mecklenburg County Sheriff's Office.

Additionally, we are not persuaded by Defendant's assertion that "the jury could have convicted [him] because it believed [he] violated the Mecklenburg County Sheriff's Office policy." The trial court carefully

instructed the jury on each element the State must prove beyond a reasonable doubt in order for the jury to find Defendant guilty of the offenses charged. Defendant has failed to show prejudicial error by the trial court in allowing the policy of the Mecklenburg County Sheriff's Office into evidence.

III. Unanimous Jury Verdict

[7] Defendant's final argument on appeal is that the trial court violated his right to a unanimous jury verdict under Article I, § 24 of the North Carolina Constitution. Specifically, Defendant argues that it was not possible to determine the theory upon which the jury convicted him when it found him guilty of failing to comply with the sex offender registration requirements for each indictment period.

"Article I, Section 24 of the North Carolina Constitution states that '[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.' " *State v. Wilson*, 363 N.C. 478, 482-83, 681 S.E.2d 325, 329 (2009) (alteration in original)(citing N.C. Const. art. I, § 24). However, "[i]t is well established . . . that if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *State v. Taylor*, 362 N.C. 514, 541, 669 S.E.2d 239, 262 (2008) (citations and internal quotation marks omitted) (holding trial court's jury instructions that did not specifically instruct jury as to which robbery it should consider as basis for felony murder charge did not violate defendant's right to unanimous jury verdict), *cert. denied*, 558 U.S. 851, 175 L.Ed.2d 84 (2009). *See State v. Hartness*, 326 N.C. 561, 563, 567, 391 S.E.2d 177, 178, 180-81 (1990) (holding that when defendant is charged with "a single offense which may be proved by evidence of the commission of any one of a number of acts," jury instruction not specifying which of those acts the jury should consider does not risk a non-unanimous verdict).

Here, with respect to the first indictment, the trial court instructed the jury as follows:

> The defendant . . . has been charged with willfully failing to comply with the sex offender registration law. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that on or about the period January 24th, 2011, and November 6th, 2011, the defendant was a resident of this state.

> Second, that the defendant had been previously convicted of a reportable [offense] for which he was required to register. The parties . . . have previously stipulated and agreed that the defendant had been previously convicted of a reportable offense and that he was required to register as a sex offender in North Carolina.
>
> Third, the State must prove to you that the defendant willfully changed his address and failed to provide written notice of his new address in person at the sheriff's office not later than three days after the change of address to the sheriff's office in the county with which he had last registered.

The trial court gave an identical instruction for the second indictment, but with the applicable time period of 1 December 2011 through 23 February 2012.

Defendant argues that, based on the trial court's instructions, it was impossible to determine whether the jury based his conviction of failing to register as a sex offender because it found he had (1) failed to register upon leaving the Mecklenburg County jail; (2) failed to register upon changing his address; (3) registered at an invalid address; or (4) did not actually live at the address he had registered. However, because any of these alternative acts satisfies the third element of the jury instruction — that Defendant changed his address and failed to notify the sheriff within the requisite time period — the requirement of jury unanimity was satisfied. As such, Defendant's argument on this issue lacks merit.

Conclusion

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

NO ERROR.

Judges GEER and STROUD concur.

STATE v. FLOYD

[238 N.C. App. 110 (2014)]

STATE OF NORTH CAROLINA
v.
COREY DEON FLOYD

No. COA14-533

Filed 16 December 2014

1. Firearms and Other Weapons—possession of firearm by convicted felon—motion to dismiss—attempted assault not recognized in North Carolina

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon charge for insufficiency of the evidence. The prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon, and that attempted assault is not a recognized offense in North Carolina. Defendant's conviction for possession of a firearm by a convicted felon was vacated.

2. Sentencing—habitual felon status—underlying offense—attempted assault not recognized in North Carolina

The trial court by allowing the use of defendant's attempted assault conviction to support the determination that he had attained habitual felon status. Attempted assault is not a recognized criminal offense in North Carolina. Defendant's conviction for having attained the status of an habitual felon was vacated.

3. Constitutional Law—right to control nature of defense—court's failure to conduct inquiry into nature of impasse

The trial court erred by failing to adequately address an impasse between defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. As a result of the fact that no inquiry was conducted into the nature of the impasse, there was no basis for finding that the State had established that the error was harmless beyond a reasonable doubt. Thus, defendant was entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction.

4. Constitutional Law—right to speedy trial—pre-indictment delay—failure to show prejudice

The trial court did not err by denying defendant's motion to dismiss the charges of possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status on the basis of an excessive period

of pre-indictment delay. Defendant failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense.

Appeal by defendant from judgment entered 30 October 2013 by Judge Jack W. Jenkins in Lenoir County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

ERVIN, Judge.

Defendant Corey Deon Floyd appeals from judgments entered based upon his convictions for possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. On appeal, Defendant argues that the trial court erred by denying his motions to dismiss the possession of a weapon by a convicted felon and habitual felon charges on the grounds that these charges were supported by Defendant's previous conviction for an offense that did not exist, effectively determining that Defendant had no right to insist that his trial counsel pose certain questions to a prosecution witness, and denying his request for dismissal based on the length of the delay between the commission of the offense and the date upon which he was formally charged with committing that offense. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the Defendant's convictions for possession of a firearm by a convicted felon and having attained the status of an habitual felon should be vacated and that Defendant is entitled to a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

I. Factual Background

A. Substantive Facts

On 16 October 2008, the Kinston Police Department received a call from a confidential source indicating that Defendant was "hanging" in the area of Adkin and Macon streets in Kinston while carrying a sawed-off shotgun in his pants. Detective Robbie Braswell and his shift commander,

Carey Barnes, set out in a patrol car to locate Defendant. Commander Barnes had had frequent face-to-face contact with Defendant in the past and knew what he looked like.

As Detective Braswell and Commander Barnes approached Adkin Street from the south, Commander Barnes spotted an individual wearing a black hoodie and jeans who fit Defendant's description. When the individual turned around, Commander Barnes recognized him as Defendant. As the officers drove past the point at which Defendant was located, parked, and started walking toward him, Defendant began "inching his way off." At that point, Commander Barnes yelled out, "Corey Floyd, you'd better stop." Although Defendant initially turned toward Commander Barnes, he then took off running.

As the officers pursued Defendant on foot, Defendant jumped a brick wall. At that point, Detective Braswell, who was right behind Defendant, saw Defendant pull a shotgun out of the waistband of his pants and toss it over a high fence into a nearby yard. Upon making this observation, Detective Braswell stopped running and stood by the weapon. Upon his arrival, Commander Barnes secured the shotgun and removed a shotgun shell from the weapon.

B. Procedural History

On 8 November 2010, an arrest warrant was issued charging Defendant with possession of a weapon of mass destruction, resisting a public officer, and possession of a firearm by a convicted felon. On 31 January 2011, the Lenoir County grand jury returned bills of indictment purporting to charge Defendant with possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. The charges against Defendant came on for trial before the trial court and a jury at the 28 October 2013 Session of the Lenoir County Superior Court. On 30 October 2013, the jury returned verdicts convicting Defendant of possession of a weapon of mass destruction and possession of a weapon by a convicted felon. On 31 October 2013, the jury returned a verdict convicting Defendant of having attained habitual felon status. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 151 to 191 months imprisonment based upon his convictions for possession of a weapon of mass destruction and having attained habitual felon status and to a concurrent term of 151 to 191 months imprisonment based upon his convictions for possession of a firearm by a convicted felon and having attained habitual felon status. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Attempted Assault as Predicate Felony

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his motion to dismiss the possession of a firearm by a convicted felon charge for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the possession of a firearm by a convicted felon charge on the grounds that the prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon and that attempted assault is not a recognized offense in North Carolina. Defendant's contention has merit.

1. Standard of Review

"In order to survive a motion to dismiss criminal charges, 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. If so, the motion is properly denied.'" *State v. Dawkins*, 196 N.C. App. 719, 723, 675 S.E.2d 402, 405 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *disc. review denied*, 363 N.C. 585, 682 S.E.2d 707 (2009). In deciding whether the dismissal motion should be allowed or denied, the evidence should be considered "in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence." *State v. Allah*, __ N.C. App. __, __, 750 S.E.2d 903, 907 (2013) (citing *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985)). This Court reviews a trial court's decision to deny a motion to dismiss using a *de novo* standard of review. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).[1]

1. The standard of review set forth in the text is that applicable to the motion that Defendant actually made before the trial court. The ultimate issue addressed by Defendant's dismissal motion could also have been raised through the making of a motion to dismiss the underlying indictment for failing to charge an offense pursuant to N.C. Gen. Stat. §§ 15A-954(a)(10) and 15A-924(a)(5). However, since the standard of review utilized in connection with challenges to the validity of an indictment is also *de novo*, *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012), we do not believe that it makes any significant difference whether we treat Defendant's argument as a challenge to the denial of his motion to dismiss for insufficiency of the evidence or a challenge to the denial of a motion to dismiss the indictment for failing to charge an offense.

2. Assault as a Predicate Felony

The essential elements of the offense of possession of a firearm by a convicted felon are that (1) the defendant was previously convicted of a felony and (2) subsequently possessed a firearm. N.C. Gen. Stat. § 14-415.1(a); *Dawkins*, 196 N.C. App. at 725, 675 S.E.2d at 406. According to N.C. Gen. Stat. § 14-415.1(b), "[p]rior convictions which cause disentitlement . . . include: (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995." Although the predicate felony alleged in the indictment by means of which Defendant was purportedly charged with the offense of possession of a firearm by a convicted felon and established during the course of the State's evidence was "Attempted Assault With a Deadly Weapon Inflicting Serious Injury" in violation of N.C. Gen. Stat. § 14-32(a), with the offense in question having been "committed on February 16, 2005" and with Defendant having "pled guilty on December 5, 2005," and "sentenced to 25-30 months in the North Carolina Department of Corrections," this Court has previously held that attempted assault with a deadly weapon inflicting serious injury is not a recognized criminal offense in North Carolina. In *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99 (1972), we explained the logic underlying this principle by noting that an assault consists of "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another." *Id.* at 265, 188 S.E.2d at 12 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). As a result, since the effect of an attempted assault verdict was to find the defendant guilty of an "attempt to attempt" and since "[o]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.*, we held that an attempted assault is simply not a recognized criminal offense in this jurisdiction.

This Court reaffirmed *Currence* in *State v. Barksdale*, 181 N.C. App. 302, 638 S.E.2d 579 (2007). In *Barksdale*, the trial court instructed the jury concerning the issue of the defendant's guilt of "attempted assault" and the jury convicted the defendant of two counts of attempted assault on a governmental official with a deadly weapon. *Id.* at 305, 638 S.E.2d at 581. Although the defendant's trial counsel did not object to the delivery of the attempted assault instruction, this Court held that the delivery of the attempted assault instruction constituted plain error, stating that "instructing a jury in such a way that the jury convicts the defendant of a nonexistent offense is an unmistakable example of a miscarriage of justice." *Id.* at 309, 638 S.E.2d at 583-84.

The decisions reflected in *Currence* and *Barksdale* to the effect that attempted assault is not a recognized criminal offense in North Carolina have not been overturned and are, for that reason, binding upon us in this case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). Although the State does not appear to dispute the validity of either *Currence* or *Barksdale*, it does contend that the offense of attempted assault has been recognized in other decisions and that we should treat these decisions as controlling. In support of this assertion, the State cites several decisions from this Court in which an attempted assault conviction was not overturned on appellate review. *See State v. Edwards*, 150 N.C. App. 544, 548-49, 563 S.E.2d 288, 290-91 (2002); *State v. Parks*, 2010 N.C. App. LEXIS 549 (N.C. Ct. App. Apr. 6, 2010) (unpublished); *State v. Carpenter*, 2007 N.C. App. LEXIS 1890 (N.C. Ct. App. Sept. 4, 2007) (unpublished); *State v. Franklin*, 2009 N.C. App. LEXIS 133 (N.C. Ct. App. Feb. 17, 2009) (unpublished). We do not believe that our opinions in these cases support a decision to reach the result that the State deems to be appropriate.

As an initial matter, we note that none of the cases upon which the State relies directly addressed the validity of a conviction for attempted assault, given that the defendant did not raise the issue of the existence of such a crime for the Court's consideration. Secondly, all but one of the decisions upon which the State relies were unpublished and do not, for that reason, have any precedential value for purposes of our consideration of this issue. Although this Court does allow the citation of unpublished opinions when they have "precedential value to a material issue in the case and . . . there is no published opinion that would serve as well," N.C. R. App. P. 30(e)(3), our decision in this case must be based on published decisions like *Currence* and *Barksdale*, in which this Court has clearly held that attempted assault is not a recognized criminal offense in North Carolina, rather than on other decisions, all but one of which were unpublished, in which the validity of an attempted assault conviction was never directly decided by the reviewing court. As a result, the decisions upon which the State relies do not provide a legitimate basis for a determination that attempted assault is, in fact, a recognized offense in North Carolina.

Having concluded that, in light of *Currence* and *Barksdale*, attempted assault is not a recognized criminal offense in North Carolina, we must determine what, if any, is the legal effect of a judgment purporting to rest on an attempted assault conviction. According to well-established

North Carolina law, "[j]udgments may be void, irregular or erroneous." *Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891) (defining void, irregular, or erroneous judgments and describing the legal effect of the entry of each type of defective judgment). A judgment is void if the court in which that judgment was imposed lacked jurisdiction over the parties or the subject matter of the case or had no authority to render the judgment in question. *Windham Distributing Co. v. Davis*, 72 N.C. App. 179, 181-82, 323 S.E.2d 506, 508 (1984) (citing *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974)), *discr. review denied*, 313 N.C. 613, 330 S.E.2d 617 (1985)). "[A void judgment] is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986); *see also Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981) (stating that "[a] void judgment is not a judgment at all, and it may always be treated as a nullity because it lacks an essential element of its formulation").

As this survey of the applicable law indicates, a judgment entered in a case in which the trial court lacked jurisdiction over the subject matter is void and may safely be ignored. "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). N.C. Gen. Stat. § 14-1 describes a "felony" as a crime which "(1) [w]as a felony at common law; (2) [i]s or may be punishable by death; (3) [i]s or may be punishable by imprisonment in the State's prison; or (4) [i]s denominated as a felony by statute." As a result of the fact that, as *Currence* and *Barksdale* clearly establish, attempted assault with a deadly weapon inflicting serious injury does not fall into any of these categories, a trial court lacks jurisdiction to enter a judgment that is based in any way on the understanding that the defendant has been convicted of that alleged offense.

In its brief, the State points to the fact that Defendant pled guilty to attempted assault as part of a negotiated plea agreement.[2] The fact that

2. In its brief, the State argues that a decision in Defendant's favor would undercut the plea negotiation process, which is an integral part of the criminal justice system, and argues that Defendant may, in fact, be worse off than he otherwise would be if he succeeds in overturning the trial court's judgment in the case in which he was convicted of possession of a firearm by a convicted felon and having attained habitual felon status. Although the plea negotiation process is a recognized part of the criminal justice system and although we are unable to say that there is no risk that Defendant would not be better off in the long-term if he had refrained from advancing the argument that is discussed in the text, neither of these arguments provides any legal justification for a decision to find that Defendant should not be afforded relief based upon his attack on the use of an attempted assault conviction to support his convictions for possession of a firearm by a convicted felon and attaining habitual felon status.

Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not, however, affect the required jurisdictional analysis. *See State v. Oliver*, 186 N.C. 329, 331, 119 S.E. 370, 371 (1923) (stating that "[j]urisdiction of the offense [can] neither be waived nor conferred by consent"); *see also Harkness v. State*, 771 So.2d 588, 589 (Fla. Dist. Ct. App. 1st Dist. 2000) (stating that "[c]onviction of a nonexistent crime is fundamental error which requires reversal, regardless of whether the error was invited by the defendant"); *Upshaw v. State*, 665 So.2d 303, 303-04 (Fla. Dist. Ct. App. 2d Dist. 1995) (holding that defendant's conviction, which stemmed from a *nolo contendere* plea, for committing a nonexistent offense constituted reversible fundamental error); *State v. Tarrer*, 140 Wash. App. 166, 169-70, 165 P.3d 35, 37 (Wash. Ct. App. 2007) (holding that defendant's plea to a nonexistent offense was invalid when entered and must be set aside); *State v. Briggs*, 218 Wis. 2d 61, 65, 68, 74, 579 N.W.2d 783, 786-87, 789 (Wis. Ct. App. 1998) (rejecting the State's argument that, even if, as the defendant contended, the crime of attempted felony murder was not a recognized offense, the defendant had waived his right to challenge the validity of the conviction by entering a guilty plea to that offense on the grounds that "[s]ubject matter jurisdiction cannot be conferred on the court by consent," so that "an objection to it cannot be waived," and concluding that, "[b]ecause the circuit court had no subject matter jurisdiction over a non-existent crime, even though the charge was filed as part of an amended information pursuant to a plea agreement, Briggs's conviction for attempted felony murder must be vacated and the order denying him postconviction relief must be reversed"). As a result, given that Defendant's attempted assault conviction is a nullity and cannot serve to support Defendant's conviction for possession of a firearm by a felon, the trial court's judgment stemming from Defendant's conviction for possession of a firearm by a felon must be vacated.[3]

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3. The State also argues that Defendant is not entitled to collaterally attack the validity of his attempted assault conviction in this case and appears to suggest that Defendant is relegated to the filing of a motion for appropriate relief instead. However, the State has not presented any authority tending to show that the argument that Defendant has advanced in this case is not cognizable on appeal and we know of none. Admittedly, the Supreme Court has held that a defendant is not entitled to argue that the trial court lacked jurisdiction to impose the underlying judgment in a revocation proceeding. *State v. Pennell*, __ N.C. __, __, 758 S.E.2d 383, 387 (2014) (stating that "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence"). As a result of the fact that we have found no decisions indicating that the principle enunciated in *Pennell* and similar cases has been extended beyond the probation revocation context and the fact that, as we have already noted, the parties are generally entitled to treat a void judgment as a nullity, we do not believe that a defendant is precluded from challenging the trial court's jurisdiction to enter an earlier

B. Attempted Assault as Basis for Habitual Felon Finding

[2] In his second challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing the use of his attempted assault conviction to support the determination that he had attained habitual felon status. In view of the fact that, for the reasons set forth above, attempted assault is not a recognized criminal offense in North Carolina, it cannot serve as support for an habitual felon allegation or conviction in this case. As a result, the trial court's judgment in the case in which Defendant was convicted of possession of a firearm by a convicted felon and sentenced as an habitual felon must be vacated and this case must be, for the reasons discussed in more detail below, remanded to the Lenoir County Superior Court for further proceedings not inconsistent with this opinion.

C. Defendant's Right to Input on Cross-Examination

[3] In his third challenge to the trial court's judgments, Defendant contends that the trial court violated his constitutional right to control the nature of the defense that was presented on his behalf. More specifically, Defendant contends that the trial court erred by failing to adequately address an impasse between Defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. Once again, we conclude that Defendant's contention has merit.

1. Standard of Review

An alleged violation of a constitutional right involves a question of law and is reviewed *de novo* by this Court. *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted). A federal or state constitutional violation requires an award of appellate relief in the absence of a demonstration by the State that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

As the Supreme Court stated in *State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954), the attorney-client relationship

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judgment based upon a conviction for a nonexistent offense in a proceeding in which a conviction for that nonexistent offense was used to establish the existence of an element of an offense or charge that has been lodged against the defendant on direct appeal in that case and is not limited to asserting such a claim by means of a motion for appropriate relief or petition for the issuance of a writ of habeas corpus.

> rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld.

"[T]actical decisions – such as which witnesses to call, which motions to make, and how to conduct cross-examination – normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 116 S. Ct. 90, 133 L. Ed. 2d 46 (1995). "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Id.* (quotation marks and citation omitted). In the event that such an impasse occurs, "[t]he attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred." *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) (quotation marks and citation omitted). As a result, when an impasse occurs and the attorney's client insists upon proceeding in a certain manner contrary to the attorney's advice, "the client's wishes must control" and "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.* at 404, 407 S.E.2d at 189.

2. Relevant Facts

At the conclusion of the testimony of Detective Braswell on recross examination, Defendant stated "I need to say something to the witness." After denying Defendant's request, the trial court asked the jury to step out of the courtroom,[4] at which point the following proceedings occurred:

> [Defendant]: You won't ask him what I need to ask him.
>
> The Court: Thank you. All right, let the record reflect that the twelve members of the jury and the alternate juror have

4. As the State notes, the record clearly reflects that Defendant had exhibited less than exemplary behavior throughout earlier portions of the trial proceedings, including having rejected the trial court's suggestion that he refrain from wearing jail clothes in the courtroom, rejecting what may well have been a favorable plea agreement against his trial counsel's advice, and repeatedly contending that the charges that had been lodged against him should be dismissed because of the fact that the State had delayed initiating charges against him, among other things.

> left the courtroom. Let the record reflect that while the jurors were in here, [Defendant] started asking questions. I called [Defendant's trial] counsel to the bench, asked counsel . . . to go back and talk to [Defendant], privately, to determine what [Defendant's] questions were or what [Defendant] wanted to present to the jury. [Defendant's trial counsel] attempted to do so. In the meantime, [Defendant] began speaking out on his own volition in the presence of the jury, and so the Court immediately sent the jury out of the courtroom. And, [Defendant], I can't let you disrupt this trial, and I've already warned you --
>
> [Defendant]: I mean, I can -- I can question the witness.
>
> The Court: Your lawyer questions the witness. You don't --
>
> [Defendant]: Then I'll represent myself. I'm firing my lawyer.
>
> The Court: No. No, you can't do that, I'm sorry.
>
> [Defendant]: See, I can represent myself.
>
> The Court: No, I'm sorry. In my discretion, I'm not allowing you to do that.
>
> [Defendant]: I can represent myself. I can represent myself. It ain't -- ain't no kind of mess like that, because he ain't questioned him what I'm going to question him.
>
> The Court: Well, you ask [Defendant's trial counsel] what you want to ask the --
>
> [Defendant]: I done told him, and ain't none of that stuff been done, and I'm going for the --
>
> The Court: You ask [Defendant's trial counsel] what questions you want to present to the witnesses in front of the jury.

At this point in the exchange, the prosecutor requested the trial court to determine if Defendant should be held in contempt of court and asked that Defendant be removed from the courtroom. In view of the fact that Defendant interrupted the prosecutor on a number of occasions, the trial court instructed Defendant to stop engaging in that sort of behavior and to wait his turn before speaking. At that point, Defendant made additional comments concerning the questions that he wanted his trial counsel to pose to Detective Braswell:

> [Defendant:] I waited till it was our turn to question this witness, and now I ain't even questioned him.
>
> The Court: Well, but the way the process works, you don't ask the questions, your attorney asks the questions.
>
> [Defendant]: He didn't ask -- I told him to ask him. Things wasn't stated. It was things I needed -- I needed to them to hear.
>
> The Court: He is a professional. He is--
>
> [Defendant]: The truth be told about --
>
> The Court: -- very experienced. He knows what he's doing. The manner in which he asks questions is part of the expertise provided by counsel. It's part of the assistance of counsel that's provided. And you are not an attorney, and you are relying on his [assistance].
>
> [Defendant]: I know the law. I know the law.
>
> The Court: -- and you can talk to him and confer with him and let him know what questions you think should be asked, but he asks the questions, not you.
>
> [Defendant]: He got -- he got to ask them, then, and put things out. That's the thing, I'll represent myself. I don't even need a counsel.

At that point, the trial court reiterated its denial of Defendant's request to represent himself and, after admonishing Defendant for the disruptive behavior in which he had engaged throughout the trial, ordered that Defendant be removed from the courtroom. In response, Defendant again expressed his concerns about the manner in which Detective Braswell had been questioned:

> [Defendant]: Well, see, I'll tell him the question, to ask him something, and he don't do it. Come on, man.
>
> The Court: Sir, you're doing it now, and I have not held you in contempt. In my discretion, I have not done that. The State has not brought any obstruction charges --
>
> [Defendant]: Well, I'm -- I'm gonna give him -- I'm gonna have -- I'm gonna talk to him so he can say what I would say?

> The Court: That's how it works, sir.
>
> [Defendant]: Exactly. And he didn't do it. That's what I'm talking about.
>
> The Court: Well, that's between you and [Defendant's trial counsel] --
>
> [Defendant]: I'm gonna get another attorney.
>
> The Court: -- that's not for me to interject.

At that point, the trial court had Defendant removed from the courtroom and instructed the jury that it should not hold Defendant's conduct or his absence from the courtroom against him.

3. Trial Court's Response to the Impasse

Although the record does not disclose the nature of the questions that Defendant wanted his trial counsel to pose to Detective Braswell,[5] the transcript clearly demonstrates that Defendant wanted his trial counsel to pose certain questions to Detective Braswell that were never asked. In addition, an examination of the record reveals that, in the aftermath of Defendant's continued insistence that certain questions be posed to Detective Braswell, Defendant's trial counsel failed to "make a record of the circumstances, [his] advice to the [D]efendant, the reasons for the advice, the [D]efendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Finally, the record clearly establishes that the trial court failed to make inquiry of Defendant and his defense counsel concerning the nature of the questions that Defendant wanted to have posed to Detective Braswell on cross-examination. As a result, given that the questions upon which his request was based were never posed despite his insistence that that be done, Defendant was denied his right to decide "how to conduct cross examination[]." *Id.*

In attempting to persuade us that Defendant has failed to establish that a violation of his right to control his defense occurred, the State points to our decision in *State v. Williams*, 191 N.C. App. 96, 662 S.E.2d 397 (2008), *disc. review denied*, __ N.C. __. 684 S.E.2d 158 (2009) in which we determined that the defendant and his trial counsel had not reached an absolute impasse with respect to the manner in which the

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5. In his brief, Defendant asserts that the questions that Defendant wanted his trial counsel to ask Detective Braswell related to the two-year delay between the date upon which Defendant allegedly possessed the shotgun and the date upon which he was initially charged with unlawfully possessing that weapon.

defendant's peremptory challenges should be exercised and that the disagreement between the defendant and his trial counsel "centered on Defendant's dissatisfaction with the fact that Defendant was required stand trial at all" rather than upon a disagreement over a specific tactical issue. *Id.* at 99, 662 S.E.2d at 399. In concluding that "Defendant's aggressive, violent and abrasive behavior did not rise to the level of an absolute impasse regarding the specific decision as to peremptory challenges," we noted that:

> First, Defendant did not advise defense counsel which six jurors he desired to excuse; in fact, Defendant did not advise defense counsel as to any particular juror he desired to excuse; Defendant tended to show displeasure with the process itself, rather instead of any particular juror in the *voir dire* proceedings; when asked to elaborate in the jury selection process as to which jurors to excuse, Defendant had nothing to add, but deferred to defense counsel. After Defendant was escorted from the courtroom, due to his disruptive behavior, defense counsel excused only four jurors. The court again stated, "now, again, the counsel will have an occasion to talk to the defendant [regarding which jurors to excuse,]" but given the opportunity to speak, Defendant did not dispute defense counsel's use of four peremptory challenges instead of six, and "didn't want to say anything to [his attorney] about this last four[,]" again deferring decisions in the selection process to defense counsel. After Defendant was escorted back into the courtroom, the court directly stated, "your lawyer has questioned the four new jurors, but he hasn't made any decision yet as to who he wants to exclude because . . . he wanted to have a chance to talk with you[.]" When asked whether he "want[ed] to talk to [his] lawyer about the exclusion of these four new jurors[,]" Defendant replied, "No, sir[,]" deferring the decision to defense counsel. In fact, Defendant repeatedly deferred to defense counsel's decision with regard to peremptory challenges, beginning with his initial statement: "[w]hatever six he [sic] talking about, I don't want them[.]" When either defense counsel or the court asked for Defendant's further input in the selection process, Defendant stated multiple times, in his usual combative and contentious manner, that he did not wish to further discuss the selection process at all, thus, deferring the decision to defense counsel.

Id. at 103-04, 662 S.E.2d at 402. Based upon this analysis, we concluded that the only arguably specific impasse relating to a tactical decision revealed by the *Williams* record stemmed from Defendant's desire to impermissibly exercise his peremptory challenges based on racial grounds and held that the defendant's trial counsel was not bound to comply with Defendant's instructions to engage in such constitutionally prohibited conduct. *Id.* at 104-05, 662 S.E.2d at 402-03.

In contrast to the situation addressed in *Williams*, the record developed in this case clearly reveals that Defendant reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination. Although Defendant repeatedly informed the trial court that he wanted his trial counsel to ask certain questions of Detective Braswell and that his trial counsel had not asked these questions, the trial court simply told Defendant that he should discuss this subject with his trial counsel without taking any further action despite Defendant's insistence that he had already done what the trial court had told him to do. Although the trial court in *Williams* provided multiple opportunities for the defendant to discuss the extent to which certain prospective jurors should be peremptorily challenged and clearly indicated that the defendant's lawful wishes with respect to this subject would be honored, Defendant's trial counsel never described the nature of the questions that Defendant wanted posed to Detective Braswell and the trial court never inquired what those questions might be nor instructed Defendant's trial counsel to ask the questions that Defendant wanted put to Detective Braswell. Thus, we do not believe that *Williams* sheds significant light on the proper resolution of this case.

In addition, the State argues that the disagreement between Defendant and his trial counsel, instead of representing an impasse over a specific tactical issue, involved nothing more than a generalized complaint by Defendant about the manner in which his trial counsel represented him during the trial. As the State correctly notes, Defendant made numerous complaints about the quality of the representation that he received from his trial counsel during the course of the trial, with these complaints including the expression of Defendant's belief that his attorney had not adequately addressed his disability and the manner in which he had been treated in jail and that his trial counsel was "going with the DA." The fact that Defendant made such generalized complaints about the representation that he received from his trial counsel during the trial does not in any way establish that Defendant had not reached an absolute impasse with his trial counsel concerning the manner

in which the cross-examination of Detective Braswell should be conducted. Instead, as we have already noted, the transcript of Defendant's trial demonstrates beyond reasonable contradiction that Defendant and his trial counsel reached an impasse with respect to the issue of whether certain specific questions should be posed to Detective Braswell. In light of Defendant's repeated statements that his trial counsel had refused to ask the questions that Defendant wanted posed to Detective Braswell; the trial court's erroneous statement that "that's between you and Mr. Herring" and that it's not its place "to interject"; and that the trial court failed, when the existence of the impasse between Defendant and his trial counsel was brought to its attention, to inquire into the nature of the impasse and order defense counsel "to comply with [his] client's lawful instructions," *Ali*, 329 N.C. at 403, 407 S.E.2d 189, we find the State's second response to this aspect of Defendant's challenge to the trial court's judgment unpersuasive as well.

Finally, the State has not argued that the trial court's error was harmless beyond a reasonable doubt and we would be unable to make such a determination even if the State had advanced a harmless error argument. *See* N.C. Gen. Stat. § 15A-1443(b) (stating that "[t]he burden is on the State to demonstrate, beyond a reasonable doubt, that the error [violating Defendant's constitutional rights] was harmless"). As a result of the fact that no inquiry was conducted into the nature of the impasse that Defendant and his trial counsel had reached concerning the manner in which the cross-examination of Detective Braswell should be conducted, including the nature of the exact questions that Defendant wanted his trial counsel to pose to Detective Braswell, we have no basis, apart from mere speculation, for finding that the State has established that the error at issue here was harmless beyond a reasonable doubt.[6]

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6. Even if we were to assume, in accordance with the unsupported contention advanced in Defendant's brief, that the impasse between Defendant and his trial counsel concerned questioning related to the delay between the date of the incident and the arrest warrant, we could not properly conclude that the error was harmless beyond a reasonable doubt. As a result of the fact that the suspect was not apprehended at the time of the commission of the alleged offense and the fact that the shotgun was not linked to Defendant on the basis of any sort of physical evidence, such as fingerprints, the only evidence identifying Defendant as the individual in possession of the shotgun on the occasion in question was the testimony of Detective Braswell and Commander Barnes. Admittedly, Commander Barnes positively identified Defendant based on his long-standing acquaintance with him. However, the officers' descriptions of the incident in question varied substantially, with Commander Barnes having testified that it occurred between "7:30 and eight o'clock" and that it was "more dark than it was light," while Detective Braswell asserted that "I know it was daylight," "maybe mid-afternoon, three, four o'clock." As a result of the length of time that elapsed between the date upon which Defendant allegedly possessed the shotgun and the date upon which Defendant's case was called for trial, coupled with the inconsistencies

As a result, we have no choice except to conclude that Defendant is entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction.[7]

D. Pre-Indictment Delay

[4] Finally, Defendant contends that the trial court erred by denying his motion that the charges that had been lodged against him be dismissed on the basis of an excessive period of pre-indictment delay. More specifically, Defendant contends that the two year period that elapsed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case violated his constitutional rights. We do not find Defendant's argument persuasive.

1. Standard of Review

As we have already noted, an alleged violation of a constitutional right raises a question of law that is subject to *de novo* review on appeal. *Gardner*, 322 N.C. at 594, 369 S.E.2d at 596. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (quotation marks and citation omitted).

2. Applicable Legal Principles

As an initial matter, we note that "the Speedy Trial Clause of the Sixth Amendment . . . applie[s] only to delay following indictment, information or arrest." *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22, *disc. review denied*, 301 N.C. 97, __ S.E.2d __ (1980). A challenge to a pre-indictment delay is, instead, predicated on an alleged violation of the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* "To prevail, a defendant 'must show both actual and substantial prejudice from the pre-indictment delay and that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the

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between the testimony of Detective Braswell and Commander Barnes, we are unable to conclude beyond a reasonable doubt that the outcome at Defendant's trial would have been the same had the trial court addressed the impasse between Defendant and his trial counsel in a different way.

7. As a result of our decision to grant Defendant a new trial based upon the trial court's failure to resolve the impasse between Defendant and his trial counsel in the manner required by North Carolina law, we need not address Defendant's alternative argument that the trial court erred by rejecting Defendant's request to be allowed to proceed *pro se*.

defendant.' " *State v. Graham*, 200 N.C. App. 204, 215, 683 S.E.2d 437, 444 (2009) (quoting *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "The test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)).

A careful review of the record demonstrates that Defendant has failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense. Although Defendant had sustained a gunshot wound to the head a few months prior to the October 2008 incident and contends, in reliance upon that fact, that he was suffering from a significant visual impairment at the time of the incident underlying this case and that the existence of this condition undermined the validity of the State's claim that he successfully fled from Detective Braswell and Commander Barnes on 16 October 2008, we do not find this contention persuasive. Assuming, without deciding, that Defendant does, in fact, suffer from the visual impairment upon which he relies in an attempt to make the necessary showing of prejudice, Defendant has not shown that the nature and extent of his visual limitations had changed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case or that any other development would have rendered a visual assessment conducted after the date upon which he was formally charged insufficient to effectively advance the argument upon which he now seeks to rely. As a result, since Defendant has not shown that "significant evidence or testimony that would have been helpful to the defense was lost due to delay," *id.*, we have no hesitation in concluding that Defendant is not entitled to relief from the trial court's judgments on the basis of his pre-indictment delay claim.

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court erred by denying Defendant's motions to dismiss the possession of a firearm by a convicted felon and habitual felon charges and that the trial court failed to address the impasse that arose between Defendant and his trial counsel during the testimony of Detective Braswell in the manner required by North Carolina law. However, we further conclude that the trial court correctly denied Defendant's motion to dismiss the charges that had been lodged against him on the basis of excessive

pre-indictment delay. As a result, the trial court's judgment based upon Defendant's convictions for possession of a firearm by a felon and attaining habitual felon status should be, and hereby are, vacated and Defendant should be, and hereby is, awarded a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

VACATED IN PART; NEW TRIAL IN PART.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA
v.
FREDERICK DARNELL JARMAN

No. COA14-572

Filed 16 December 2014

1. Sentencing—habitual felon status—runs consecutively with other sentences

At defendant's resentencing hearing, the trial court did not err by ordering that defendant's term of imprisonment for his conviction as a habitual felon begin at the expiration of his two consecutive sentences for prior convictions. N.C.G.S. § 14-7.6 requires that sentences imposed for habitual felon status "shall run consecutively with and shall commence at the expiration of any sentence being served" by the habitual felon.

2. Sentencing—resentencing—de novo hearing—no error

The trial court properly conducted at de novo hearing for defendant's resentencing. The trial court's comment that "those judges had the benefits of things I do not have in front of me" was a response to defense counsel's request that he consider evidence of mitigation presented at a previous sentencing hearing. Further, the trial court sentenced defendant at the bottom of the presumptive range and therefore was not required to formally find or act on defendant's proposed mitigating factors.

Appeal by Defendant from judgment entered 4 November 2013 by Judge John E. Nobles, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 17 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Erin O. Scott, for the State.

North Carolina Prisoner Legal Services, by Mary E. McNeill, for Defendant—Appellant.

McGEE, Chief Judge.

Frederick Darnell Jarman ("Defendant") appeals from a judgment entered pursuant to a resentencing hearing that corrected his prior record level determination from a level IV to a level III offender, and sentenced him to a term of 93 months to 121 months' imprisonment, to begin at the expiration of two consecutive sentences imposed for prior convictions. We affirm.

Defendant was found guilty by a jury of possession with intent to sell and deliver cocaine and entered a plea of no contest to having attained the status of an habitual felon on 15 April 1998. *See State v. Jarman (Jarman II)*, 132 N.C. App. 398, 518 S.E.2d 579, slip op. at 1 (1999) (unpublished), *cert. denied*, 351 N.C. 644, 543 S.E.2d 879 (2000). After finding that the factors in aggravation outweighed the factors in mitigation, and based on the trial court's determination that Defendant was a prior record level IV offender, he was sentenced to a term of 133 to 169 months' imprisonment. *See id.* The trial court further ordered that Defendant's sentence begin at the expiration of two consecutive terms of 125 to 159 months' imprisonment that Defendant was then obligated to serve from December 1997 convictions for forgery, uttering a forged check, and being an habitual felon. *See State v. Jarman* (*Jarman I)*, 131 N.C. App. 702, 515 S.E.2d 758, slip op. at 1, 3 (1998) (unpublished).

Defendant is said to have filed a motion for appropriate relief requesting a resentencing hearing to correct his prior record level determination from a designation as a level IV offender to a designation as a level III offender, and to reconsider his sentence for his 15 April 1998 convictions in light of the correction to his prior record level determination. Defendant's resentencing hearing ("the hearing") was held on 4 November 2013.

At the hearing, the State conceded an error in calculating Defendant's prior record level, and submitted to the trial court a corrected worksheet with Defendant's level III offender designation, along with the sentencing grid that was in effect at the time the offenses were committed. Defense counsel then asked the court to make findings as to mitigating

factors because counsel opined, among other things, that: Defendant "only ha[d] 13 infractions since he'[d] been in prison;" Defendant's mother was present at the hearing; Defendant had a "handicapped brother at home;" and Defendant had a job as a janitor and had taken classes in prison. Counsel did not seek to present any testimonial or documentary evidence for the court to consider in support of counsel's declarations, and the trial court did not make any findings as to aggravating or mitigating factors. Defense counsel then requested that the trial court allow Defendant's sentence for the 15 April 1998 convictions to run consecutively with the first of Defendant's two consecutive terms of 125 to 159 months' imprisonment for his December 1997 convictions, so that Defendant's sentence for the present case would run concurrently with the second term of imprisonment for his 1997 convictions. The trial court declined counsel's request, and sentenced Defendant at the bottom of the presumptive range to a term of 93 to 121 months' imprisonment for his 1998 convictions, to begin at the expiration of the two consecutive terms of imprisonment Defendant was serving for his 1997 convictions. Defendant appeals.

[1] Defendant first contends the trial court erred when it ordered that Defendant serve the sentence imposed for his 1998 habitual felon conviction upon the expiration of both terms of imprisonment for his 1997 convictions, rather than concurrently with the second term of imprisonment arising from his 1997 convictions. Defendant asserts the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run Defendant's 1998 sentence concurrently with the second term of imprisonment arising from his 1997 convictions. We disagree.

N.C. Gen. Stat. § 14-7.6 has long provided that "[s]entences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2013); N.C. Gen. Stat. § 14-7.6 (1997). Our Courts have also long recognized that, when this language has been examined in other criminal statutory provisions, such language is "clear" and "unambiguous," *e.g.*, *State v. Wall*, 348 N.C. 671, 675, 502 S.E.2d 585, 588 (1998) (N.C. Gen. Stat. § 14-52); *State v. Warren*, 313 N.C. 254, 265, 328 S.E.2d 256, 264 (1985) (N.C. Gen. Stat. § 14-52); *State v. Woods*, 77 N.C. App. 622, 625-26, 336 S.E.2d 1, 2-3 (1985) (N.C. Gen. Stat. § 14-87(d)), *aff'd per curiam*, 317 N.C. 143, 343 S.E.2d 538 (1986); *see*, *e.g.*, *State v. Ellis*, 361 N.C. 200, 206, 639 S.E.2d 425, 429 (2007) (N.C. Gen. Stat. § 14-87(d)); *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010) (N.C. Gen. Stat. § 90-95(h)(6)), and

its plain meaning is "that a term imposed for [such offenses] under the [respective] statute[s] is to run consecutively with *any other sentence* being served by the defendant." *See Warren*, 313 N.C. at 265, 328 S.E.2d at 264. We find no authority, and have been directed to none, that would require us to construe the substantively-similar language of N.C. Gen. Stat. § 14-7.6 any differently than our Courts have previously construed it for other statutory provisions in Chapter 14 of the North Carolina General Statutes. Thus, we conclude that the plain meaning of the last sentence of N.C. Gen. Stat. § 14-7.6 requires that a term of imprisonment imposed pursuant to a conviction as an habitual felon must "run consecutively with *any other sentence* [or sentences] being served by [a] defendant." *See id.*

Nevertheless, in the present case, Defendant directs our attention to an excerpt from N.C. Gen. Stat. § 15A-1354(a), which provides as follows: "When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354(a) (2013); N.C. Gen. Stat. § 15A-1354(a) (1997). Defendant relies on this language to insist that the trial court "ha[d] the discretion to determine which prior sentence to run the habitual felon sentence consecutive to." However, Defendant seems to have overlooked the last sentence of this statutory subsection, which further provides: "*If* not specified or *not required by statute to run consecutively*, sentences shall run concurrently." N.C. Gen. Stat. § 15A-1354(a) (emphases added). Since we have determined N.C. Gen. Stat. § 14-7.6 requires that sentences imposed pursuant to this provision must "run consecutively with *any other sentence*," *see Warren*, 313 N.C. at 265, 328 S.E.2d at 264, the discretion that would otherwise be afforded to the trial court with respect to sentencing pursuant to N.C. Gen. Stat. § 15A-1354(a) is inapposite to N.C. Gen. Stat. § 14-7.6. Accordingly, we conclude the trial court did not misapprehend the law or abuse its discretion when it ordered that Defendant's term of imprisonment for the sentence at issue in the present case begin at the expiration of the two consecutive sentences imposed for Defendant's prior 1997 convictions.

[2] Defendant next contends the trial court failed to conduct a *de novo* resentencing hearing. Specifically, Defendant asserts the trial court made statements "indicating that it was not conducting a *de novo* resentencing and did not understand that it should." We disagree.

"It has been established that each sentencing hearing in a particular case is a *de novo* proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370

S.E.2d 68, 69 (1988). "The judge hears the evidence without a jury," *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 388 (1985), "and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *State v. Brooks*, 136 N.C. App. 124, 133, 523 S.E.2d 704, 710 (1999) (internal quotation marks omitted), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). "Although [the judge] must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist." *Jones*, 314 N.C. at 648, 336 S.E.2d at 388. At each sentencing hearing, "the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation," *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986), and must find aggravating and mitigating factors "without regard to the findings in the prior sentencing hearings." *Jones*, 314 N.C. at 649, 336 S.E.2d at 388.

"[H]owever, the trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences." *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363 (internal quotation marks omitted), *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007). When a trial court "enter[s] a sentence within the presumptive range, the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible." *Id.* (citing *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006) ("[The] notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected."), *appeal after remand*, 188 N.C. App. 799, 656 S.E.2d 704 (2008)).

In the present case, Defendant directs our attention to the following comment from the trial court as support for its assertion that the court misapprehended its obligation to conduct *de novo* review: "I agree with you that two Class Is and Class H, you don't normally think in terms of 30 years, but those judges had the benefits of things I do not have in front of me." Defendant asserts that "[t]his statement indicates that the trial court felt that its discretion on how to sentence [him] was limited by the decision of the original sentencing court," and "indicates that the trial court did not understand that it could consider mitigating factors and had the discretion to sentence [Defendant] in the mitigated range." However, our review of the context of this remark

shows that the trial court was responding to defense counsel's earlier entreaty that it consider evidence of mitigation presented during the sentencing phase for Defendant's two 1997 Class I convictions, which convictions were not subject to review by the trial court. Thus, the court properly recognized that it could not consider evidence of mitigation from, or consider modifying the sentences of, Defendant's prior convictions that were not before it for review. Therefore, after reviewing the transcript of the resentencing proceedings in its entirety, we are not persuaded that the trial court's arguably imprecisely worded remarks demonstrate that it "did not understand" its obligation to conduct a *de novo* review of the evidence that was properly before it for consideration. Since the trial court sentenced Defendant at the bottom of the presumptive range based on Defendant's corrected prior record level determination, and since "the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible" when it sentences a defendant within the presumptive range, *see Dorton*, 182 N.C. App. at 43, 641 S.E.2d at 363, we conclude that this issue on appeal is without merit.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.

STATE OF NORTH CAROLINA
v.
MAJOR WOODY MYERS, JR.

No. COA14-504

Filed 16 December 2014

1. Sentencing—second-degree murder—aggravating factors—especially heinous atrocious or cruel

The trial court's finding that a second-degree murder was especially heinous, atrocious, or cruel was not supported by the evidence. Additional injuries found on the victim's hands and face before she was shot did not alone rise to the necessary level of extreme physical and psychological suffering; defendant was in the home that he lawfully shared with the victim and his mere presence in his own home did not make his actions especially atrocious, heinous, or

cruel; and the fact that the victim did not die instantaneously did not support the factor because the medical examiner testified that the victim likely lost consciousness shortly after being shot and there was no indication she suffered.

2. Sentencing—second-degree murder—aggravating factors—position of trust or confidence—spouse

The trial court's finding that defendant took advantage of a position of trust or confidence in order to kill his wife was not supported by the evidence. In essence, the State argued that the marital nature of the relationship made his killing a *per se* taking advantage of a position of trust or confidence. However, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence to effectuate the offence.

3. Sentencing—second-degree murder—aggravating factors—not supported by evidence—disposition

Where neither of the aggravating factors supporting a sentence for second-degree murder had a sufficient factual basis in the record, the Court of Appeals determined that the proper disposition for defendant's appeal was to set aside his plea agreement and remand for disposition on the original charge of first-degree murder.

Appeal by Defendant from judgment entered 19 February 2009 by Judge Donald Stephens in Superior Court, Caswell County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Linda B. Weisel for Defendant.

McGEE, Chief Judge.

Major Woody Myers, Jr. ("Defendant") was charged with the first-degree murder of his wife, Darlene Myers ("Ms. Myers"). During Defendant's trial, Defendant entered an Alford plea to second-degree murder, pursuant to a plea agreement. The plea agreement required that Defendant concede the existence of two aggravating factors in connection with Ms. Myers' homicide. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced Defendant for second-degree murder in the aggravated range. On appeal, Defendant contends there was an insufficient factual basis

to support the aggravating factors. We agree with Defendant. Thus, the plea agreement must be set aside, and we remand for disposition on Defendant's original charge of first-degree murder.

I. Background

Defendant and Ms. Myers lived together in rural Caswell County. Defendant regularly shot targets with firearms on their property. Defendant's neighbor, Danny Gregory ("Mr. Gregory"), disliked Defendant's target shooting and at times argued with Defendant over his practice of target shooting. Mr. Gregory's cousin, Tony Cook ("Mr. Cook"), was working on Mr. Gregory's property with other workers around 11:00 a.m. on 14 January 2008, when Mr. Cook heard gun shots coming from Defendant's property. Defendant was conducting target practice with his Taurus 9mm pistol ("the pistol"). Fearing that he or one of the other workers might be struck by a stray bullet, Mr. Cook confronted Defendant, and the two argued. Defendant eventually calmed down, apologized, went into his house, and Mr. Cook returned to his work.

Within the hour, at 11:37 a.m., Defendant called 911 and reported a shooting inside his home. Law enforcement and emergency medical personnel arrived at Defendant's home around 11:50 a.m. and found Ms. Myers lying unresponsive and face down on the kitchen floor with a fatal gunshot wound in the back of her head. Other than an overturned space heater, the kitchen appeared undisturbed. In spite of multiple attempts at resuscitation, Ms. Myers was pronounced dead at 1:07 p.m., ninety minutes after the 911 call.

Defendant was not at home when law enforcement arrived. After calling 911, Defendant left his house and went to his stepdaughter's house to tell her what had happened. However, Defendant eventually returned and peacefully surrendered to law enforcement. Defendant subsequently was indicted for first-degree murder.

At trial, Defendant testified that he had consumed two 22-ounce beers and had smoked some marijuana on the morning of 14 January 2008, before engaging in target practice. Defendant further testified that, after his confrontation with Mr. Cook, he went inside his house and had a heated conversation with Ms. Myers over his ongoing disputes with Mr. Gregory. Defendant stated that he was frustrated, was talking with his hands, and that he continued to hold the pistol while he spoke. However, the pistol reportedly had a "hair-pin trigger," and Defendant testified that it accidently discharged and shot Ms. Myers in the head. The State contends the shooting was intentional.

Medical Examiner Deborah Radisch ("Dr. Radisch") testified that the cause of Ms. Myers' death was one "very tangential . . . almost a glancing" gunshot wound across the back of Ms. Myers' head. She testified that the gunshot was not made point-blank or in close range because there was no stippling about the wound. Dr. Radisch further testified that Ms. Myers likely lost consciousness shortly after being shot. She said that Ms. Myers had several bruises and abrasions on her face and hands, which "could be consistent with defens[ive] wounds." These injuries were visibly "faint" and not very large; although Dr. Radish testified that, if Ms. Myers sustained the injuries right before being shot, her subsequent, and significant, blood loss would have minimized the amount of bruising that otherwise might have developed. Dr. Radisch further testified that these injuries were also consistent with injuries "inflicted by being struck by a blunt force object or perhaps a fall onto a hard surface," and "more likely than not" were incurred before the gunshot wound.

At the close of all the evidence, and pursuant to a plea agreement ("the plea agreement"), Defendant entered an *Alford* plea to second-degree murder. The plea agreement provided that

> [u]pon Defendant's plea to second-degree murder with the existence of aggravating factors ([taking] advantage of [a] position of trust and confidence, and [especially heinous], cruel, and atrocious); Defendant waives notice of aggravating factors; and sentencing will be in the aggravated range.

The trial court conducted a plea colloquy with Defendant, found factual bases for the above-listed aggravating factors, and accepted Defendant's plea. The trial court sentenced Defendant in the aggravated range for second-degree murder. Defendant did not enter a notice of appeal. However, Defendant filed a petition for a writ of certiorari with this Court on 7 October 2013 to review his sentence, which this Court granted.

II. Standard of review

The standard of review for a sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and at the sentencing hearing. *See State v. Choppy*, 141 N.C. App. 32, 43, 539 S.E.2d 44, 51 (2000).

III. Analysis

On appeal, Defendant contends there was not a sufficient factual basis for the trial court to find the aggravating factors listed in Defendant's plea agreement. Defendant is correct.

A. Especially Atrocious, Heinous, or Cruel

[1] During Defendant's sentencing hearing, the trial court found that

> [Ms. Myers] suffered blunt force trauma to her face in the nature of an assault separate and apart from the final assault that caused her death, and the totality of the assault that she suffered . . . in combination [was] especially atrocious, heinous, and cruel and therefore, the Court makes that finding in aggravation.

There is not a sufficient factual basis in the record to support this finding.

All homicides are gruesome. However, to support a finding that a homicide was especially heinous, atrocious, or cruel, the defendant's acts must have been characterized by "*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*" in the homicide charged. *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983).

In *State v. Martin*, 303 N.C. 246, 250-53, 278 S.E.2d 214, 217-19 (1981), the trial court properly found a homicide was especially heinous, atrocious, or cruel where the victim was paralyzed from the waist down after being shot by the defendant. The defendant then, over a twenty-five minute period, dragged the victim into another room, beat her with a pistol, threw her repeatedly against a wall, beat her on the head with his fists, and beat her again with the pistol before finally firing the fatal shots. *Id.* at 252, 278 S.E.2d at 218. Similarly, in *State v. Shadrick*, 99 N.C. App. 354, 355, 393 S.E.2d 133, 133 (1990), the trial court properly found this aggravating factor where,

> on the day of the offense and prior to the victim's death, [the] defendant assaulted the victim, his wife, by pushing her and pulling her by the hair of her head, [the] defendant placed a gun to the victim's head and clicked the trigger, and [the] defendant burned the victim's clothes in her presence and burned her pubic hair.

Assuming *arguendo* that Defendant did cause the additional injuries found on Ms. Myers' hands and face before she was shot, although deplorable, those injuries alone do not rise to the level of extreme physical and psychological suffering that would support a finding that the circumstances surrounding Ms. Myers' death were especially atrocious, heinous, or cruel.

The State also argues that a finding of this aggravating factor is supported by the fact that Ms. Myers was killed within the "sanctuary" of her home. In support of this contention, the State cites several sources of authority, specifically *State v. Garcell*, 363 N.C. 10, 66, 678 S.E.2d 618, 653 (2009); *State v. Cummings*, 361 N.C. 438, 477, 648 S.E.2d 788, 811-12 (2007); and *State v. Smith*, 359 N.C. 199, 220, 607 S.E.2d 607, 622 (2005). While it is true that killing someone in his or her home can help support a finding that a homicide was especially heinous, atrocious, or cruel, the present case is distinguishable from the authority presented by the State. The defendants in *Garcell*, *Cummings*, and *Smith* did not live with their victims, and they either had no lawful right to be in the victims' homes when the homicides occurred or had tricked their way inside. *See Garcell*, 363 N.C. at 21, 678 S.E.2d at 626; *Cummings*, 361 N.C. at 443, 648 S.E.2d at 792; *Smith*, 359 N.C. at 203, 607 S.E.2d at 612. In the present case, Defendant was in the home that he lawfully shared with Ms. Myers when she was shot. As such, Defendant's mere presence in his own home did not make his actions especially atrocious, heinous, or cruel.

Finally, the State contends that a finding of this aggravating factor is supported by the fact that Ms. Myers did not die instantaneously; indeed, from the time Defendant called 911, it took Ms. Myers ninety minutes to die. In support of its contention, the State points only to *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). However, in *Stanley*, this aggravating factor was found unsupported by the evidence where the victim was shot, "rendered . . . unconscious within minutes," and died some time later. *Id.* at 340, 312 S.E.2d at 398. The *Stanley* Court expressly stated that even where "death is not instantaneous, . . . [this] does not alone make a murder especially heinous, atrocious or cruel." *Id.* at 337, 312 S.E.2d at 396.

In the present case, Dr. Radisch's testimony indicated that Ms. Myers likely lost consciousness shortly after being shot and, although she was not pronounced dead for at least another ninety minutes, there was no indication she suffered during that time period. As such, the present case is not distinguishable from *Stanley*, and the State's argument here is without merit. Therefore, for all the above reasons, the trial court's finding that the circumstances surrounding Ms. Myers' death were especially heinous, atrocious, or cruel was not supported by the evidence.

B. Position of Trust or Confidence

[2] During Defendant's sentencing hearing, the trial court also found that

> given the relationship between the Defendant and the victim, his wife, that the Defendant did take advantage of a position of trust, including a domestic relationship[,] to commit this offense, and therefore finds aggravating factor number 15 based upon the evidence presented to the jury and to this Court with regard to what occurred on January the 14th of 2008, at the time, prior to the victim's death.

This, too, is not supported by the evidence.

In essence, the State presents this Court with the argument that the marital nature of Defendant's and Ms. Myers' relationship made his killing her a *per se* taking advantage of a position of trust or confidence. Indeed, the State's argument that the trial court's finding was supported by the evidence rests on a contention that Defendant and Ms. Myers had been married for eighteen years, they shared a home together, and that Ms. Myers was shot while not directly facing Defendant because "she had no reason to distrust [Defendant] immediately before he fired the gun." However, "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where '[t]here was no evidence showing that defendant *exploited* his wife's trust in order to kill her.'" *State v. Wiggins*, 159 N.C. App. 252, 269, 584 S.E.2d 303, 316 (2003) (quoting *State v. Marecek*, 152 N.C. App. 479, 514, 568 S.E.2d 237, 259 (2002)) (emphasis added). In other words, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence with his or her spouse in some way to effectuate the offense. *See e.g.*, *State v. Arnold*, 329 N.C. 128, 135, 144, 404 S.E.2d 822, 826, 832 (1991) (aggravating factor supported by the evidence where the defendant asked her husband to retrieve her purse from their church late at night, and where, upon arrival, the husband was ambushed by the wife's lover and killed). In the present case, there is no evidence that Defendant asked Ms. Myers to face away from him before firing the pistol, or that he otherwise utilized his position of trust or confidence with Ms. Myers in order to effectuate her death. As such, the trial court's finding that Defendant took advantage of a position of trust or confidence in order to kill Ms. Myers also was not supported by the evidence.

C. Rescinding the Plea Agreement

[3] Because neither of these aggravating factors has a sufficient factual basis in the record, this Court now must determine the proper disposition for Defendant's appeal. In *State v. Rico*, 218 N.C. App. 109, 110, 720 S.E.2d 801, 802 (2012), *rev'd in part per curiam for the reasons*

stated in the dissent, 366 N.C. 327, 734 S.E.2d 571 (2012), the defendant was charged with first-degree murder. The defendant entered into a plea agreement, through which he pleaded guilty to voluntary manslaughter and admitted to the existence of an aggravating factor in connection with the homicide. *Id.* at 110–11, 720 S.E.2d at 802. The trial court accepted the plea agreement and found the existence of the aggravating factor that was included in the plea agreement. *Id.* at 111, 720 S.E.2d at 802. After being sentenced in the aggravated range for voluntary manslaughter, the defendant appealed and successfully challenged the factual sufficiency of that aggravating factor. *Id.* at 118, 720 S.E.2d at 806. However, because the defendant "elected to repudiate a portion of his [plea] agreement," the "essential and fundamental terms of the plea agreement were unfulfillable." *Id.* at 122, 720 S.E.2d at 809 (Steelman, J, dissenting in part). As a result, the plea agreement had to be set aside, and the case was remanded to superior court for disposition on the original charge of first-degree murder. *Rico*, 366 N.C. at 327, 734 S.E.2d at 571; *accord State v. Smith*, __ N.C. App. __, __ S.E.2d __, COA13-742-2, slip op. at 9–10 (Aug. 5, 2014) (unpublished) (setting aside the defendant's plea agreement, which defendant repudiated, and remanding for disposition on the original charges against the defendant).

Defendant's case is indistinguishable from *Rico*. Defendant entered into a plea agreement, through which he pleaded guilty to a lesser included offense of first-degree murder and admitted to two aggravating factors in connection with Ms. Myers' homicide. On appeal, Defendant successfully challenges the factual bases for the aggravating factors set out in his plea agreement. Therefore, as required by *Rico*, Defendant's plea agreement must be set aside and this case is remanded for disposition on the original charge of first-degree murder.

Reversed and remanded; new trial.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA
v.
KELLY WINTON PIERCE

No. COA14-574

Filed 16 December 2014

1. Sexual Offenders—registration—failure to notify new sheriff's office of change of address—sufficiency of indictment

Although the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender improperly alleged that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office, the "new county sheriff."

2. Sexual Offenders—registration—new address—amendment of indictment—expansion of dates of offense

The trial court did not err by allowing the State to amend the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender to expand the dates of the offense from 7 November 2012 to June to November 2012. The amendment did not substantially alter the charge because the specific date that defendant moved was not an essential element of the crime. Further, defendant's argument that timing was of the essence in charges involving failure to report a change of address as a sex offender was without merit. Finally, defendant failed to show that he detrimentally relied on the original date of the offense and that he was substantially prejudiced by the amendment.

3. Sexual Offenders—registration—failure to notify sheriff's office of change of address—motion to dismiss—temporary home address

The trial court did not err by denying defendant's motion to dismiss the charge of failing to notify the sheriff's office of a change of address as a registered sex offender based on the State's alleged failure to provide substantial evidence that defendant changed his address. The State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address, in Wilkes County.

STATE v. PIERCE

[238 N.C. App. 141 (2014)]

Appeal by defendant from judgment entered 7 November 2013 by Judge Ronald E. Spivey in Wilkes County Superior Court. Heard in the Court of Appeals 21 October 2014.

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

Brock & Meece, P.A., by C. Scott Holmes, for defendant.

HUNTER, Robert C., Judge.

Defendant appeals the judgment entered after he was convicted of failing to notify the sheriff's office of a change of address as a registered sex offender ("failure to notify") and pled guilty to attaining habitual felon status. On appeal, defendant only challenges the failure to notify conviction and argues that: (1) the indictment was fatally defective because it named the wrong sheriff's department where notification was required and failed to allege a "failure to report in person"; (2) the trial court erred in allowing the indictment be amended with regard to the dates of offense; and (3) the trial court erred in denying defendant's motion to dismiss because the State failed to provide substantial evidence that he resided in Wilkes County.

After careful review, we find no prejudicial error.

Background

In 2009, defendant was convicted of four counts of indecent liberties with a child, an offense that required him to register as a sex offender. In November 2010, defendant registered as a sex offender in Burke County. Deputy Robin Jennings at the Burke County Sheriff's Office reviewed all the sex offender registration requirements with defendant, including the requirement that, if he moved to a different county, he would be required to appear in-person and provide written notice of the address change to both the sheriff in the county where he was most currently registered and the new sheriff. However, the State contends that defendant moved to Wilkes County during the summer of 2012 but failed to notify the Wilkes County Sheriff's Office that he had moved. Defendant denies it and claims that he still resided in Burke County throughout 2012 where he was properly registered. Both sides presented evidence at trial in support of their contentions.

I. The State's Evidence

Defendant's ex-wife, Marilyn Joann Long ("Joann"), lived in Wilkes County. At trial, Melissa Anderson ("Melissa"), who lived next door to Joann, testified on behalf of the State. Melissa claimed that, beginning in June 2012, she saw defendant at Joann's house "all week," "at least five days a week," and "every evening." Although she acknowledged that defendant would usually be gone on the weekends, he was "always there" during the week. Furthermore, she alleged that defendant did things around Joann's home "like a normal person living in a house" such as mowing the yard.

Joy Griffin ("Joy"), who lived in the trailer in front of Joann's, also testified at trial. She claimed that, in June, she saw defendant in her backyard with a headlight on his head. Joy alleged that defendant would be at Joann's two or three days, leave for a day, and then come back. He would be there all day and all night. Ultimately, in November 2012 after she found out that defendant was a registered sex offender, Joy called the Wilkes County Sheriff's Office and reported that defendant was living with Joann.

II. Defendant's Evidence

Defendant testified on his own behalf at trial and claimed that he never moved in with Joann. Although he conceded that he may have stayed with Joann two or three days in a row to help her with home improvement projects, he usually just drove back and forth between Morganton and Wilkesboro. Joann's testimony was similar to defendant's. She claimed that defendant travelled back and forth between Morganton and Wilkesboro to help her. According to Joann, although he may have spent one or two nights with her a week, "that was about the limit."

At trial, defendant produced several documents showing an address in Burke County, including his driver's license, an electricity bill from November 2012, his bank account statements, a wireless phone bill, car registration and tax bill, and his disability check. According to defendant, these documents showed that he still resided in Burke County.

Defendant also relied on the testimony of Earl Miller ("Earl"), his neighbor in Burke County, to support his claim that he never moved to Wilkes County. According to Earl, he helped defendant complete several projects around his mobile home, including installing a water pump and water heater. Earl claimed that he and his wife saw defendant every other day during 2012 and that defendant often ate dinner with him, sometimes five times a week.

On 7 November 2012, Lieutenant Whitley from the Wilkes County Sheriff's Office took the report from Joy that defendant was living with Joann. He and Sergeant Coles went to Joann's home to investigate. Defendant denied that he was living with Joann, claiming that he stays with her "from time to time." Based on their investigation and defendant's failure to register in Wilkes County, they arrested defendant for failure to notify the Wilkes County Sheriff's Office.

On 22 July 2013, defendant was indicted for failure to notify pursuant to N.C. Gen. Stat. §§ 14-208.11(a)(7) and 14-208.9(a). The date of offense was 7 November 2012. The indictment read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did as a person required by-Article 27A of Chapter 14 of the General Statues to register as a sexual offender, moved from Morganton, North Carolina, which is Burke County, North Carolina to Wilkes County, North Carolina, thereby the defendant changed his address to Wilkes County, North Carolina, and the defendant failed to provide written notice within 10 days after his change of address to the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office as required by statute.

At trial, the court allowed the State to amend the date of offense from 7 November 2012 to June to November 2012. The jury found defendant guilty on 6 November 2013 of failing to notify the Wilkes County Sheriff's Office of his address change, and defendant pled guilty to attaining the status of being a habitual felon. The trial court sentenced defendant to a minimum term of 87 months to a maximum term of 117 months imprisonment. Defendant appeals.

Arguments

[1] Defendant first argues that the indictment was fatally defective because it failed to include all the essential elements of the offense. Specifically, defendant contends that the indictment was fatal in two respects. First, it failed to include the essential element that defendant "report in person" as required by sections 14-208.11(a)(7) and 14-208.9(a). Second, defendant argues that it improperly alleges a failure to notify "the last registering sheriff"; in contrast, defendant contends that it should allege that defendant failed to notify "the sheriff of

the new county." We disagree; although the indictment improperly alleges that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office—the "new county sheriff."

This Court reviews the sufficiency of an indictment de novo. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). Regarding its sufficiency, it is well-established that:

> The indictment is sufficient if it charges the offense in a plain, intelligible and explicit manner. Indictments need only allege the ultimate facts constituting each element of the criminal offense, and an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.

State v. Barnett, __ N.C. App. __, __, 733 S.E.2d 95, 98 (2012).

A person who is required to register as a sex offender commits a felony if he "[f]ails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(7) (2013). In turn, section 14-208.9(a), the statute defendant was indicted for violating, sets out two basic sets of notification requirements for registered sex offenders. First, to the sheriff of the county with whom the person had last registered, i.e., the "last registering sheriff," the person must provide in-person and written notice of the new address "not later than the third business day after the change." *Id.* Second, if the person moves to a new county, he must also report in-person and provide written notice of his address within 10 days after the change in address to the sheriff of the new county, i.e., the "new county sheriff." *Id.*

Here, the indictment alleges that defendant violated section 14-208.9(a) by failing to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office as required by statute." As to defendant's first contention that the indictment was fatally defective for not alleging that defendant failed to give in-person notification to the Wilkes County Sheriff's Office, defendant has failed

to show any defect in the indictment. Defendant is correct that a registered sex offender must provide both in-person notification and written notice of the new address. However, defendant was only prosecuted and convicted based on his failure to give 10 days of written notice, which, by itself, constitutes a violation of section 14-208.9(a). Thus, the indictment properly charged a violation of section 14-208.9(a) based on his failure to provide written notice of his new address to the "new county sheriff." Consequently, defendant has failed to establish any defect in the indictment based on the type of notification defendant was charged with failing to provide.

Next, as to the indictment's reference to the wrong sheriff's department, clearly, there is a conflict in the language of the indictment. Specifically, while the indictment alleges that defendant failed to give written notification of the address change to "the last registering sheriff," it references the Wilkes County Sheriff's Office which is the new county's sheriff's office. Thus, the issue is whether the conflict constituted a fatal variance.

Here, read in totality, the language of the indictment would put defendant on notice that he was being prosecuted for failing to give notice to the "new county sheriff," not the "last registering sheriff," for two primary reasons. First, the indictment actually named the sheriff's department properly—the Wilkes County Sheriff's Office. Second, the 10-day notice requirement only applies to the "new county sheriff," not the "last registering sheriff." Thus, although the indictment improperly references the "last registering sheriff," this language is not fatal to the indictment because the other language was sufficient to charge a violation of section 14-208.9(a) for failing to provide in-person notification to the "new county sheriff."

[2] Next, defendant argues that the trial court erred in allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. We disagree.

This Court reviews a trial court's granting of the State's motion to amend an indictment *de novo*. *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596 (2010). "A change of the date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment." *State v. Wallace*, 179 N.C. App. 710, 716, 635 S.E.2d 455, 460 (2006). "Where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment." *State v. Taylor*, 203 N.C. App. 448, 457, 691 S.E.2d 755, 763 (2010).

Here, the amendment of the dates of offense did not substantially alter the charge against defendant because the specific date that defendant moved to Wilkes County was not an essential element of the crime. In *State v. Harrison*, 165 N.C. App. 332, 336, 598 S.E.2d 261, 263 (2004), this Court rejected the defendant's argument that the specific date that the sex offender moved was an essential element of the crime of failing to register as a sexual offender pursuant to N.C. Gen. Stat. § 14-208.11(a)(2). Accordingly, time is not be an essential element of a violation under section 14-208.11(a)(7), and the trial court was permitted to amend the dates of offense in the indictment.

Furthermore, defendant's argument that "timing is of the essence in charges involving failure to report a change of address as a sex offender" is without merit. The only time element that must be alleged in the indictment charging a violation of section 14-208.11 is the time period in which the registered sex offender has to notify the sheriff of a change of address, not the date he moves. Here, since the indictment properly alleged that defendant failed to provide written notice to the Wilkes County Sheriff's Office within 10 days after his change of address, the indictment sufficiently alleged the relevant time element, and the amendment of the dates of the offense did not substantially alter the charges against defendant.

Finally, defendant has failed to show that he detrimentally relied on the original date of offense and was substantially prejudiced by the amendment. *See State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001). Defendant contends he was deprived of the ability to present a meritorious defense because he only focused on the original date in the indictment in preparing for trial. Specifically, he claims that he only brought bills and proof of his address from November and December 2012. However, at trial, both Joann and Earl testified that defendant was still living in Burke County throughout the time period set out in the amended indictment. Therefore, defendant has not demonstrated that he was prejudiced by relying on the original timeframe set forth in the indictment. Accordingly, the trial court did not err in allowing the amendment of the indictment.

[3] Next, defendant argues that the trial court erred in denying his motion to dismiss because the State failed to provide substantial evidence that defendant changed his address. Taking the evidence in a light most favorable to the State, we disagree.

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007). However, the trial court must consider all the evidence in a light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

With regard to what constitutes a sex offender's "home address," our Supreme Court has rejected the notion that it is only "a place where a registrant resides and where that registrant receives mail or other communication." *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009). Instead, the Court held that

> a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. Domicile is a legal term of art that denotes one's permanent, established home, whereas a person's residence may be only a temporary, although actual, place of abode.

Id. at 331, 677 S.E.2d at 451 (internal citations and quotation marks omitted). The Court went on to say that

> mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

Id. at 332, 677 S.E.2d at 451. Thus, the issue is whether the State presented substantial evidence that defendant changed his residence or actual place of abode, even temporarily.

Here, the testimony of Melissa and Joy support a reasonable inference that defendant resided with Joann at her home in Wilkes County. Specifically, Melissa testified that, even though defendant often left on weekends, he would be at Joann's house all week, including the evenings; Joy claimed that defendant would be at Joann's house more often than not. Furthermore, Melissa testified that defendant engaged

in certain "activities of life," *id.*, like mowing the yard, that would be normal for someone residing at Joann's. In sum, the evidence tended to show that defendant had more than just a "physical presence" at Joann's but, instead, had established a residence there. Thus, the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a "temporary home address," *see id.* at 331, 677 S.E.2d at 451, in Wilkes County. Accordingly, this evidence tended to show that defendant changed his "home address," as that term is described in *Abshire*, and was sufficient to defeat defendant's motion to dismiss.

We find the facts of this case analogous to *Abshire*. In *Abshire*, the defendant, a registered sex offender, was charged with violating section 14-208.11 by failing to notify the Caldwell County Sheriff's department that she changed her address *Id.* at 326, 677 S.E.2d at 448. The evidence at trial tended to show that, in July 2006, the defendant notified the Caldwell County Sheriff's Office that she had changed her address to a house on Gragg Price Lane in Hudson, North Carolina. *Id.* at 324-25, 677 S.E.2d at 447. This home was owned by Ross Price ("Mr. Price"). *Id.* at 325, 677 S.E.2d at 447. In September, the defendant's children's school became concerned about the children's poor attendance. *Id.* A school social worker visited Mr. Price's home and was told that the defendant had not lived at that address for a couple of weeks. *Id.* Although Mr. Price stated that the defendant still received mail there and had been "in and out" of the residence, he did not know where the defendant was currently residing. *Id.* A Caldwell County Sheriff's Detective also visited Mr. Price's home in an attempt to find the defendant; Mr. Price told him that the defendant "got mad a couple of weeks ago and went to go stay with her father" at his house on Poovey Drive in Granite Falls. *Id.*

Based on this, the defendant was arrested for failing to register her change of address to Poovey Drive. *Id.* at 326, 677 S.E.2d at 447-48. After her arrest, the defendant submitted a statement to the sheriff's department, claiming that, although she was staying with her father on Poovey Drive, she still received mail at Mr. Price's house and planned on returning there, at some point in the future, to live. *Id.* at 326, 677 S.E.2d at 448. Moreover, during the trial, she testified that she visited her house on Gragg Price Lane daily and that she considered it her "home." *Id.* at 327, 677 S.E.2d at 448.

At trial, the defendant made a motion to dismiss, arguing that there was insufficient evidence that she changed her address. *Id.* The trial court denied her motion. *Id.* A divided panel of this Court agreed

with the defendant and vacated her conviction. *State v. Abshire*, 192 N.C. App. 594, 605, 666 S.E.2d 657, 665. The defendant appealed to the Supreme Court. *Abshire*, 363 N.C. at 327, 677 S.E.2d at 448.

On appeal, our Supreme Court first discussed the definition of a sex offender's "home address" for purposes of the registration statutes. *Id.* at 329, 677 S.E.2d at 449. The Court noted that the intent of the legislature was clear and that even a sex offender's "temporary home address must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders in our state." *Id.* at 331, 677 S.E.2d at 450-51. Viewing the evidence in a light most favorable to the the State, our Supreme Court held that there was sufficient evidence that the defendant changed her address to defeat the motion to dismiss. *Id.* at 333, 677 S.E.2d at 452. Specifically, the Court concluded that the jury could have reasonably inferred that although "[the] defendant carried out the core necessities of daily living at Gragg Price Lane[,]" she resided at her father's house on Poovey Drive. *Id.* In other words, even though the defendant still received mail and maintained a presence on Gragg Price Lane, her "place of abode," even if it was temporary, was at her father's. *Id.* Consequently, the Supreme Court held that the trial court properly denied the defendant's motion to dismiss and reversed this Court. *Id.*

Similar to *Abshire*, the evidence here showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," *id.*, at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, Joy and Melissa testified that defendant was often at Joann's all week. Furthermore, Melissa testified that defendant engaged in activities that only someone living at Joann's would do. Thus, as in *Abshire*, the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," *Abshire* makes it clear that his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a second, temporary residence. Accordingly, the State's evidence was sufficient to defeat defendant's motion to dismiss. We note that although defendant may have "changed" his address by temporarily residing at Joann's house, he still had an obligation under the law to remain registered in Burke County since he also had his permanent domicile there.

Conclusion

Because the indictment's language was sufficient to put defendant on notice that he was indicted for failing to register his address with the Wilkes County Sheriff's Office, any conflict in the indictment did not constitute a fatal variance. In addition, the trial court did not err in allowing the State to amend the dates of the offense because the amendment did not substantially alter the charges against defendant. Finally, because the State presented substantial evidence that defendant had a temporary residence in Wilkes County, the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
SUSAN DENISE SHAW

No. COA14-124

Filed 16 December 2014

1. Search and Seizure—traffic stop—information received from other officers provided reasonable suspicion

In a driving while impaired prosecution, the trial court did not err by denying defendant's motion to suppress. The officer who conducted the traffic stop had been radioed by other officers and informed that they had observed defendant weaving outside his lane of travel. This information gave the officer reasonable, articulable suspicion that defendant was driving while impaired, justifying the traffic stop.

2. Constitutional Law—right to confrontation—not violated by non-hearsay

In a driving while impaired prosecution, the trial court did not err by admitting an officer's testimony that other officers had informed him that they had observed defendant weaving outside his lane of travel. This testimony did not violate the Confrontation Clause because it was admitted to prove that the officer was told that defendant was weaving, not to prove that defendant was in fact weaving.

STATE v. SHAW

[238 N.C. App. 151 (2014)]

Appeal by defendant from judgment entered 25 February 2013 by Judge Sharon Tracey Barrett in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Roy Cooper, Attorney General, by J. Rick Brown, Associate Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

DAVIS, Judge.

Susan Denise Shaw ("Defendant") appeals from her conviction of driving while impaired ("DWI"). On appeal, she contends that the trial court erred by denying her motion to suppress. After careful review, we affirm.

Factual Background

At approximately 12:30 a.m. on 26 June 2010, Officer Robert Gormican ("Officer Gormican") of the Charlotte-Mecklenburg Police Department ("CMPD") was on patrol and participating in a "DWI saturation operation." This operation involved multiple CMPD officers working together to patrol areas where impaired driving was known to be prevalent. The operation called for two officers driving an undercover car to patrol a stretch of road near Freedom Drive and Morehead Street in Mecklenburg County. The undercover officers were tasked with identifying potentially intoxicated drivers and radioing officers in both marked and unmarked patrol cars to intercept them.

Officers E. Morales ("Officer Morales") and M. Wallin ("Officer Wallin") were operating one of the undercover CMPD vehicles as part of this operation when, at approximately 12:28 a.m., they radioed Officer Gormican and informed him that they "were behind a blue Mitsubishi on Freedom Drive coming up Morehead, and it was weaving outside its lane of travel several times." Officer Gormican was in an unmarked patrol car approximately one mile away and responded by traveling eastbound down Morehead Street toward Freedom Drive in order to locate the Mitsubishi. Upon approaching the traffic light at the intersection of Morehead Street and Freedom Drive, Officer Gormican spotted the Mitsubishi and the trailing undercover vehicle pass in front of him and continue traveling down Freedom Drive. From the far left lane on Morehead Street, Officer Gormican observed both vehicles to his right

and noticed that the Mitsubishi's tail lights were not illuminated. He activated his blue lights and initiated a traffic stop of the Mitsubishi.

After the Mitsubishi had pulled off the road into an empty parking lot, Officer Gormican approached the vehicle, which was occupied solely by Defendant. Upon asking Defendant for her driver's license and registration, Officer Gormican detected a strong odor of alcohol and ordered her out of her vehicle. Officer Gormican performed several field sobriety tests as well as two Alco-Sensor Breathalyzer tests and then placed Defendant under arrest for DWI.

Defendant was convicted of DWI on 28 April 2011 in Mecklenburg County District Court by the Honorable Theo X. Nixon. She appealed the district court's judgment to Mecklenburg County Superior Court. Defendant filed a pretrial motion seeking to suppress all evidence stemming from the traffic stop that ultimately led to her arrest on the ground that Officer Gormican lacked reasonable suspicion to stop her vehicle. A hearing on the motion to suppress was held on 22 February 2013.

During the hearing, Defendant entered into evidence Officer Gormican's Digital Motor Vehicle Recording, which showed that contrary to Officer Gormican's testimony, Defendant's tail lights were in fact operational and illuminated prior to the traffic stop.

On 28 February 2013, the trial court entered an order denying her motion that contained the following pertinent findings of fact:

> 1. On June 26, 2010 at approximately 12:30AM, Officer R. Gormican of the Charlotte Mecklenburg Police Department ("CMPD") was participating in a Driving While Impaired "saturation operation" in the vicinity of Freedom Drive and W. Morehead Street in Charlotte, Mecklenburg County, North Carolina.
>
> 2. The area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity, as well as the fact that numerous establishments serving alcohol late into the night were located in that immediate area.
>
> . . . .
>
> 4. At approximately 12:30AM, Officers Morales and Wallin radioed to Officer Gormican that they had observed a blue

> Mitsubishi weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street.
>
> . . . .
>
> 6. Officer Gormican testified that he observed that the brake-lights on the blue Mitsubishi appeared to be functional on June 26, 2010, but tail-lights on that vehicle did not. The defendant offered and the State consented to the admission of Officer Gormican's Digital Motor Vehicle Recording ("DMVR") in evidence at the suppression hearing. From a review of that recording in open court, it did not appear that the recording supported the Officer's testimony that the tail-lights were not functional, but this discrepancy did not substantially impeach the overall credibility of the officer's testimony.
>
> 7. Officer Gormican pursued the blue Mitsubishi a short distance on Freedom Drive and immediately initiated a traffic stop of that vehicle.

Based on these findings of fact, the trial court made the following pertinent conclusions of law:

> 2. Considering the totality of the circumstances, Officer Gormican had sufficient reasonable and articulable suspicion to justify the traffic stop of the defendant on or near Freedom Drive in Charlotte, North Carolina as a result of a traffic violation.
>
> 3. Before placing the defendant under arrest for impaired driving, Officer Gormican had sufficient probable cause to believe that the defendant had committed that offense.
>
> 4. Both reasonable suspicion to stop and probable cause to arrest may be based on the collective knowledge of law enforcement officers other than the stopping and/or arresting officer himself. *State v. Bowman*, 193 N.C. App 104, 666 S.E.2d 831 (2008), *State v Battle*, 109 N.C. App. 367, 427 S.E.2d 156 (1993).

Following the denial of her motion to suppress, Defendant entered a conditional plea of guilty, reserving her right to appeal the trial court's denial of her motion to suppress. Defendant was sentenced to 30 days imprisonment. The sentence was suspended, and Defendant was placed on 12 months unsupervised probation. As a term of special probation,

Defendant was ordered to complete 24 hours of community service within the first 30 days of her probation. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying her motion to suppress.

> An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. This Court's review of the denial of a motion to suppress evidence is limited in scope to whether the underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial judge's conclusions of law are reviewed *de novo*.

State v. Hodges, 195 N.C. App. 390, 395, 672 S.E.2d 724, 728 (2009) (internal citations, quotation marks, and ellipses omitted).

I. Reasonable Suspicion

[1] Defendant first argues that the trial court erred in denying her motion to suppress on the ground that Officer Gormican lacked reasonable suspicion to conduct a traffic stop of her vehicle. Specifically, Defendant asserts that the trial court's conclusion that reasonable suspicion existed to justify the traffic stop was improperly based on hearsay statements from Officers Morales and Wallin to Officer Gormican that they had observed Defendant weave several times outside of her lane of travel. We disagree.

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L.Ed.2d 570, 576 (2000). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citation and quotation marks omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008). Investigatory traffic stops "must be 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 his experience and training."

State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory traffic stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (internal citation and quotation marks omitted).

This Court has held that an officer's observation of weaving, in conjunction with other factors, can create the requisite reasonable and articulable suspicion to justify an investigatory traffic stop. *State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 891-92 (2013), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). These other factors may include traveling at an unusual hour or driving in an area in close proximity to bars and nightclubs. *Id.* at __, 745 S.E.2d at 891. Moreover, our Supreme Court has ruled that a defendant's "weaving constantly and continuously [within her lane of travel] over the course of three-quarters of a mile" at 11:00 p.m. on a Friday night constituted reasonable suspicion to initiate a traffic stop. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828 (internal quotation marks omitted).

In determining that Officer Gormican possessed reasonable suspicion to conduct the traffic stop, the trial court relied on the principle that reasonable suspicion may properly be based on the collective knowledge of law enforcement officers. This doctrine provides that

> [i]f the officer making the investigatory stop (the second officer) does not have the necessary reasonable suspicion, the stop may nonetheless be made if the second officer receives from another officer (the first officer) a request to stop the vehicle, and if, at the time the request is issued, the first officer possessed a reasonable suspicion that criminal conduct had occurred, was occurring, or was about to occur. . . . Where there is no request from the first officer that the second officer stop a vehicle, the collective knowledge of both officers may form the basis for reasonable suspicion by the second officer, if and to the extent the knowledge possessed by the first officer is communicated to the second officer.

State v. Battle, 109 N.C. App. 367, 370-71, 427 S.E.2d 156, 159 (1993) (internal citations omitted).

In *Battle*, the defendant moved to suppress his Breathalyzer test results on the ground that the arresting officer lacked the requisite reasonable suspicion to justify the initial stop of his vehicle. One officer radioed the arresting officer to "be on the lookout" for the defendant's

vehicle based on his suspicion that the defendant was driving while impaired. *Id.* at 368-69, 427 S.E.2d at 157-58. The officer who radioed the arresting officer had earlier observed the defendant in a parking lot sitting behind the wheel of his parked car. He ordered the defendant out of the car and after performing two field sobriety tests and detecting a strong odor of alcohol on the defendant's breath formed the opinion that the defendant was impaired. He told the defendant not to drive and left the parking lot. *Id.* at 368, 427 S.E.2d at 157. However, believing that the defendant might nevertheless attempt to drive, the officer contacted the arresting officer and told him to be on the lookout for the defendant's car. The arresting officer spotted and followed the defendant's vehicle for a few blocks without observing any conduct justifying a stop but nevertheless stopped the defendant's vehicle and arrested him for DWI. *Id.* at 368-69, 427 S.E.2d at 157-58.

On appeal, this Court reversed the trial court's order suppressing the evidence obtained as a result of the traffic stop on the ground that the first officer's radio report was sufficient to justify the second officer's stop of the vehicle. *Id.* at 372-73, 427 S.E.2d at 159-60. We held that an officer making a traffic stop need not have personally observed the defendant's conduct giving rise to reasonable suspicion if (1) "the officer making the stop has received a request to stop the defendant from another officer, if that other officer had, prior to the issuance of the request, the necessary reasonable suspicion"; or (2) "the officer making the stop received, prior to the stop, information from another officer, which, when combined with the observations made by the stopping officer, constitute the necessary reasonable suspicion." *Id.* at 371, 427 S.E.2d at 159.

In the present case, Officers Morales and Wallin observed Defendant's vehicle "weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street," and radioed this information to Officer Gormican prior to his initiation of the stop. Defendant does not challenge the trial court's findings that "[t]he area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity" or that "numerous establishments serving alcohol late into the night were located in that immediate area." Because these findings of fact have not been challenged by Defendant, they are binding on appeal. *See State v. Clark*, 211 N.C. App. 60, 65, 714 S.E.2d 754, 758 (2011) ("[A]ny findings of fact which the defendant fails to challenge on appeal are binding for purposes of appellate review."), *disc. review denied*, 365 N.C. 556, 722 S.E.2d 595 (2012).

We reject Defendant's contention that the trial court erred in considering evidence of the statements made by Officers Morales and Wallin to Officer Gormican based on the theory that these statements were hearsay. Defendant's argument is foreclosed by our decision in *State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982). In *Gray*, an officer conducted a traffic stop of the defendant relying solely on a radio report received from another officer that the defendant was driving with expired tags. *Id.* at 570, 286 S.E.2d at 359. The defendant moved to suppress evidence of drugs discovered as a result of the stop on the ground that the arresting officer's testimony concerning the statement received from the first officer was hearsay. *Id.* at 573, 286 S.E.2d at 361.

This Court affirmed the trial court's denial of the motion to suppress on the ground that the statement "was not offered to prove that defendant was driving with expired tags, but to prove that [the arresting officer] *was told* by a fellow officer that defendant was driving with expired tags." *Id.* We further concluded that "[t]he evidence tended to show that [the arresting officer] had received information which would justify his forming a reasonable suspicion that defendant was involved in criminal activity. As such, the evidence was not hearsay." *Id.*

The same reasoning applies in the present case. Officer Gormican testified that he was contacted by Officers Morales and Wallin, who told him that they had observed Defendant's vehicle "weaving outside its lane of travel several times." Officer Gormican therefore followed Defendant and initiated the traffic stop. As in *Gray*, his receipt of this information justified his reasonable suspicion that Defendant was driving while impaired, which in turn justified stopping Defendant's vehicle. Accordingly, Defendant's argument is overruled.

II. Confrontation Clause

[2] Defendant's final argument on appeal is that Officer Gormican's testimony regarding the statements of Officers Morales and Wallin violated her Sixth Amendment rights under the Confrontation Clause. This argument also lacks merit.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L.Ed.2d 177, 194 (2004).

However, our Supreme Court has held that evidence admitted as nonhearsay does not trigger the protection of the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 473 ("[A]dmission of nonhearsay raises no Confrontation Clause concerns." (citations and internal quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Because we conclude that Officer Gormican's testimony as to the information he received from Officers Morales and Wallin was nonhearsay, we reject Defendant's argument on this issue.

Conclusion

For these reasons, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR

No. COA14-490

Filed 16 December 2014

Evidence—detective vouching for witness's credibility—plain error

The trial court committed plain error in a prosecution for larceny and obtaining property by false premises by permitting a detective to testify that she moved forward with her investigation into the allegations that a witness had made against defendant, despite a great deal of family drama, because she believed that the witness was telling her the truth. The challenged testimony constituted an impermissible vouching for the witness's credibility; given the importance that the jury probably gave to the detective's assessment of the relative credibility of the positions taken by the witness and defendant and the fact that the outcome in this case depended largely on the witness's credibility, the admission of the detective's testimony constituted plain error.

Judge BRYANT dissenting.

STATE v. TAYLOR

[238 N.C. App. 159 (2014)]

Appeal by defendant from judgments entered 16 September 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Associate Attorney General Melody Hairston, for the State.

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

ERVIN, Judge.

Defendant Bo Anderson Taylor appeals from judgments entered based upon his convictions for misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred by allowing the admission of evidence affirming the truthfulness of the alleged victim and by allowing the State to elicit extensive testimony that Defendant had exercised his right to remain silent as part of its case in chief. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In October 2010, Defendant and his girlfriend, Gail Lacroix, were living with Defendant's sister, Crystal Medina. In view of the fact that Ms. Lacroix was Defendant and Ms. Medina's step-mother, no one in the family was happy about the relationship between Defendant and Ms. Lacroix.

Because she did not have any room in her house to accommodate Defendant and Ms. Lacroix, Ms. Medina allowed them to stay in a shop located in her backyard. At the time that Defendant and Ms. Lacroix moved in, the Medinas were planning to separate and Ms. Medina's husband was in jail.

The Medinas had formerly owned and operated a residential and commercial concrete business and had purchased several tools for use in the business, including two lasers that had been purchased for $1,495 each. The tools in question were stored in locked trailers located in Ms.

Medina's backyard. Defendant had access to the keys to these trailers. As part of the divorce settlement, Ms. Medina planned to let her husband keep the tools while she would keep the house. In view of the fact that she "didn't trust [her husband's] family," Ms. Medina had photographed all of the tools and recorded their serial numbers.

On 2 October 2010, Defendant pawned a hammer drill at Picasso Pawn for $50. On 4 October 2010, Defendant pawned two generators at Pawn USA for $300. Defendant returned to Picasso Pawn on 13 October 2010 and pawned an air compressor for $35. On 6 November 2010, Defendant pawned two lasers at National Pawn for $200. On each of these occasions, Defendant signed a statement indicating that he owned the items that were being pawned.

In November 2010, Ms. Medina found a pawnshop ticket on the floor of her truck indicating that Defendant had pawned the lasers. Upon making this discovery, Ms. Medina called Defendant to ask about the ticket. However, Defendant hung up on her. Although Ms. Medina subsequently confronted Defendant at her home, he denied knowing anything about the ticket. At that point, Ms. Medina left to go to an appointment. Upon her return, Defendant and Ms. Lacroix had packed up their belongings and left. After Defendant and Ms. Lacroix departed, Ms. Medina discovered another pawnshop ticket in the shop in which Defendant and Ms. Lacroix had been staying.

Ms. Medina did not immediately call the police because she did not want Defendant to get in trouble. Instead, Ms. Medina just wanted to recover the tools. After having failed to get Defendant, who knew that he did not have permission to pawn the tools, to return the items in question, Ms. Medina contacted the New Hanover County Sheriff's office and reported that Defendant had stolen two lasers, three generators, an air compressor, and a hammer drill from the trailers in her backyard.

The investigation into the allegations that Ms. Medina had made against Defendant was conducted by Detective Angie Tindall of the New Hanover County Sheriff's Department. Although Detective Tindall left messages for Defendant with numerous family members, she never reached him. As part of her investigation, Detective Tindall checked into the validity of Ms. Medina's claims after being told by a family member that Defendant had been asked to pawn the items for Ms. Medina because Ms. Medina had stolen $500 from her employer. However, Detective Tindall was unable to find any support for this accusation. As a result of the fact that Ms. Medina was in a position to provide the serial numbers for the items that had been pawned, Detective Tindall was able

to locate the missing tools and obtain the return of most of the missing property to Ms. Medina. In spite of her recognition that this matter was replete with family drama, Detective Tindall proceeded with the investigation because Ms. Medina "seemed to be telling [her] the truth."

2. Defendant's Evidence

Defendant traveled to South Carolina in order to turn himself in on unrelated criminal charges on 1 October 2010. Ms. Medina wired $200 to Defendant in order to enable him to post bond. However, Ms. Medina told Defendant that she needed him to repay the money that she had loaned him for the purpose of making bond promptly because she had taken $500 from the safe at Friendly Check Cashing, where she was employed, in order to secure Defendant's release and to pay for a party that she planned to host. More specifically, Ms. Medina told Defendant that she needed to replace all of the money that she had taken from the safe before an audit that was going to be conducted on the following Monday. As part of the repayment process, Ms. Medina gave Defendant two broken generators and told him that he could have them if he could get them running.

On 2 October 2010, Defendant, with Ms. Medina's permission, pawned a drill that he had received from Ms. Medina, gave half of the money that he received as a result of this transaction to Ms. Medina, and used the other half to purchase gas which he used to drive to Leland as part of an attempt to get the broken generators running. Ms. Medina's fiancé, Juan, helped Defendant load the generators into a truck since they were too heavy for Defendant to lift on his own.

At some point, Defendant was able to pawn the two generators for $300 and handed the proceeds to Ms. Medina outside Friendly Check Cashing. After the transfer had been completed, Defendant and Ms. Medina entered Friendly Check Cashing, where Ms. Medina put the cash in a rolled up newspaper, slipped the newspaper to Defendant from behind the glass, and told Defendant to give the cash to her manager, who was working beside her. Upon receiving these instructions, Defendant took $250 from the newspaper and gave it to the manager, who took the cash and then swiped her ATM card for the apparent purpose of replacing the remaining $250 that Ms. Medina had taken from the store's safe.

On 6 November 2011, Defendant pawned two lasers that he had received from Ms. Medina at National Pawn for $200 and took the proceeds directly to Picasso Pawn for the purpose of making a payment relating to certain items of jewelry that Ms. Medina had pawned there.

While at Picasso Pawn, Defendant pawned an air compressor that Ms. Medina had thrown away for $35. Defendant left the pawn ticket for the lasers in Ms. Medina's truck, along with the receipt for the payment that he had made to assist in the process of redeeming her jewelry.

Defendant denied having stolen anything from Ms. Medina, asserted that Ms. Medina was aware that he was pawning the tools, and testified that "she was basically hand in hand with everything I did." Similarly, Ms. Lacroix testified that she knew that Defendant was pawning certain items, that Defendant and Ms. Medina had discussed the transactions in which Defendant had engaged and the manner in which the resulting proceeds would be used, and that she and Defendant had moved away from Ms. Medina's property because they were fighting about the pawn tickets and Defendant's relationship with Ms. Lacroix.

According to Defendant, the members of his family frequently called the police about each other's activities. Although Ms. Medina denied that she was referring to Defendant, Defendant pointed out that Ms. Medina had written a Facebook message calling upon people to "Bring That White Trash Down" by helping her get "dirt" on Defendant, who was known by the nickname of "White Trash."

B. Procedural History

On 7 November 2010, a warrant for arrest was issued charging Defendant with obtaining property by false pretenses. On 18 November 2010, a warrant for arrest was issued charging Defendant with felonious larceny and two additional counts of obtaining property by false pretenses. On 21 February 2011, the New Hanover County grand jury returned bills of indictment charging Defendant with felonious larceny, felonious breaking or entering into a trailer, and five counts of obtaining property by false pretenses. The charges against Defendant came on for trial before the trial court and a jury at the 12 September 2011 criminal session of New Hanover County Superior Court. On 15 September 2011, the jury returned verdicts finding Defendant guilty of misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 8 to 10 months imprisonment based upon his consolidated convictions for misdemeanor larceny and felonious breaking or entering a trailer and to two consecutive terms of 11 to 14 months imprisonment based upon his consolidated convictions for obtaining property by false pretenses. On 15 October 2013, Defendant filed a petition seeking the issuance of a writ of *certiorari* by this Court. This Court granted Defendant's *certiorari* petition on 31 October 2013.

II. Substantive Legal Analysis

In his initial challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by permitting Detective Tindall to testify that she moved forward with her investigation into the allegations that Ms. Medina had made against Defendant because she believed that Ms. Medina was telling her the truth. More specifically, Defendant contends that the challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and Defendant. Defendant's argument has merit.

A. Standard of Review

As he candidly concedes in his brief, Defendant did not object to the admission of the challenged portion of Detective Tindall's testimony at trial. For that reason, our evaluation of the validity of Defendant's contention is limited to determining whether the admission of the challenged portion of Detective Tindall's testimony constituted plain error. A plain error is an error that is "so fundamental that it undermines the fairness of the trial, or [has] a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). In order to obtain relief on plain error grounds, "[D]efendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Relevant Legal Principles

"It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citing *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986)). "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). For that reason, it is well established that "a witness may not vouch for the credibility of a victim," *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858-59 (2010), with this rule being applicable regardless of whether the improper vouching for the credibility of another witness occurs during the testimony of an expert, *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (stating that "[e]xpert opinion testimony is not admissible to establish the credibility of the victim as a witness"), *aff'd* 356 N.C. 428, 571 S.E.2d 584 (2002), or a lay witness. *State v. Freeland*, 316 N.C. 13, 16-17, 340 S.E.2d 35, 36-37 (1986) (holding that

the trial court erred by allowing the alleged victim's mother to testify that her daughter tells the truth).

C. Plain Error Analysis

In the course of Detective Tindall's testimony on direct examination, the State and Detective Tindall engaged in the following colloquy:

> [Prosecutor]: At any point did you ever question this case, this has a lot of family drama?
>
> [Det. Tindall]: Yes
>
> [Prosecutor]: What made you go forward?
>
> [Det. Tindall]: [Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.

By testifying that Ms. Medina seemed to be telling her the truth, Detective Tindall vouched for Ms. Medina's credibility,[1] a result that is clearly forbidden by basic principles of North Carolina evidence law. *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508. As a result of the fact that testimony of the type given by Detective Tindall is clearly inadmissible, the only remaining question for our consideration is whether the jury would have probably reached a different outcome had it not been allowed to hear the challenged portion of Detective Tindall's testimony.

The importance of Ms. Medina's testimony to the State's case against Defendant should be apparent from even a cursory examination of the record. Simply put, the State's case hinged almost entirely on Ms. Medina's credibility. As a result of the fact that Defendant freely admitted that he had pawned the tools that Ms. Medina accused him of converting to his own use, the extent to which the jury convicted or acquitted Defendant necessarily depended on whether the jury believed Defendant's claim to have been authorized to pawn the tools in question by Ms. Medina or whether the jury believed the State's assertion that Defendant took the tools from the storage trailers and pawned them without obtaining Ms. Medina's permission.

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1. Although our dissenting colleague argues that Detective Tindall's testimony did not vouch for the credibility of a witness, the record reflects that Ms. Medina testified at trial and that Detective Tindall's explanation for her decision to continue the investigation stemmed from her belief that Ms. Medina was telling the truth. Under that set of circumstances, we have no hesitation in concluding that Detective Tindall vouched for Ms. Medina's credibility.

The only evidence presented at trial to the effect that Defendant lacked permission to pawn the Medinas' tools consisted of Ms. Medina's testimony to that effect, which Defendant directly disputed when he took the witness stand. As a result of the fact that law enforcement officers have the responsibility of conducting a fair investigation before initiating criminal charges against anyone, the jury "most likely gave [Detective Tindall's] opinion more weight than a lay opinion." *Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508. As a result, given the importance that the jury probably gave to Detective Tindall's assessment of the relative credibility of the positions taken by Ms. Medina and Defendant and the fact that the outcome in this case depended largely on Ms. Medina's credibility, we have no hesitation in holding that the admission of the challenged portion of Detective Tindall's testimony constituted plain error. *Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (stating that "the admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility"); *see also Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508 (holding that the trial court committed plain error by allowing the admission of non-expert testimony that the Department of Social Services had substantiated a claim of sexual abuse given that the only evidence to that effect in the record was the children's testimony and their prior consistent statements).

In attempting to persuade us to reach a different result, the State relies upon our decision in *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397-98 (2004), in which a law enforcement officer testified that he had refrained from conducting a more thorough investigation of the available physical evidence in a sexual assault case because the victim of the sexual assault was able to positively identify her assailant. In upholding the defendant's conviction, we rejected the defendant's argument that the officer had impermissibly vouched for the witness' credibility, holding that, instead of expressing an opinion that the victim had, in fact, been assaulted, the officer had merely explained why he did not request more thorough testing of the physical evidence during the course of his investigation and stated that the officer's testimony was "helpful to the fact-finder in presenting a clear understanding of his investigative process." *O'Hanlan*, 153 N.C. App. at 563, 570 S.E.2d at 762. Although the State asserts that the challenged portion of Detective Tindall's testimony was admissible on the basis of the same logic that we deemed persuasive in *O'Hanlan*, we do not believe that *O'Hanlan* is controlling here given that, in *O'Hanlan*, the defendant specifically challenged the officer's failure to conduct additional testing of the physical evidence on cross-examination while Defendant never questioned Detective Tindall's decision to

proceed to have charges taken out against Defendant.[2] In view of the fact that Defendant did not directly challenge Detective Tindall's decision to proceed against him, there was no need for the State to explain why she did so.[3] As a result, *O'Hanlan* provides no basis for a decision in the State's favor.[4]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court committed plain error by permitting Detective Tindall to improperly vouch for Ms. Medina's credibility. As a result, Defendant is entitled to a new trial.

NEW TRIAL.

Judges ELMORE concurs.

BRYANT, Judge, dissenting.

The majority remands for a new trial based on their determination that the trial court committed plain error in allowing Detective Tindall's

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2. Similarly, in an attempt to suggest that Detective Tindall's testimony was admissible, our dissenting colleague relies upon our decision in *State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994), in which we held that the trial court did not err by admitting the testimony of an investigating officer to the effect that he had not taken notes during the interview of a particular witness because he believed that the witness was lying given that the officer had been questioned on cross-examination about his failure to take notes during his interview of the witness. We do not believe that *Westall* is relevant to this case given that Detective Tindall made the statement that is discussed in the text on direct examination and had never been subject to cross-examination concerning the reason that she decided to pursue the investigation.

3. Admittedly, Defendant questioned Ms. Medina on cross-examination in such a manner as to challenge her credibility. Although the State argues that Defendant's decision to question Ms. Medina in this manner authorized the admission of the challenged portion of Detective Tindall's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 608(a) (providing that "[t]he credibility of a witness may be attacked by evidence . . . in the form of reputation or opinion as provided in [N.C. Gen. Stat. § 8C-1,] Rule 405(a)," subject to the limitation that "(1) such evidence may refer only to character for truthfulness or untruthfulness" and that "(2) evidence of truthful character is admissible only after the character of the witness has been attacked by opinion or reputation evidence or otherwise"), we do not find this argument persuasive given that Detective Tindall's testimony was not focused on Ms. Medina's "character for truthfulness or untruthfulness" and given that Ms. Medina's character, as compared to her credibility, had not been attacked.

4. As a result of our determination that Defendant is entitled to a new trial for the reason discussed in the text, we need not address Defendant's remaining challenge to the trial court's judgments.

testimony that "[Ms. Medina] seemed to be telling me the truth[.]" Because I do not believe the admission of that testimony meets the threshold needed for plain error, I respectfully dissent.

As acknowledged in the majority opinion, "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *Hannon*, 118 N.C. App. at 451, 455 S.E.2d at 496 (citation omitted). And, I would hold that in this case, the jury's ability to make such a credibility determination about Ms. Medina—a woman thirty-one years old and mother of four—who testified before them, was unimpeded.

Detective Tindall testified that she investigated the claims made by Ms. Medina, and the detective was aware of the "family drama" surrounding defendant and Ms. Medina.

> A family member advised me that [defendant] was asked to pawn the items for [Ms. Medina], that [Ms. Medina] had stolen Five Hundred Dollars from her employer. I investigated that and learned that there was no evidence of this occurring so, therefore, [Ms. Medina] was never charged and I had no evidence.

When asked what made her move forward, Detective Tindall testified, "[Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest." Detective Tindall expressed a lay opinion in response to a proper question regarding why she moved forward with her investigation and charges.[1] Furthermore, Detective Tindall provided the basis for her opinion: "she gave me all the information possible that she had . . . ." *See State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994) (holding no error where the detective expressed his lay opinion that the defendant was not being truthful during an interview as a basis for the detective's failure to take any notes during the interview).

For error to rise to the level that it requires a new trial, when no objection was made at trial and the alleged error is brought forth for the first time on appeal, such error must be

> fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been

1. N.C. Gen. Stat. § 8C-1, Rule 701 (2013) ("If the witness is not testifying as an expert, [her] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.").

> done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial . . . .

Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333 (citation omitted). We apply the plain error rule cautiously and only in exceptional cases where the defendant can show extreme prejudice. Such is not the case on this record. Defendant challenges the detective's response to a question regarding the investigation. The response was not one in which the detective was vouching for the credibility of a trial witness. Such a response cannot be deemed a fundamental error resulting in the denial of a fair trial to defendant. Therefore, because defendant cannot meet his burden and show plain error, defendant is not entitled to a new trial. Accordingly, I would overrule defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.

KEITH TEDDER, EMPLOYEE, PLAINTIFF
v.
A&K ENTERPRISES, EMPLOYER AND PROTECTIVE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA14-551

Filed 16 December 2014

1. Workers' Compensation—temporary total disability—calculation of average weekly wage—temporary employees

The Industrial Commission erred in a workers' compensation case by its calculation of the average weekly wage for temporary total disability compensation for a temporary employee. In calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period.

2. Workers' Compensation—ongoing temporary total disability—temporary employee—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff temporary employee was entitled to ongoing temporary total disability payments. Under the applicable standard of review, Dr. Burke's testimony was

competent evidence supporting the Commission's finding that plaintiff was unable to continue work as a delivery driver because of his back injury.

Appeal by defendants from opinion and award entered 10 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 2014.

Goodman McGuffey Lindsey & Johnson, LLP, by Michael A. Cannon, for defendants-appellants.

David Gantt Law Office, by David Gantt, for plaintiff-appellee.

DIETZ, Judge.

This workers' compensation case concerns the proper method of calculating average weekly wages for temporary employees. After two years of unemployment and a few months in a low-paying seasonal job, Plaintiff Keith Tedder began a seven-week temporary position with Defendant A&K Enterprises that paid $625 per week.

Unfortunately, Tedder injured his back after the first week in this temporary position and could not continue working. He then applied for workers' compensation benefits. In awarding benefits, the Industrial Commission calculated Tedder's average weekly wage at $625, despite finding that Tedder was a temporary employee, that he could not expect to earn that wage full time, and that the $625 calculation was "unfair" to A&K.

The Commission's calculation cannot be sustained. The purpose of the average weekly wage calculation is to approximate what the employee would be earning were it not for the injury, not to provide an earnings safety net for the chronically unemployed or underemployed.

Consistent with this statutory purpose, we hold that in calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. Here, the short duration of Tedder's temporary employment must result in an average weekly wage that is substantially less than $625. Accordingly, although we affirm the Commission's conclusion that Tedder is eligible for temporary total disability compensation, we reverse the Commission's average weekly wage determination and remand for a new determination consistent with this opinion.

Factual Background

I. Tedder's Employment History

Keith Tedder is a 48-year-old single father whose work experience consists entirely of heavy lifting and driving trucks. Over the years, Tedder has worked as a delivery driver for a number of different companies, loading and unloading items weighing up to 150 pounds. In June 2004, while delivering packages for an employer in Asheville, Tedder injured his back. He later settled his workers' compensation claim with that employer.

To alleviate the pain resulting from his 2004 injury, Tedder underwent a right L4-5 laminectomy and discectomy on 7 November 2005. Dr. Michael Goebel, who performed the surgery, noted that Tedder experienced a surprising recovery. On 14 February 2006, Dr. Goebel found that Tedder had reached maximum medical improvement and assigned a 10% permanent partial impairment rating to his back. He released Tedder to medium-duty work, placing permanent restrictions on lifting more than fifty pounds, as well as limitations on bending, stooping, twisting, squatting, crouching, and prolonged sitting or standing.

After his release from Dr. Goebel's care in April 2006, Tedder did not find a job until March 2007, when he began working for Carolina Mulch as a delivery driver. He worked that job for eighteen months before being laid off in September 2008. While at Carolina Mulch, Tedder was able to perform all the duties of a delivery driver, including loading and unloading very heavy items without difficulty. He regularly exceeded Dr. Goebel's permanent restrictions without incident. Although he occasionally experienced a sore back when he worked overtime, Tedder did not seek any medical assistance for his back while working for Carolina Mulch.

After being laid off from Carolina Mulch in September 2008, Tedder was unemployed for more than two years. In November 2010, Tedder accepted a position with Volt Management Corporation, a temporary staffing agency that contracted with Federal Express to provide extra delivery drivers during the press of the holiday season. Tedder worked approximately eight to ten hours per day, two days per week for Volt, earning at most $260 per week. Tedder did not seek any medical treatment for his back during his employment with Volt.

II. Tedder's Job at A&K

In February 2011, as Tedder's seasonal work at Volt drew to a close, Defendant A&K Enterprises asked Volt for recommendations to fill an open position for a temporary delivery driver. A&K is a small

"mom-and-pop" delivery company and subcontractor for Federal Express. The company hires temporary employees during the peak holiday season and also on an as-needed basis. A&K was searching for a temporary employee to fill in for one of its full-time delivery drivers who was scheduled to undergo surgery. A&K anticipated that the full-time employee would be absent for seven weeks on medical leave.

Volt referred Tedder to A&K, and A&K ultimately hired Tedder as a temporary driver working five days per week for $625 per week. The Full Commission expressly found that Tedder was "a temporary employee hired to work for a limited time period of seven weeks."

III. Tedder's Injury and Ongoing Treatment

On 8 March 2011, just one week after beginning his temporary employment with A&K, Tedder felt a sharp pain in his lower back while bending over to pick up a package. He was able to complete the remainder of his shift, but the route took him twice as long due to intense pain in his lower back. The next day, Tedder called to inform the owners of A&K that he was unable to work due to the pain he was experiencing. A&K hired another temporary worker to cover the remainder of its full-time employee's seven-week medical leave.

Following his 8 March 2011 injury, Tedder sought care from a number of medical professionals to address the pain in his back. Despite this ongoing care, however, Tedder continued to experience sharp pain in his lower back, as well as pain and numbness in his left buttock, leg, and foot. He scheduled an appointment at the Carolina Spine & Neurosurgery Center in early 2012, where he was examined by Dr. John Silver. Dr. Silver, a board certified neurosurgeon, determined that the 8 March 2011 accident exacerbated Tedder's pre-existing back condition. He recommended that Tedder undergo a Functional Capacity Evaluation to determine his physical limitations. Dr. Silver referred Tedder for an epidural injection and for additional evaluation with Dr. Margaret Burke.

Before beginning treatment with Dr. Burke, Tedder underwent an independent medical evaluation (at Defendants' request) with Dr. Richard Broadhurst, an expert in occupational and environmental medicine. Dr. Broadhurst recommended that until he receive further treatment, Tedder could return to work at the sedentary level with a ten pound maximum lifting restriction, along with significant limitations on movement.

Tedder began treatment under the care of Dr. Burke, a physiatrist, on 29 March 2012. Dr. Burke diagnosed Tedder with chronic left L5

radiculopathy and prescribed a course of physical therapy. In her deposition testimony, Dr. Burke stated that Tedder's condition was not purely degenerative in nature, and that the 8 March 2011 accident exacerbated Tedder's pre-existing back condition. Tedder has continued treatment with Dr. Burke, who is his ongoing pain management physician. As of the date of her post-hearing deposition conducted 14 January 2013, Dr. Burke had not released Tedder at maximum medical improvement.

Since his injury in March 2011, Tedder has not returned to employment with A&K or any other employer. Tedder filed for workers' compensation benefits on 2 May 2011. A&K and its insurer denied the compensability of the claim. Deputy Commissioner Myra L. Griffin granted Tedder's claim in an opinion and award filed 15 April 2013, determining that he was entitled to temporary total disability compensation and calculating his statutory average weekly wages at $625 per week. Defendants timely appealed to the Full Commission.

The Full Commission, in a unanimous decision by Commissioners Pamela T. Young, Bernadine Ballance, and Danny Lee McDonald, affirmed the deputy commissioner's award on 10 March 2014. Defendants timely appealed to this Court.

Analysis

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The findings of the Commission are conclusive on appeal where competent evidence exists, "even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). We review the Full Commission's conclusions of law *de novo*. *Conyers v. New Hanover Cnty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008).

I. Computation of Tedder's Average Weekly Wages

[1] Defendants first challenge the Commission's computation of Tedder's average weekly wages. "The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (citation and internal quotation marks omitted). We therefore review the Commission's calculation of Tedder's average weekly wages *de novo*. *Id.*

Average weekly wages are determined by calculating the amount the injured worker would be earning but for his injury. *Loch v. Entm't Partners*, 148 N.C. App. 106, 111, 557 S.E.2d 182, 185 (2001). The calculation is governed by N.C. Gen. Stat. § 97-2(5), which sets out five distinct methods for calculating an injured employee's average weekly wages. *Conyers*, 188 N.C. App. at 255, 654 S.E.2d at 748. The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate. *Id.* Methods 1, 3, and 5 are relevant in this case:

> [Method 1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52 . . . .
>
> . . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> . . . .
>
> [Method 5] 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).[1]

Under this statutory hierarchy, when an employee has worked at his job continuously for the preceding 52 weeks, average weekly wages must be calculated under Method 1 by simply dividing the total earnings during that 52-week period by 52. The Commission found, and we agree, that this method is inappropriate because Tedder only worked at A&K for one week, nowhere near the 52 weeks necessary to use Method 1.

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1. The Commission determined, and the parties concede, that Methods 2 and 4 are inapplicable to the factual circumstances of this case, and therefore we need not address those methods in this opinion.

Method 3 can be used when the employee was on the job less than 52 weeks. Under Method 3, average weekly wages are calculated by dividing the total earnings on the job by the number of weeks (or portions of weeks) the employee worked. Under Method 3, Tedder's average weekly wage is $625, a figure obtained by dividing his total earnings, $625, by the total number of weeks worked, one. But Method 3 can be used only if "results fair and just to both parties will be thereby obtained." N.C. Gen. Stat. § 97-2(5). Here, the Commission found as fact that Tedder was "a temporary employee hired to work for a limited time period of seven weeks." Based on this finding, the Commission determined, and we agree, that Method 3 is inappropriate because the result "would be unfair . . . due to the temporary nature of the employment relationship shared by defendant-employer and plaintiff."

Having determined that Methods 1 and 3 were inappropriate (and that Methods 2 and 4 were inapplicable), the Commission resorted to Method 5. This "catch-all" method does not dictate any particular methodology; it instructs the Commission to employ whatever method "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). It is available only where use of the previous four methods "would be unfair." *Id.*

The Commission, ostensibly applying Method 5, determined that Tedder's average weekly wage was $625—effectively treating Tedder as if he was a full-time, permanent employee of A&K. We reject this computation because it squarely conflicts with the statute's unambiguous command to use a methodology that "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). As the Commission found, Tedder would have earned that $625 wage for no more than seven weeks, until his temporary job ended. He would then be unemployed and searching for work, as he was for most of the preceding two years. Indeed, a $625 per week wage so vastly overstates Tedder's actual "average" earnings that, when applying Method 3, the Commission expressly found that a $625 average weekly wage was "unfair" to A&K. Accordingly, we must reverse and remand this case for a new average weekly wage calculation.

We leave it to the Commission on remand to determine the appropriate average weekly wage consistent with the statutory language of Section 97-2(5). However, to assist with that calculation, we provide the following guidance based on existing precedent from our appellate courts.

First, the Supreme Court's decision in *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), is instructive. In *Joyner*, the

claimant was a relief truck driver who worked only as needed. *Id.* at 519-20, 146 S.E.2d at 448. The Court described the driver's employment as "inherently part-time and intermittent." *Id.* at 522, 146 S.E.2d at 450. In calculating the driver's average weekly wage, therefore, the Court held that it was unfair to the employer not to take into consideration both peak and slack periods in the plaintiff's employment. *Id.* Accordingly, the Supreme Court held that the employee's average weekly wages should be calculated under the fifth method by taking the total wages he actually earned in the 52 weeks prior to his injury and dividing that amount by 52, the number of weeks in a year. *Id.*

This Court later applied *Joyner* to cases involving employees who worked only part of the year. *See Conyers*, 188 N.C. App. at 260-61, 654 S.E.2d at 751-52. In *Conyers*, the plaintiff was a bus driver who worked ten months per year. *Id.* at 254, 654 S.E.2d at 747. We held that the fifth method was most appropriate to take into account the slack periods in the plaintiff's employment. *Id.* at 261, 654 S.E.2d at 751. Noting that the purpose of the calculation is to "most nearly approximate the amount which the [bus driver] would be earning were it not for the injury," we held that the plaintiff's average weekly wages should be determined by dividing the wages she earned in the 52 weeks before her accident by 52. *Id.*

Finally, in *Thompson v. STS Holdings, Inc.*, 213 N.C. App. 26, 33, 711 S.E.2d 827, 831 (2011), this Court addressed the average weekly wage calculation for an employee who worked contract jobs for various employers throughout the year. At the time of his injury, the employee had worked a total of 14 days for his current employer. *Id.* at 28, 711 S.E.2d at 828. This Court held that the employee's contract work for other employers during the year could not be considered in calculating his average weekly wages. *Id.* at 33-34, 711 S.E.2d at 831-32. We again held, as we did in *Conyers*, that an employee's average weekly wages under Method 5 should be calculated by taking the "wages earned by [the employee] while in the employ of [the current employer] in a fifty-two week period, then dividing that amount by fifty-two." *Id.* at 33, 711 S.E.2d at 831.

In light of *Joyner*, *Conyers*, and *Thompson*, we hold that in calculating average weekly wages for employees in temporary positions, the Commission must consider the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. One approach that would satisfy this requirement is to calculate the total amount the employee would have earned in the temporary position and divide that amount by 52. We do not suggest that

this is the *only* appropriate methodology in every case, as the intent of Method 5 is to provide flexibility in reaching a result that "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). But in this case, and others with similar facts, we hold that calculating the total amount the employee could expect to earn in the temporary position, and then dividing that amount by 52, is an appropriate means of approximating the amount the injured employee would be earning were it not for the injury.

We are mindful that this methodology, when applied to Tedder, will result in a compensation rate only slightly above the statutory minimum. But treating Tedder as if his "average weekly wages" were $625—in other words, treating Tedder as if he had a history of long-term, full-time employment in his temporary position at A&K—is a financial windfall for Tedder and an unjust result for A&K. This, in turn, violates the guiding principle and primary intent of the statute—obtaining "results that are fair and just to both employer and employee." *Conyers*, 188 N.C. App. at 256, 654 S.E.2d at 748. Accordingly, we reverse and remand this case to the Industrial Commission to recalculate Tedder's average weekly wages consistent with this opinion.

II. Determination of Temporary Total Disability

[2] Defendants next argue that the Commission erred by concluding that Tedder is entitled to ongoing temporary total disability payments. Defendants' argument is straightforward. In 2004, Tedder suffered a compensable back injury. In 2006, Tedder's treating physician, Dr. Goebel, found that Tedder had reached maximum medical improvement and assigned a permanent "medium-duty" restriction on lifting more than fifty pounds as well as limits on bending, stooping, twisting, squatting, crouching, and prolonged sitting or standing. Dr. Goebel never lifted that permanent restriction.

After his 2011 injury, Tedder again underwent treatment. His treating physician, Dr. Burke, testified that, as of 9 January 2013, she believed Tedder had shown improvement and that "I think anything up to medium would be fine." Defendants argue that, because Tedder had medium-duty work restrictions before his 2011 injury, and had returned to medium-duty work capacity as of 9 January 2013, he was no longer disabled under the terms of the Workers' Compensation Act. For the reasons that follow, we reject this argument and affirm the Commission's finding that Tedder is entitled to ongoing disability payments.

The definition of disability under the Workers' Compensation Act "specifically relates to the incapacity to earn wages, rather than only to physical infirmity." *Medlin v. Weaver Cooke Constr., LLC*, ___ N.C. ___, ___, 760 S.E.2d 732, 736 (2014). In *Medlin*, our Supreme Court reaffirmed the test for establishing disability under the Workers' Compensation Act set out in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). *Hilliard* articulated three factual elements that a plaintiff must prove to support the legal conclusion of disability:

> We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 595, 290 S.E.2d at 683.

Defendants contend that Dr. Burke's testimony proves Tedder was able to return to medium-duty work as of 9 January 2013, the same work level he had before his 2011 injury. Thus, Defendants argue that Tedder's inability to find work was not "caused by" his 2011 injury because he had the same functional capacity in January 2013 that he had before his injury in 2011.

We agree that the portion of Dr. Burke's testimony on which Defendants rely supports their position. But under the deferential standard of review afforded to decisions of the Industrial Commission, we must affirm if there is "any competent evidence" supporting its findings of fact, even if there is evidence supporting a contrary finding. *See, e.g.*, *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394-95 (2008). Here, although there is evidence supporting Defendants' position, there is at least some competent evidence supporting the Commission's contrary findings.

Dr. Burke's testimony is not a model of clarity. Dr. Burke testified that "I certainly think [Tedder] can do a job. I think anything up to medium would be fine." But she also testified that "I think at this point *I would anticipat*e him being able to do medium work." She explained that while she expects this to be the case, she had not yet completed a Functional Capacity Evaluation, "so I can't be very specific about exactly what he could lift, carry, stoop, bend, and all those other things at this point." Dr. Burke concluded that "it is my overall feeling of his level of

functioning, that [medium-duty work] is what *he's going to be able to do*." Thus, Dr. Burke did not unequivocally conclude that Tedder was capable, as of 9 January 2013, of performing medium-duty work. Her testimony also could be interpreted as an indication that she *anticipates* he will be capable of medium-duty work in the future as he continues his treatment.

Moreover, in addition to the somewhat ambiguous exchange above, Dr. Burke testified that while Tedder was "close" to achieving maximum medical improvement, he had not yet reached that point. She indicated that Tedder was still experiencing "some numbness and tingling in the left foot," as well as "some tightness over the lumbar spine." Finally, she opined that she did not believe Tedder would be "in the shape [he is] in now" but for the 8 March 2011 injury.

Under the applicable standard of review, this testimony is competent evidence supporting the Commission's finding that Tedder was unable to continue work as a delivery driver because of his back injury. Accordingly, we affirm the Commission's award of temporary total disability compensation.

Conclusion

For the foregoing reasons, we affirm the Industrial Commission's conclusion that Plaintiff Keith Tedder is entitled to temporary total disability compensation. We reverse and remand for a determination of average weekly wages consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEPHENS concur.

THE TOWN OF BLACK MOUNTAIN, NORTH CAROLINA AND THE COUNTY OF BUNCOMBE, NORTH CAROLINA, PLAINTIFFS
v.
LEXON INSURANCE COMPANY AND BOND SAFEGUARD INSURANCE COMPANY, DEFENDANTS

No. COA14-740

Filed 16 December 2014

1. Cities and Towns—subdivision performance bonds—assignment of bonds—standing

In an action to enforce subdivision performance bonds, the Town of Black Mountain had standing to sue defendant bond insurance companies for breach of contract. The assignment by the original obligee on the bonds, Buncombe County, to the Town of Black Mountain gave the Town standing to sue defendants.

2. Cities and Towns—subdivision performance bonds—governmental function—action not barred by statute of limitations

An action for breach of contract on subdivision performance bonds was not barred by the statute of limitations. Buncombe County's entry into the bonds to assure compliance with subdivision ordinance requirements was a governmental function. Therefore, because the section 1-52 statute of limitations does not include the State or its subdivisions, the County (and the Town of Black Mountain, by assignment of the bonds) was not subject to the statutory time limitation.

Appeal by defendants from order entered 4 March 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2014.

Cannon Law, P.C., by William E. Cannon, Jr. and Ronald E. Sneed, P.A., by Ronald E. Sneed, for plaintiffs-appellees.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges and Daniel R. Hansen, for defendants-appellants.

HUNTER, Robert C., Judge.

The Town of Black Mountain, North Carolina ("the Town") and the County of Buncombe, North Carolina ("the County") (collectively "plaintiffs") filed suit against Lexon Insurance Company and Bond Safeguard

Insurance Company ("defendants") seeking to enforce a series of subdivision performance bonds. The trial court entered summary judgment in plaintiffs' favor. On appeal, defendants argue that summary judgment for plaintiffs was improper because: (1) neither the Town nor the County has standing to enforce the bonds; and (2) the statute of limitations for plaintiffs' claim has run.

After careful review, we affirm the trial court's order.

Background

From March 2005 through February 2007, defendants entered into four subdivision performance bonds ("the bonds") as sureties for The Settings of Black Mountain, LLC and Richmarc Black Mountain, LLC (collectively "developers").[1] Approval from the County for the developers to begin construction on a residential subdivision was conditioned on obtaining the performance bonds to secure completion of the project. Thus, the obligee on each of the bonds in question was the County, not the Town. Each of the bonds contained a clause indicating that defendants, as sureties, would not be required to complete the infrastructure or pay the principal amount of the bond until they received a resolution from the obligee indicating that the improvements had not been installed or completed by the developers. The bonds also contained a provision holding defendants and the developers jointly and severally liable for any amounts due upon default.

The real property that was secured by the bonds was annexed by the Town at varying times between May 2005 and February 2007. Defendants assert that they lacked knowledge of the annexation until 5 January 2012. In 2009, the Town sought confirmation from the developers that they intended and had the means to complete the infrastructure secured by the bonds. In a letter dated 23 October 2009, attorneys for the developers indicated that they were working toward closing a recapitalization loan. On 18 December 2009, a principal in one of the development companies stated via e-mail that "we still believe we have viable entities, though obviously troubled. We are committed to finishing our communities without need of the bonds[.]" Indeed, construction activity by the developers continued into 2010. Ultimately the companies failed. Richmarc Black Mountain, LLC filed its final annual report on 7 June 2011, and The Settings at Black Mountain, LLC was administratively dissolved on 21 August 2011.

1. Although plaintiffs named all four bonds in their complaint, the construction secured by one of the bonds has since been completed; thus, only three remaining bonds are the subject of plaintiffs' claim.

On 5 January 2012, the County contacted defendants and asked if they would consent to an assignment of the bonds to the Town. In its inquiry, the County conceded that, due to the annexation, "Buncombe County no long[er] has any jurisdiction over the properties and cannot enforce any rights per its ordinances." Defendants did not consent to the assignment.

On 1 August 2011 and 20 December 2011, the Town sent defendants notice that the developers had ceased all construction activity. On 22 June 2012, the County assigned its rights in the bonds to the Town, which accepted assignment on 9 July 2012. On that same day, the Town adopted a resolution finding the infrastructure to be incomplete. The Town sent defendants notice of their claims under the bonds on 24 July 2012. Following nonpayment by defendants, plaintiffs filed their complaint for breach of contract on 25 October 2012. Both the County and the Town brought suit because they anticipated that defendants would challenge standing if either party sued separately; thus, their claims are pled in the alternative pursuant to Rule 8 of the North Carolina Rules of Civil Procedure.

Plaintiffs and defendants each moved for summary judgment and were heard on their respective motions 10 February 2014. The trial court entered an order granting summary judgment for plaintiffs on 4 March 2014. Defendants filed timely notice of appeal.

Discussion

I. Standing

[1] Defendants first argue that neither the Town nor the County has standing to bring suit. Specifically, defendants contend that once the Town annexed the property covered by the bonds, the bonds were extinguished, leaving no rights for the County to assign. We disagree.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). Summary judgment is appropriate "only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). The burden of proof rests with the movant to show that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). We review the record in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Defendants rely on *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984), in support of their contention that the bonds were extinguished when the subject properties were annexed by the Town. In *Stillings*, the Court stated the issue it considered as follows: "Does an exclusive solid waste collection franchise granted by a county remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city, pursuant to statutory mandate, begins providing its own garbage collection service?" *Id.* at 691, 319 S.E.2d at 235. The Court answered this question in the negative. *Id.* In holding that the exclusive waste collection franchise entered into by the county and a private party terminated in the geographic areas annexed by the city, the Court noted that the garbage collection company, "had no rights which the [c]ity was bound to respect." *Id.* at 694-96, 319 S.E.2d at 237-38. According to the statutory mandate in N.C. Gen. Stat. § 160A-47, the city was required to provide garbage collection services without charge to its residents in newly annexed areas. *Id.* at 694, 319 S.E.2d at 237. Therefore, annexation created a conflict between the exclusive franchise rights held by the plaintiffs and the statutory mandate imposed on the city. In recognition of the rule that "[c]orporations which receive franchises take the granted privileges subject to the police power of the state," the Court ultimately held that "[b]y annexation of the property in question, the county's franchise terminated and the police power of the [c]ity became operative." *Id.*

Defendants argue that, pursuant to *Stillings*, "once a town annexes territory that is the subject of a private contract between the county and a private citizen, the annexation effectively nullifies the contract." Thus, defendants contend that the bonds were extinguished when the annexation took place, rendering them unenforceable by either the County or the Town.

We do not read *Stillings* so broadly. The *Stillings* Court did not hold that the franchise agreement between the garbage collection company and the county was terminated in its entirety; rather, the contract was terminated only in those geographical areas annexed by the city. *See Stillings*, 311 N.C. App. at 696, 319 S.E.2d at 238. Therefore, *Stillings* does not support the idea that annexation automatically terminates an entire agreement between a county and a private party. Furthermore, the conflict between the exclusive waste collection franchise and the police powers of the annexing city was crucial to the *Stillings* Court's holding. Here, unlike in *Stillings*, the bonds do not conflict with the Town's police power. There is no statute requiring the Town to behave adversely to the agreement between defendants and the County. Rather

than attempting to terminate the bonds, the Town seeks to enforce them. This situation contrasts sharply with the facts of *Stillings*, where the annexing city was required by statute to provide free garbage collection services in direct contravention of the exclusive franchise agreement between the county and the plaintiffs. Based on these material distinctions, we decline to extend the *Stillings* holding to the facts of this case.

We agree with defendants that the County lost standing to enforce the bonds after annexation. The bonds were created pursuant to the County's "subdivision control ordinance," allowing the County to "provide orderly growth and development" by entering into surety bonds with developers to "assure successful completion of required improvement." *See* N.C. Gen. Stat. § 153A-331 (2013). But the County's power to issue subdivision control ordinances was geographically limited by N.C. Gen. Stat. § 153A-122 (2013), providing that such ordinances are only applicable "to any part of the county not within a city." Therefore, after annexation, the County no longer had statutory authority to call the bonds. The County's attorney admitted as much in his 5 January 2012 e-mail to defendants requesting their consent to assignment, wherein he stated that "Buncombe County no long[er] has any jurisdiction over the properties and cannot enforce any rights per its ordinances." We also agree with defendants that, prior to assignment, the Town did not have standing to enforce or call the bonds because it was not a party to the agreements.

However, we find nothing in the law or within the agreements themselves indicating that assignment of the bonds from the County to the Town was impermissible or without legal effect. *See North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 465-66, 160 S.E. 484, 485-86 (1931) (holding that an indemnity bond was freely assignable as a chose in action). Indeed, defendants "do not contest the general law that, absent contrary language or public policy, bonds can be assigned." Here, the bonds do not contain any language restricting their assignability, and we believe public policy favors assignability under these facts. It is uncontested that substantial infrastructure remains incomplete as a result of the developers' financial troubles. If neither the Town nor the County are able to call the bonds, defendants would in effect receive a windfall by being released from their obligation to pay the sums owed under the bonds.

Accordingly, we hold that the assignment of the bonds from the County to the Town was sufficient to allow the Town to enforce the agreements against defendants. Thus, the assignment conferred standing

upon the Town to sue for the alleged breach of those agreements. We affirm the trial court's order as to this issue.

II. Statute of Limitations

[2] Defendants also argue that summary judgment for plaintiffs was improper because their cause of action is time-barred by the statute of limitations. We disagree.

N.C. Gen. Stat. § 1-52(1) (2013) provides that actions concerning a "contract, obligation or liability arising out of a contract" have a three-year limitations period. Plaintiffs do not dispute that section 1-52 applies to claims for breach of contract. However, they assert protection under the doctrine of *nullum tempus occurrit regi*, which generally allows for governmental bodies to be exempt from statutory time limitations in bringing civil lawsuits. In *Rowan Cnty. Bd. of Educ. v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814 (1987) ("*Rowan I*"), and *Rowan Cnty. Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992) ("*Rowan II*"), our Courts analyzed the doctrine of *nullum tempus* in North Carolina and developed a framework for its application. "If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State." *Rowan II*, 332 N.C. at 9, 418 S.E.2d at 654 (emphasis in original).

Because section 1-52 is silent as to its application to the State or its subdivisions, this issue turns on whether plaintiffs are engaged in a proprietary or governmental function. The *Rowan II* Court noted that the distinction between governmental and proprietary action in the context of sovereign immunity is the same as the distinction to determine whether the State benefits from the protection of *nullum tempus*. *Rowan II*, 332 N.C. at 9, 418 S.E.2d at 654. Thus, the case most helpful to this analysis is *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998).

In *Derwort*, the issue before this Court was whether Polk County's enactment of a subdivision control ordinance pursuant to sections 153A-121 and 153A-331 rendered it immune from suit under the public duty doctrine. *Id.* at 792, 501 S.E.2d at 381. The Court noted that section 153A-121 was included under the heading titled "Delegation and Exercise of the General Police Power," and that section 153A-331 allowed counties to issue ordinances "in a manner that . . . will create

conditions essential to public health, safety, and the general welfare." *Id.* Citing *Lynn v. Overlook Development*, 98 N.C. App. 75, 78, 389 S.E.2d 609, 611 (1990), it also noted that "[a] municipality ordinarily acts for the benefit of the public, not a specific individual, in providing protection to the public pursuant to its statutory police powers." *Id.* at 791, 501 S.E.2d at 381. The Court went on to hold that "[t]he plain language of the statute and our case law thus indicate that subdivision control is a duty owed to the general public, not a specific individual," and therefore the county was immune from suit by virtue of the public duty doctrine. *Id.* at 792, 501 S.E.2d at 381.

However, defendants argue that *City of Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967), is more applicable than *Derwort*, and therefore, we should find that the act of suing under the bonds is a proprietary rather than governmental function. In *Burton*, the Court noted that generally municipal corporations are immune from application of a statute of limitations because "construction and maintenance of public streets and of bridges constituting a part thereof are governmental functions[.]" *Id.* at 210, 152 S.E.2d at 151. However, the Court held that the City of Reidsville was engaged in a proprietary function when it sued for breach of contract with a private party in the construction of a bridge that was not used by the public, was not maintained by the city, and was not connected to any public streets. *Id.* Here, unlike in *Burton*, there is evidence in the record that the subdivision secured by the bonds allowed public access. Specifically, the developers were required to allow for limited public use of the subdivision clubhouse. Additionally, the developers were required to include easements sufficient for the Town to maintain and access all waterlines. Based on this distinction, we do not find Burton controlling.

Here, the County entered into the bonds pursuant to section 153A-331, the same statute utilized by Polk County in *Derwort*. Section 153A-331 provides that counties are authorized to enact subdivision control ordinances for a variety of purposes consistent with their governmental police powers, such as: (1) "provid[ing] for the orderly growth and development of the county"; (2) "creat[ing] conditions that substantially promote public health, safety, and the general welfare"; and (3) "provid[ing] for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county plans, policies and standards." *Id.* The statute goes on to allow counties to enter into bonds like those at issue in this case "[t]o assure compliance with these and other ordinance requirements[.]" *Id.*

Because the enabling statute allowing for the creation of the bonds between defendants and the County explicitly states that such bonds exist to "assure compliance" with subdivision ordinance requirements, which this Court has characterized as "a duty owed to the general public, not a specific individual," *Derwort*, 129 N.C. App. at 792, 501 S.E.2d at 381, and the subdivision is open to the public, we conclude that plaintiffs are engaged in a governmental function by attempting to enforce the bonds against defendants. *See also State Art Museum Bldg. Comm'n v. Travelers Indem. Co.*, 111 N.C. App. 330, 335, 432 S.E.2d 419, 422 (1993) ("A court may [] consider whether or not the State's action is for the 'common good of all' and therefore governmental, or for pecuniary profit and therefore proprietary."); *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975) (noting that "governmental functions . . . are those historically performed by the government, and which are not ordinarily engaged in by private corporations."). Therefore, under the *Rowan* rulings, plaintiffs are not subject to the statutory time limitation in section 1-52.

Even assuming that the County and the Town were engaged in a proprietary function sufficient to trigger the three-year time limitation in section 1-52, we would still find that summary judgment for plaintiffs is proper. Defendants argue that this cause of action accrued before 25 October 2009, three years before the complaint was filed on 25 October 2012, because by that time plaintiffs knew or should have known that the construction work would not be completed within a reasonable time. We disagree. The bonds themselves do not specify any particular date by which time the construction needed to be completed. Although there is evidence that the Town was concerned in mid-2009 by the relative lack of progress on the construction, as late as 18 December 2009, a principal in the development companies stated that they were "committed to finishing [the] communities without need of the bonds." Indeed, construction activity by the developers continued well into 2010. Therefore, because it is clear that the developers themselves had not yet given up on the project, we disagree with defendants' contention that there is a genuine issue of fact regarding whether plaintiffs knew or should have known prior to 25 October 2009 that the project would not be completed within a reasonable time.

Conclusion

After careful review, we hold that the Town has standing to bring suit against defendants for breach of contract. Furthermore, plaintiffs are engaged in a governmental function and are exempt from the

otherwise applicable statute of limitation. Therefore, we affirm the trial court's order granting summary judgment for plaintiffs.

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

ERIC TUCKER, PLAINTIFF
v.
FAYETTEVILLE STATE UNIVERSITY AND
JAMES A. ANDERSON, CHANCELLOR, DEFENDANTS

No. COA14-178

Filed 16 December 2014

Public Officers and Employees—basketball coach—forced retirement accepted—loyalty to team—administrative remedies not exhausted

The trial court correctly dismissed plaintiff's employment termination action under N.C.G.S. § 1A-1, Rule 12 (b)(6). Plaintiff, the former basketball coach at a state university, retired in the face of the university's indicated intent to pursue termination but alleged in his complaint that he had accepted forced retirement and not pursued administrative relief out of loyalty to his basketball team. Plaintiff was not required to exhaust his administrative remedies if the only remedies available would be inadequate, but he provided no authority that loyalty to the team satisfied his burden of showing an inadequate remedy. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint.

Appeal by plaintiff from order entered 8 November 2013 by Judge Lucy Inman in Cumberland County Superior Court. Heard in the Court of Appeals 13 August 2014.

McGeachy, Hudson & Zuravel, by Donald C. Hudson, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for defendant-appellees.

CALABRIA, Judge.

Plaintiff Eric Tucker ("plaintiff") appeals from an order dismissing his complaint with prejudice and, alternatively, granting Fayetteville State University's ("FSU") and University Chancellor James A. Anderson's ("Anderson") (collectively, "defendants") motion for summary judgment. We affirm.

Plaintiff had a written employment contract and had been employed as the head coach of the FSU women's basketball team for sixteen years. During plaintiff's tenure, he never had any negligent evaluations, reprimands, or warnings. According to plaintiff, he always executed his duties in an exemplary manner.

In April 2009, FSU's Department of Police and Public Safety ("FSU DPPS") investigated allegations regarding plaintiff's inappropriate language towards team members, assault on a team member, and threats to terminate team members' athletic scholarships. As a result of FSU DPPS's report, Anderson decided there were grounds for termination. FSU subsequently informed plaintiff that he could either resign his position or FSU would begin the process of terminating his employment. In a letter dated 21 April 2009, plaintiff notified the FSU athletic director of his decision to retire. On 1 July 2009, plaintiff did in fact retire, even though his contract did not expire until 30 June 2010.

On 23 December 2009, plaintiff filed a complaint against defendants seeking compensatory damages for breach of contract, alleging FSU lacked just cause to terminate his employment and forced him to resign against his will. Defendants filed a motion to dismiss. On 22 April 2010, the trial court granted defendants' motion and dismissed the action with prejudice pursuant to Rule 12(b)(6). On appeal, this Court reversed the dismissal. After the case was remanded, plaintiff voluntarily dismissed that complaint without prejudice.

On 12 April 2013, plaintiff timely refiled his complaint against defendants, alleging, *inter alia*, that defendants breached his employment contract because defendants lacked just cause to terminate his employment and forced him to resign against his will. Plaintiff alleged that "the grievance system set up by the Defendants does not allow for the Plaintiff to receive the compensatory damages to which he is entitled based upon the alleged breach of contract and the resulting damage to the Plaintiff's ability to engage in his profession." Defendants subsequently filed a motion to dismiss pursuant to N.C.R Civ. P. 12(b)(1) and 12(b)(2) on the grounds that plaintiff failed to exhaust his administrative remedies and sovereign immunity. Defendants also included a motion for summary judgment on the grounds that there was no genuine issue

of material fact with respect to the breach of plaintiff's employment contract. On 8 November 2013, the trial court entered an order dismissing plaintiff's complaint with prejudice and in the alternative granted defendants' motion for summary judgment. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in granting both defendants' motion to dismiss the complaint and defendants' motion for summary judgment. We disagree.

"An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. An appellate court's review of such a dismissal is *de novo*." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (citations and quotations omitted).

"Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-43 (2013). The actions of the University of North Carolina and its constituent institutions are subject to the judicial review procedures of N.C. Gen. Stat. § 150B-43. *Huang v. N.C. State University*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). Since FSU is a constituent institution of the University of North Carolina pursuant to N.C. Gen. Stat. § 116-4 (2013), any action taken is subject to specific review procedures. "Because no statutory administrative remedies are made available to employees of the University [of North Carolina], those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts." *Huang*, 107 N.C. App. at 713-14, 421 S.E.2d at 814. "Therefore, before a party may ask the courts for relief from a University decision: (1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by the University must be exhausted." *Id.* at 714, 421 S.E.2d at 814. Additionally, "the complaint should be carefully scrutinized to ensure that the claim for relief is not inserted for the sole purpose of avoiding the exhaustion rule." *Id.* at 715, 421 S.E.2d at 816 (citation omitted).

As an initial matter, the correct procedure for seeking review of an administrative decision is to file a petition in court, explicitly stating the exceptions taken to the administrative decision. *Id.* at 715, 421 S.E.2d at 815. "The burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a

claim must include such allegation in the complaint." *Id.* (citations omitted). "In order, however, to rely upon futility or inadequacy, allegations of the facts justifying avoidance of the administrative process must be pled in the complaint." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004) (citation and internal quotation marks omitted).

In the instant case, according to plaintiff's employment contract, plaintiff was "subject to Fayetteville State University's Employment Policies for Personnel Exempt from the State Personnel Act" (the "employment policies"). The employment policies are incorporated by reference and include grievance policies and procedures for employees to secure review of decisions concerning discharge or termination of employment. Therefore, plaintiff was entitled to all of the procedures available in the employment policies. Those procedures included, *inter alia*, a written grievance to the Director of Human Resources, a hearing before a grievance committee, and ultimately review of the grievance by the University of North Carolina Board of Governors. Once plaintiff completed that process, he would have been entitled to judicial review of the decision pursuant to N.C. Gen. Stat. § 150B-43.

Nevertheless, plaintiff elected not to pursue any of the administrative remedies available to him, arguing that the administrative remedies provided by FSU were so inadequate that he essentially had no effective administrative remedies. Plaintiff contends that due to his unique position as a basketball coach, the outcome of any administrative remedy "would have been so unfair to the team and the coach as to render such procedures virtually meaningless." Specifically, plaintiff contends that, as a basketball coach, proceeding with an administrative remedy would cause damage to the basketball team, and "a coach who has formed close bonds with the players on his team could not be reasonably expected to damage the team in that manner."

Plaintiff correctly relies on *Huang* for the proposition that he was not required to exhaust his administrative remedies "when the only remedies available from the agency are shown to be inadequate." *Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815 (citation omitted). *Huang*, as a tenured professor, filed a complaint in superior court seeking compensatory damages rather than pursuing administrative remedies, believing them to be inadequate. *Id.* at 712, 421 S.E.2d at 814. Plaintiff, like Huang, is an aggrieved party in a contested case. Unlike Huang, plaintiff supports his argument with his loyalty to the basketball team. However, plaintiff provides no authority to support his contention that his loyalty to the basketball team satisfies his burden of showing the inadequacy of

the administrative remedy. Since plaintiff submitted a letter indicating his decision to retire rather than requesting a hearing, then filed a complaint, plaintiff not only failed to meet his burden of showing that the administrative remedies were inadequate, but also essentially avoided the exhaustion rule. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint. Since we find that the trial court properly granted defendants' motion to dismiss because plaintiff failed to carry his burden of proving that the administrative remedies available to him were inadequate, and therefore failed to exhaust his administrative remedies, we do not reach the issue of sovereign immunity.

Although plaintiff also argues that the trial court erred in granting defendants' motion for summary judgment, since the trial court lacked subject matter jurisdiction, we need not address plaintiff's remaining arguments. The trial court properly dismissed plaintiff's complaint with prejudice. We therefore affirm the order of the trial court.

Affirmed.

Judges ELMORE and STEPHENS concur.

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER WITH WACHOVIA BANK, NATIONAL ASSOCIATION, PLAINTIFF

v.

JOHN M. CORNEAL; AND WIFE, JORENE S. PROPER, AND SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA14-660

Filed 16 December 2014

1. Appeal and Error—interlocutory orders—substantial right—counterclaims—risk of inconsistent verdicts

Although defendants conceded that their appeal in a breach of contract and judicial foreclosure case was from an interlocutory order, defendants showed that it affected a substantial right entitling them to immediate review since their counterclaims and plaintiff's claims shared a common factual issue such that separate litigation of these claims may result in inconsistent verdicts.

2. Contracts-breach—judicial foreclosure—dismissal of counterclaims-unfair and deceptive trade practices-North Carolina Debt Collection Act

The trial court did not err in a breach of contract and judicial foreclosure case by granting plaintiff's motion to dismiss defendants' counterclaims under N.C.G.S. § 1A-1, Rule 12(b)(6). Defendants failed to state a claim under the Unfair and Deceptive Trade Practices Act or the North Carolina Debt Collection Act.

Appeal by defendants from order entered 18 February 2014 by Judge Walter H. Godwin, Jr. in Superior Court, Dare County. Heard in the Court of Appeals 23 October 2014.

Womble Carlyle Sandridge & Rice by Jesse A. Schaefer, for plaintiff-appellee.

David R. Dixon, for defendants-appellants.

STROUD, Judge.

John M. Corneal and his wife, Jorene S. Proper, ("defendants") appeal from the trial court's order granting a motion to dismiss their counterclaims. Finding no error, we affirm the trial court's order.

I. Background

On or about 5 December 2008, defendants and Wachovia Bank, National Association executed a note, in which defendants promised to pay a principal amount of $389,890. The note's payment schedule includes a balloon payment on 4 December 2011, the maturity date. The parties secured the note by a deed of trust on a parcel of Hatteras real property owned by Corneal. Wells Fargo Bank, N.A. ("plaintiff") is Wachovia Bank's successor by merger.

Defendants failed to make the balloon payment upon maturity of the note. On or about 27 January 2012, plaintiff notified defendants of their right to cure the default. On or about 27 March 2012, plaintiff mailed defendants a notice of foreclosure.

On 10 July 2013, plaintiff sued defendants for breach of contract and judicial foreclosure. On 30 September 2013, defendants answered, raised affirmative defenses, and brought counterclaims for violations of the Unfair and Deceptive Trade Practices Act ("UDTPA") and the North Carolina Debt Collection Act ("NCDCA"). *See* N.C. Gen. Stat. ch.

75 (2013). On 2 December 2013, plaintiff moved to dismiss defendants' counterclaims pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). On 17 February 2014, the trial court held a hearing on plaintiff's motion. On 18 February 2014, the trial court granted plaintiff's motion. On 19 March 2014, defendants timely filed a notice of appeal.

II. Appellate Jurisdiction

[1] Although defendants concede that the trial court's order is interlocutory, they contend that the order is immediately appealable because it affects a substantial right. Immediate appeal is available from an interlocutory order that affects a substantial right. *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014). The appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature. *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011). It is not the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. *Id.* at 79, 711 S.E.2d at 190.

In determining whether a particular interlocutory order is appealable, we examine (1) whether a substantial right is affected by the challenged order and (2) whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. *Id.* at 78, 711 S.E.2d at 189. We take a "restrictive" view of the substantial right exception and adopt a case-by-case approach. *Id.*, 711 S.E.2d at 189.

A party has a substantial right to avoid two separate trials of the same issues. *Id.* at 79, 711 S.E.2d at 190. Issues are the "same" if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts. *Id.*, 711 S.E.2d at 190. "The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Id.* at 80, 711 S.E.2d at 190.

Here, defendants assert that "the issues brought to the jury by the complaint, the defenses that remain, and the counterclaims are the same—the effect and meaning of the promissory note, deed of trust, and the bank's actions (or lack thereof) surrounding the execution of the same." Defendants' counterclaims include the allegation that,

at the loan's execution, Wachovia Bank, plaintiff's predecessor-in-interest, promised that defendants could refinance the loan upon maturity. Defendants' affirmative defenses of estoppel and unclean hands also include this allegation. Accordingly, we hold that defendants have shown that their counterclaims and plaintiff's claims share a common factual issue, such that separate litigation of these claims may result in inconsistent verdicts. *See id.* at 79, 711 S.E.2d at 190. Defendants thus have successfully demonstrated that the trial court's order affects a substantial right. *See id.* at 77, 711 S.E.2d at 189. We therefore have jurisdiction to review this order. *See Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439.

III. Motion to Dismiss

[2] Defendants contend that the trial court erred in dismissing their counterclaims pursuant to Rule 12(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Guyton v. FM Lending Servs., Inc., 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citations and quotation marks omitted). We conduct a de novo review of the pleadings to determine their legal sufficiency. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429, *disc. rev. dismissed and appeal dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

B. Unfair and Deceptive Trade Practices Act

To establish a prima facie UDTPA claim, a plaintiff must show that: (1) the defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act

proximately caused injury to the plaintiff. *Phelps Staffing, LLC v. C.T. Phelps, Inc.*, ___ N.C. App. ___, ___, 740 S.E.2d 923, 928 (2013); *see also* N.C. Gen. Stat. ch. 75.

> A practice is properly deemed unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers or amounts to an inequitable assertion of power or position. To prove deception, while it is not necessary to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, a plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.

Capital Resources, LLC v. Chelda, Inc., ___ N.C. App. ___, ___, 735 S.E.2d 203, 212 (2012) (citations and quotation marks omitted), *disc. rev. dismissed and cert. denied*, ___ N.C. ___, 736 S.E.2d 191 (2013). A UDTPA action is distinct from a breach of contract action; a plaintiff must allege and prove egregious or aggravating circumstances to prevail on a UDTPA claim. *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 340, 713 S.E.2d 495, 504, *disc. rev. denied*, 365 N.C. 353, 718 S.E.2d 376 (2011).

In *Overstreet v. Brookland, Inc.*, the defendant promised to the plaintiff that no part of a subdivision would be used for non-residential purposes, but one year later, sold a subdivision lot to a buyer whom it knew would use the lot for non-residential purposes. 52 N.C. App. 444, 451-52, 279 S.E.2d 1, 6 (1981). This Court held that the defendant had not violated the UDTPA, because no evidence indicated that the defendant intended to break its promise *at the time* defendant made the promise. *Id.* at 452-53, 279 S.E.2d at 6-7. Similarly, in *Opsahl v. Pinehurst Inc.*, the defendant's agent represented that a projected completion date was firm and would be met. 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986), *disc rev. improvidently allowed per curiam*, 319 N.C. 222, 353 S.E.2d 400 (1987). The defendant, however, failed to meet the projected completion date. *Id.*, 344 S.E.2d at 76-77. This Court held that the defendant had not violated the UDTPA. *Id.* at 70, 344 S.E.2d at 77.

Here, defendants alleged that plaintiff broke its promise to allow defendants to refinance the loan upon maturity. Defendants, however, did not allege that plaintiff intended to break its promise at the time that it made the promise. In light of *Overstreet* and *Opsahl*, we hold that defendants' allegation that plaintiff broke its promise, standing alone,

does not constitute a UDTPA claim. *See Overstreet*, 52 N.C. App. at 452-53, 279 S.E.2d at 6-7; *Opsahl*, 81 N.C. App. at 70, 344 S.E.2d at 77.

C. North Carolina Debt Collection Act

To establish a NCDCA claim, a plaintiff must show, among other elements, that: (1) the obligation owed is a "debt"; (2) the one owing the obligation is a "consumer"; and (3) the one trying to collect the obligation is a "debt collector." *Green Tree Servicing LLC v. Locklear*, ___ N.C. App. ___, ___, 763 S.E.2d 523, 527 (2014); *see also* N.C. Gen. Stat. §§ 75-50 to -56 (2013). A "consumer" means "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes." N.C. Gen. Stat. § 75-50(1). Defendants did not allege that they incurred the debt for "personal, family, household or agricultural purposes." *See id.* Accordingly, we hold that defendants did not state a NCDCA claim.

IV. Conclusion

Because defendants have failed to state a claim under the UDTPA or the NCDCA, we affirm the trial court's order dismissing defendants' counterclaims.

AFFIRMED.

Judges GEER and BELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 DECEMBER 2014)

BURNETTE v. FOX No. 14-266	Haywood (12CVS29)	No Error
FINNEY v. FINNEY No. 14-420	Haywood (06CVD26)	Affirmed
GUPTA v. CARTER No. 14-334	Wake (13CVD14441)	Affirmed
IN RE J.W. No. 14-598	Durham (13J173-175)	Affirmed
IN RE K.J.C. No. 14-452	Robeson (13JB62)	Affirmed
IN RE M.N.M. No. 14-587	Rowan (12JT11)	Affirmed
IN RE Y.M.C. No. 14-699	Wake (13JA660-662)	Affirmed
JABEZ CONSOL. HOLDINGS, INC. v. WELLS FARGO BANK, N.A. No. 14-552	Mecklenburg (13CVS14695)	Affirmed
JACKSON v. JACKSON No. 14-440	Durham (13CVD4785)	Vacated
KAPLAN v. KAPLAN No. 14-386	Buncombe (10CVD1643)	Affirmed
OLAVARRIA v. MARRIOTT No. 14-579	Wake (13CVS3778)	Affirmed
RICHARDSON v. PCS PHOSPHATE CO., INC. No. 14-615	N.C. Industrial Commission (W28174)	Affirmed
SARTORI v. N.C. DEP'T OF PUB. SAFETY No. 14-567	N.C. Industrial Commission (TA-22787)	Vacated and Remanded
SETTLERS EDGE HOLDING CO., LLC v. RES-NC SETTLERS EDGE, LLC No. 14-252	Yancey (10CVS279)	Dismissed

STATE v. ANDERSON No. 14-444	Guilford (12CRS96238-40) (12CRS96242) (12CRS96244) (12CRS96247) (13CRS24056)	No Error
STATE v. ANDREWS No. 14-544	Forsyth (12CRS60457) (12CRS60457)	No Error
STATE v. AUSTIN No. 14-617	Buncombe (12CRS441-442)	Remanded for correction of clerical error.
STATE v. BLACKMON No. 14-594	Mecklenburg (11CRS223305) (11CRS33155)	No Error
STATE v. BRITT No. 14-413	Robeson (11CRS5511) (11CRS56104)	No Error
STATE v. BROWN No. 14-814	Onslow (12CRS56333) (12CRS56335-36) (12CRS56338-39) (13CRS52796-98) (13CRS52799-804) (13CRS52807)	No Error in part; Vacated and Remanded in part
STATE v. BULLABOUGH No. 14-678	Mecklenburg (10CRS78869-70)	New Trial In Part; Remanded With Instructions In Part
STATE v. FIGURELLI No. 14-483	Johnston (13CRS52186) (13CRS52188)	Affirmed
STATE v. FREDERICK No. 14-338	Sampson (10CRS52051) (10CRS52053-54)	Affirmed
STATE v. GADDY No. 14-360	Mecklenburg (12CRS235086) (12CRS235088) (12CRS235090)	Remanded for resentencing
STATE v. GASH No. 14-581	Buncombe (13CRS50747-48)	No Error

STATE v. HAMPTON No. 14-394	Mecklenburg (08CRS254123)	No Error
STATE v. HARRIS No. 14-681	Iredell (13CRS3175) (13CRS3177) (13CRS3179)	No Error
STATE v. HARRIS No. 14-705	Craven (87CRS3525) (87CRS4136)	Affirmed
STATE v. HOLLEMAN No. 14-555	Stanly (10CRS50736) (10CRS50738-39)	No Error
STATE v. HUBBARD No. 14-546	Cumberland (12CRS56386)	No Error
STATE v. HUFFSTETLER No. 14-727	Cleveland (12CRS50635)	No Error
STATE v. JOHNSON No. 14-481	Mecklenburg (11CRS255943)	No Prejudicial Error
STATE v. JORDAN No. 14-716	Buncombe (12CRS58869-70)	Affirmed
STATE v. LIGHTSEY No. 14-576	Onslow (12CRS57424-26)	No error in part; vacated in part.
STATE v. McKOY No. 14-796	Scotland (12CRS50970-71)	No Error
STATE v. MILTON No. 14-664	Onslow (12CRS50988)	No prejudicial error in part; dismissed in part
STATE v. MONROE No. 14-556	Hoke (10CRS50069)	No Error
STATE v. MOSES No. 14-605	Forsyth (12CRS61452)	Vacated and Remanded
STATE v. PAGE No. 14-600	Robeson (10CRS54508)	New Trial
STATE v. PATE No. 14-464	Cherokee (10CRS51499)	No Error

STATE v. PATTERSON No. 14-714	Davidson (11CRS53220) (11CRS5345) (11CRS5358) (12CRS2656)	No Error
STATE v. PATTERSON No. 14-618	New Hanover (13CRS58149)	No Error
STATE v. PETTIGREW No. 14-672	Franklin (05CRS51895)	No Error
STATE v. PETTY No. 14-641	Mecklenburg (12CRS236412) (12CRS39339)	No Error as to Trial, Ineffective Assistance of Counsel Claim Dismissed Without Prejudice
STATE v. RACHELS No. 14-571	Davidson (11CRS5353) (11CRS54866)	No error in part; no prejudicial error in part.
STATE v. ROBINSON No. 14-409	Guilford (12CRS89510) (12CRS89511) (13CRS73433)	No Error
STATE v. SMITH No. 14-663	Duplin (11CRS50335) (11CRS50343)	Reversed and Remanded
STATE v. WYSE No. 14-679	Yadkin (13CRS604)	Affirmed
TAYLOR v. TAYLOR No. 14-673	Buncombe (12CVD4993)	Affirmed in Part and Vacated in Part
WHITE v. WHITE No. 14-274	Pasquotank (09CVD770)	Affirmed
WIMES v. N.C. BD. OF NURSING No. 14-525	Wake (12CVS16201)	Affirmed

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